

## Part III

# ILO Instruments

This section focuses on the International Labour Organization (ILO) instruments and mechanisms that are relevant to migrant workers' rights. It includes a list of ILO member States, abuses suffered by migrants and how these are addressed by the various instruments, and a list of States Parties, i.e., States that have ratified, to the various ILO conventions.



# 6

## International Labour Organization Mechanisms Relevant to Migrant Workers' Rights

by *Alejandra M. Varela*

### 6.1. Introduction to the International Labour Organization (ILO)

#### 6.1.1. Mandate

The International Labour Organization (ILO) is a specialized agency of the United Nations. The activities of the ILO are often overlooked by non-governmental organizations working in the area of human rights because it is assumed that the ILO's sole focus is international labour standards, not human rights. This assumption is incorrect. Labour rights *are* human rights, in the same way that women's rights are human rights. Labour rights are, for the most part, economic and social rights, and are as fundamental to the integrity and development of the individual as civil and political rights. In fact, the ILO's mandate, as stated in its Constitution and in the Declaration annexed to it (referred to as the *Declaration of Philadelphia*), is to promote social justice, labour rights and internationally recognized human rights.

#### 6.1.2. Structure

The ILO is characterized by its tripartite structure, unique among international organizations. This means that three parties are represented on its main bodies and participate in the decision making, including the formulation of international labour standards and supervision of their implementation. These three parties are: governments of States that are members of the ILO; representatives of workers; and representatives of employers.

### **i. The International Labour Conference**

The International Labour Conference (ILC) is held in June of each year, in Geneva, Switzerland. It is at this forum that labour and other social issues are discussed, and international labour standards are formulated and adopted.

The International Labour Conference is often called an *international parliament of labour*. It is akin to the UN General Assembly, but differs from it because of its tripartite structure. The Conference is composed of government, employer and worker delegates from ILO member States, accompanied by their technical advisors. Each member State is entitled to have two government delegates, a worker delegate and an employer delegate. The employer and the worker delegates also have speaking and voting rights and represent their respective organizations, not their states. They may disagree with their government's delegates or with each other. International organizations, including international NGOs, maintain observer status at the Conference.

### **ii The Governing Body**

The Governing Body is the ILO's executive council and is elected by the International Labour Conference. The Governing Body formulates ILO policy, sets the agenda of the International Labour Conference, elects the Director-General, and establishes the ILO's draft programme and budget for submission to the International Labour Conference.

The Governing Body is composed of government, employer and worker representatives who meet three times a year in Geneva. The Governing Body has 56 titular members of which 28 are government representatives, 14 represent organizations of workers, and 14 represent organizations of employers. Ten of the government seats are permanently held by States of chief industrial importance, namely Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States. The Governing Body also has 66 deputy members, 28 being government representatives, 19 workers' representatives and 19 employers' representatives. The remaining titular government members and all deputy government members are elected by the International Labour Conference every three years, while the workers' and employers' representatives are elected by worker and employer delegates to the International Labour Conference.

The Governing Body has various Committees, of which the following are particularly relevant to migrant workers:

- Committee on Freedom of Association (CFA);

- Committee on Legal Issues and International Labour Standards (LILS);
- Subcommittee on Multinational Enterprises (MNE);
- Committee on Employment and Social Policy (ESP); and
- Working Party on the Social Dimensions of the Liberalization of International Trade (WP/SDL).

### iii. The International Labour Office

The International Labour Office is the ILO's permanent secretariat. Its activities are overseen by the Governing Body and the Director-General. The Office's headquarters are located in Geneva, but it has some 40 field offices around the world. The ILO Regional Office for Asia and the Pacific (ROAP) is located in Bangkok, Thailand. The contact information is:

Regional Office for Asia and the Pacific (ROAP)  
 United Nations Building, 11th Floor  
 Rajdamnern Nok Avenue  
 P.O. Box 2-349  
 Bangkok 10200, Thailand  
 Tel: (66) 2288 2224, 2288 1234  
 Fax: (66) 2288 3056 (direct), 2288 3062  
 Email: bangkok@ilo.org

### 6.1.3. Non-Governmental Organizations (NGOs) and the ILO

The ILO's unique tripartite structure offers non-state actors the opportunity to participate in its activities to a greater extent than do other international bodies. However, an individual complainant cannot access the ILO's procedures directly because only governments, organizations of workers and of employers, and delegates to the ILO can do so.

To gain access to the ILO's mechanisms, concerned individuals and organizations can either form their own trade unions or work in conjunction with national or international trade unions. They may also work with organizations of employers.

International non-governmental organizations may also submit a request to be represented at the International Labour Conference. In order to qualify for such representation, the NGO must meet certain conditions that include demonstrating the international nature of its composition and activities.

**For more details** please see the International Labour Conference Information Note on *Representation of non-governmental international*

organizations at the International Labour Conference<sup>56</sup> or contact the Official Relations Branch at:

Fax: ++ 41-22-799+8944;  
E-mail: RELOFF@ilo.org

#### For NGOs: NGO Participation at the International Labour Conference<sup>1</sup>

There are two (2) types of accreditation for NGOs who wish to participate in the ILC. One is the ILO Special List of NGOs, which basically grants an NGO permanent observer status, not only to the ILC but also to most of the major meetings of the ILO. The other is an accreditation limited to only the specific ILC session that the NGO wishes to attend. Both types of accreditation require a list of credentials that the NGO needs to submit. Essential among the requirements is the international nature and composition of its activities.<sup>1</sup>

Thus, smaller NGOs and migrant workers associations that wish to participate in a specific ILC session but do not meet the requirements, can join with international NGOs who have accreditation status. In the case of migrant workers unions, they can come as part of their country delegation to the ILC or participate through their affiliation with their global union.

As the policy-making assembly of the ILO, the ILC is crucial in setting the policy agenda of the organization with regard to the treatment of migrant workers. Recently, of direct critical importance to migrant workers and NGOs working on migrants' rights was the 92nd ILC session held in June 2004, which included in its agenda a discussion on "Migrant Workers." The Conference established an Action Plan on Migrant Workers, which contains the following elements:<sup>1</sup>

- Development of a non-binding multilateral framework for a rights-based approach to labour migration;
- Identification of relevant action for a wider application of international labour standards and other relevant instruments;
- Support for the implementation of the ILO Global Employment Agenda at the national level;
- Capacity building, awareness raising, and technical assistance;
- Strengthening social dialogue;
- Improving the information and knowledge base on global trends in labour migration, conditions of migrant workers, and effective measures to protect their rights;
- Mechanisms to ensure ILO Governing Body follow-up on the plan of action and ILO participation in relevant international initiatives concerning migration.

The Action Plan was arrived at through a long and arduous process of deliberation by the tripartite Committee on Migrant Workers, purposely established by the Conference to deliberate on the agenda item and to prepare the conclusions for the Conference plenary. Throughout the debate, NGOs, who are generally considered outside of the tripartite system, cannot intervene except through the Committee's approval. In the experience of two migrant civil society organizations, namely Migrants Rights International and Migrant Forum in Asia, they found it extremely important to use their alliance with the workers' unions, such as the International Confederation of Free Trade Unions, which share the same objectives on migrants' rights.

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<sup>56</sup> The ILC Information Note can be downloaded from <http://www.ilo.org/public/english/standards/relm/ilc/pdf/note.pdf>

### For NGOs: NGO Participation at the International Labour Conference<sup>1</sup>

This alliance enabled NGOs to gain access to intervention, to bring forth their advocacy issues, and in some cases, to offer proposed language for consideration in the debate. Likewise, a good working relationship characterized by an effective liaison and information exchange proved to be mutually beneficial to both the workers' unions and the NGOs.

At the same time, working with friendly government delegations that share the same concern for migrants' human rights was also a useful strategy. At the end of the day, the more allies that the NGOs won from the tripartite structure, the better it was for the defense of migrants' human rights.

Learning from this experience at the ILC, a successful ILC participation does not come overnight. NGOs need to consider a few important factors and to work on them if they wish to influence an ILC session. First, is the NGO's ability to access the information on what is happening inside the ILO, or with regard to the annual ILC, what are the important reports or agenda items that will be discussed. Second, is the ability, as in the case of local or national NGOs, to link up with international NGOs or trade union organizations to help them get accreditation to the Conference. Also included here is the ability to do groundwork and to build strong partnerships with trade unions, which have a direct voice in the tripartite nature of the ILO. Finally, a good advocacy agenda supported by as many allies within the tripartite structure really helps in bringing the migrants' rights agenda of the NGOs to be reflected in the final document of the Conference.

## 6.1.4. The ILO and Migrant Workers

### i. The ILO's Long-Standing Commitment to Protecting Migrant Workers

The protection of migrant workers has been one of the ILO's priorities since its inception. The Preamble to the ILO Constitution states that the ILO's mandate includes the "protection of the interests of workers when employed in countries other than their own". This commitment to migrant workers was reiterated recently in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, the Preamble to which states that **"the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers."**

The ILO's concern for the plight of migrant workers stems from their particularly vulnerable position, both within the host country's society and in their own States. The social isolation faced by many migrant workers makes it difficult for them to effectively defend their interests, rendering them easy targets of discrimination and exploitation in host countries. Moreover, the governments of labour-exporting States are often reticent to protect the interests of their own nationals who migrate abroad for employment fearing that if they do so too vigorously, the labour receiving States will simply import workers from elsewhere.

The ILO has sought to protect migrant workers in various ways. Firstly, it is generally accepted that unless otherwise stated, ILO instruments apply to all workers, including migrant workers.<sup>57</sup> Therefore, migrant workers benefit from the ILO's general standard-setting activities as much as do other workers. Secondly, the ILO has also included provisions in general ILO instruments singling out migrant workers for special protection. Finally, in order to better protect the special interests of migrant workers, the ILO has adopted a number of Conventions and Recommendations dealing specifically with issues of particular concern to migrant workers. The four main such instruments are:

- *Migration for Employment Convention (Revised), 1949* (No. 97);
- *Migration for Employment Recommendation (Revised), 1949* (No. 86);
- *Migrant Workers (Supplementary Provisions) Convention, 1975* (No. 143); and
- *Migrant Workers Recommendation* (No. 151).

These instruments were the subject of a General Survey undertaken by the Committee of Experts on the Application of Conventions and Recommendations in 1998 and discussed during the International Labour Conference (87<sup>th</sup> Session) in 1999. During the Conference, it was agreed that a general discussion should be held at a future session on the future directions of these instruments as well as on possible standard setting activities.<sup>58</sup> These standards and the current context of international migration were the focus of a report discussed during the 92<sup>nd</sup> Session of the International Labour Conference in 2004.<sup>59</sup>

## ii. Who is a Migrant Worker for the Purposes of ILO Instruments?

The term “migrant for employment” is defined in the *Migration for Employment Convention (Revised), 1949* (No. 97) and the *Migrant Workers (Supplementary Provisions) Convention, 1975* (No. 143) as:

*. . . a person who migrates from one country to another [or who has migrated from one country to another] with a view to being employed otherwise than on his [or her] own account and includes any person regularly admitted as a migrant for employment.*

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<sup>57</sup> The Committee of Experts on the Application of Conventions and Recommendations stated in para. 37 of its 1999 General Survey of four ILO instruments on Migrant Workers that “the Conventions and Recommendations adopted by the International Labour Conference are of general application, that is, they cover all workers, irrespective of citizenship”.

<sup>58</sup> Refer to ILO. General Survey on Migrant Workers, Report III (IB). This survey is available on the ILOLEX database, which can be accessed via the ILO's website at [www.ilo.org](http://www.ilo.org).

<sup>59</sup> See ILO. *Towards a Fair Deal for Migrant Workers in the Global Economy*, Report VI. 92<sup>nd</sup> Session, International Labour Conference.

Certain categories of workers are excluded from the scope of these two Conventions<sup>60</sup>, but in general terms, this is the official 'ILO definition' of the term 'migrant worker'.

This means that the four aforementioned ILO instruments dealing specifically with migration:

- focus on migrants for employment rather than on migrants in general. However, refugees and displaced persons do fall within the scope of their provisions in their capacity as workers employed outside their home country. Moreover, certain provisions dealing with rights outside the confines of the employment relationship also apply to those family members who are legally entitled to accompany the migrant.
- only cover workers who cross international borders, and do not apply to those who move within a country for employment purposes.
- exclude migrant workers, whose status in the host-country is irregular, from the scope of certain provisions. This is the case for Convention No. 97, Recommendation No. 86 and Part II of Convention No. 143. However, Part I of Convention No. 143 and several provisions of Recommendation No. 151 seek to protect the rights of migrants whose status is irregular.
- do not distinguish between workers who intend to settle permanently in the host country and those who have migrated for short-term or seasonal employment, although the latter receive additional protection under certain provisions that only apply to them.<sup>61</sup>

## 6.2. The Supervisory System of the International Labour Organization<sup>62</sup>

The ILO does not only establish human rights standards, but also monitors their implementation, using various mechanisms. The ILO's Supervisory System can be divided into three groups of mechanisms:

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60 Convention No. 97 excludes frontier workers, the short term entry of members of the liberal professions and artistes, and seafarers from its scope, while Part II of Convention No. 143 excludes two further categories of workers, namely persons coming specifically for purposes of training or education and those admitted temporarily to a country at the request of their employer to undertake specific tasks or projects for a limited and set period of time, and who are required to leave the receiving country upon completion of said tasks or projects.

61 See for example article 8 of Convention No. 97 which seeks to protect migrant workers and their families from expulsion from the host country on the basis that the migrant is incapable of working.

62 <http://www.ilo.org/public/english/standards/norm/enforced/index.htm> (9 November 2004)

- regular system of supervision based on a review of periodic government reports on ratified and unratified ILO Conventions;
- special systems of supervision which include the filing of representations or complaints against States Parties to ILO Conventions, and the Freedom of Association procedures which apply to all ILO member States; and
- ad-hoc and informal mechanisms which tend to be issue and country specific.

### **6.2.1. Regular Supervisory System (Reporting System)**

The ILO's regular system of supervision (or reporting system) is unique in that member States are required to submit reports not only on the measures taken to implement ratified Conventions, but also on:

- the measures taken to submit newly-adopted Conventions and Recommendations to the competent authorities,<sup>63</sup> and
- the position of a State's "law and practice" with respect to the matters dealt with in certain Recommendations and unratified Conventions.<sup>64</sup>

Two ILO bodies are primarily responsible for supervising the implementation of all ratified and unratified ILO Conventions and Recommendations by ILO member States. They are:

- the Committee of Experts on the Application of Conventions and Recommendations and
- the Conference Committee on the Application of Conventions and Recommendations.

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<sup>63</sup> Art. 19(5)(c) of the ILO Constitution.

<sup>64</sup> Arts. 19(5)(e) and 19(6)(d) of the *ILO Constitution*.

### For NGOs: NGOs and the Reporting Process

NGOs can both contribute to the ILO's reporting process and benefit from this involvement. Firstly, NGOs have an important role to play in terms of information gathering and dissemination. They have sources of information at their disposal, such as first-hand accounts of human rights violations, that the bodies reviewing government reports often cannot access. Therefore, NGOs can collect pertinent information not otherwise accessible to the supervisory bodies and pass it on to them so that they get as complete a picture as possible of the situation in a given State. In this manner, NGOs can increase the chances that the supervisory bodies will make informed comments on the extent to which a given State is complying with its international obligations. Secondly, NGOs can focus the limited time, energies and resources of the supervisory bodies on particularly pressing, serious or key issues. This is because NGOs are closer to the grassroots level and are therefore better equipped to prioritize issues than are supervisory bodies which are usually far removed from the situation on the ground.

Moreover, NGOs can get as much (if not more) out of the reporting process as they put in. This is because involvement in reporting procedures serves as an important advocacy tool for NGOs. The information gathered through such involvement gives NGOs the opportunity to shame governments that are violating international law into complying with their obligations. The information contained in government reports or a government's non-compliance with its reporting obligations can be used to focus attention on human rights problems in a given country. Such reports can be used in campaigns designed to publicize certain issues, and engage the media's interest.

At the very least, NGOs can use the reporting process to stimulate public debate on human rights.

### 6.2.2. Newly Adopted Conventions and Recommendations

While a member State of the ILO is free to decide whether or not it will ratify an ILO Convention and thereby accept specific legal obligations, membership in the ILO itself implies certain obligations. More specifically, articles 19(5)(b), 19(6)(b) and 19(7)(b)(i) of the ILO Constitution are binding upon all ILO member States. These articles require that the government of an ILO member State bring new ILO Conventions or Recommendations "before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action".

The 'competent authority' is the authority empowered to implement the instruments under consideration, as distinguished from the authority which is merely empowered to ratify Conventions or authorize their ratification, although they are often one and the same. The competent authority is usually, but not always, the legislature.<sup>65</sup>

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<sup>65</sup> Bartolomei de la Cruz at 46.

When submitting newly adopted instruments to the competent authority, the government is under no obligation to recommend their ratification or implementation. However, governments must endeavor to ensure that there will be an opportunity to debate the matter in the legislature or other competent authority.<sup>66</sup>

Governments must discharge this obligation of submission within at most one year from the closing of the International Labour Conference session during which the Convention or Recommendation was adopted. This time frame may be extended by at most six months (for a total of 18 months) if 'exceptional circumstances' render it 'impossible' for the government to submit the new instruments to the competent domestic authorities within the one year period.<sup>67</sup> Federal states, such as Canada and Australia, also have 18 months from the closing of the Conference session to refer new Conventions and Recommendations "to the appropriate federal, state, provincial or cantonal authorities for the enactment of legislation or other action".<sup>68</sup> Governments must also report back on how they fulfilled this Constitutional obligation and the decisions taken by the 'competent authority' as a result.<sup>69</sup> Their reports are reviewed by the Committee of Experts and the Conference Committee on the Application of Conventions and Recommendations. The Committee of Experts reports on the extent to which states have complied with this obligation of submission as does the Conference Committee.<sup>70</sup>

Article 30 of the ILO Constitution covers situations where the government of an ILO member State fails to submit ILO Conventions or Recommendations to the competent authorities, as required by article 19 of the ILO Constitution. Under article 30, "any other [ILO] Member shall be entitled to refer the matter to the Governing Body". If the Governing Body finds that the government in question has indeed failed to meet its obligations under the ILO Constitution, "it shall report the matter to the [International Labour] Conference". The ILO Constitution does not specify what action the International Labour Conference may subsequently take in response.

### **6.2.3. Ratified ILO Conventions**

#### **i. The Reporting Schedule**

The current ILO reporting system provides for different types of government reports to be submitted at periodic intervals, as well as

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66 Ibid. at 47.

67 Arts. 19(5)(b) and 19(6)(b) of the ILO Constitution.

68 Art. 19(7) of the ILO Constitution.

69 Arts. 19(5)(c) and 19(6)(c) and 19(7)(b)(iii) of the ILO Constitution.

70 Chiarabini at 529.

reports to be submitted outside of these regular intervals when there are serious problems with the implementation of a ratified Convention in a given state. Government reports on ratified Conventions are due at the International Labour Office between June 1st and September 1st each year.

Governments must submit a first detailed report to the International Labour Office “on the measures which [they have] taken to give effect to the provisions of Conventions” they have ratified.<sup>71</sup> This first report is due the year after the Convention comes into force in their state. A second detailed government report must follow not more than two years after the first report is due.

Thereafter, governments must periodically submit reports on ratified Conventions (either every two years or every five years depending on the nature of the Convention). The Committee of Experts may also request detailed government reports outside of this schedule.<sup>72</sup>

More specifically, governments must submit detailed reports every two years on the following 10 ILO Conventions, which are considered priority Conventions:

- Conventions No. 87 and 98 on freedom of association;
- Conventions No. 29 and 105 on the abolition of forced labour;
- Conventions No. 100 and 111 on discrimination in employment;
- Convention No. 122 on employment policy;
- Conventions No. 81 and 129 on labour inspection; and
- Convention No. 144 on tripartite consultation.<sup>73</sup>

Governments must submit simplified reports every five years on other Conventions they have ratified. However, the Committee of Experts may require the government to submit a detailed report if it feels it is necessary.<sup>74</sup>

Finally, the Committee of Experts may request that governments submit detailed reports on the implementation of ratified Conventions outside of the regular intervals when:

- national or international organizations of employers or workers have submitted comments on their government’s compliance with

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71 Art. 22 of the ILO Constitution.

72 ILO. Handbook of Procedures Relating to International Labour Conventions and Recommendations [hereinafter Handbook of Procedures].

73 Ibid.

74 Ibid.

ratified ILO Conventions to the Committee of Experts. The Committee of Experts may decide that a detailed government report is needed given the government's reply or lack of reply to these comments; and/or

- the government in question has failed to submit a report as required under the regular reporting schedule or has not replied to comments addressed to it by the supervisory bodies.<sup>75</sup>

Under article 23(2) of the ILO Constitution, governments are obligated to send copies of their reports on the implementation of international labour standards to representative organizations of employers and workers, which may then communicate observations on the reports to their governments or directly to the ILO. Comments from organizations of employers or workers will usually lead the Committee of Experts to request a report from the government concerned prior to the next due date.<sup>76</sup>

It is important for NGOs to determine when their governments must report on given Conventions so that they may become involved in the reporting process or at least publicize the extent to which their governments are complying with their reporting obligations.

## **ii. Content of the Reports**

The type of information that governments must include in their reports varies depending on the Convention in question and on whether the report is detailed or simplified.

For detailed reports, the government must use the form approved by the Governing Body for each Convention. The type of information requested includes:

- the government's understanding of its obligations, specifically its interpretation of each of the Convention's articles;
- the impact of ratification on national law;
- government measures that have been taken or will be taken to implement the Convention's provisions, particularly laws and regulations;
- the text of such laws and regulations;
- information on the authorities responsible for enforcing government measures;

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<sup>75</sup> Chiarabini at 529-530.

<sup>76</sup> *Handbook of procedures* at para. 34(c)(iii).

- any permitted exclusions, exceptions or other limitations to the Convention's application which the State intends to invoke;
- action taken, if any, in response to comments by the supervisory bodies;
- relevant decisions rendered by judicial or administrative bodies; and
- any comments submitted by organizations of workers or employers on their State's compliance with its obligations under the Convention or on any aspect of the government's report.<sup>77</sup>

On the other hand, the information requested for simplified reports is less detailed and concerns:

- the general implementation of the Convention (specifically information required under the Convention);
- changes in legislation and practice, if any, which affect the Convention's implementation; and
- any comments submitted by organizations of workers or employers.<sup>78</sup>

NGOs that wish to participate in the reporting process would be well-advised to collect the above information so that they may counter the erroneous or misleading information presented in official government reports.

### iii. Review of Government Reports and Follow-Up<sup>79</sup>

- a) Review of reports. Government reports on ratified Conventions are reviewed by the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts), which is comprised of independent specialists in labour conditions or administration.

The Committee's sources of information include: the government in question, publications, court decisions, collective agreements, the conclusions of other ILO bodies, and comments made by organizations of employers or workers. These comments may be included by the government with its report or sent directly to the ILO by the organization in question, in which case, the government is notified of the comments and given an opportunity to reply to them. Comments by organizations of employers or workers may bear on the application

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<sup>77</sup> Chiarabini at 531.

<sup>78</sup> Ibid.

<sup>79</sup> The following information has been taken from the ILO's website at <www.ilo.org> and can also be found at Section VI. of the *Handbook of procedures*.

of ratified conventions or on any other aspect of international labour standards dealt with in the governments' reports.

- b) Committee of Experts' conclusion. If the Committee concludes that the government is not fully complying with its obligations under a ratified Convention or with its constitutional obligations regarding Conventions and Recommendations, it addresses a comment to the government pointing out problems in its implementation of obligations and requesting action to remedy the situation. These comments may take the form of observations or direct requests.

Observations are used for the more serious violations of obligations, and when comments have been sent by organizations of workers or employers. They are published in the Committee's report.

Direct requests are not published, and are merely sent to the governments and organizations concerned in cases involving minor shortcomings on the government's part or when the government has provided insufficient information.

- c) Committee of Experts' report. The Committee of Experts then submits its report to each annual session of the International Labour Conference, at which point it is dealt with by a tripartite Conference Committee on the Application of Conventions and Recommendations (Conference Committee). At this point, governments singled out in the Committee of Experts' report as not fully complying with their obligations under ratified Conventions may be invited to address the Conference Committee, and most opt to do so either orally or in writing.

The Conference Committee then drafts a report dealing with the most serious cases of governments failing to fully implement ratified Conventions, as well as government explanations (if any), and summaries of the discussions on individual cases (contained in the annexes). The report of the Conference Committee is submitted and presented to the International Labour Conference, where it is discussed by delegates in one or more plenary sittings. Once the report is adopted by the Conference, it is sent to governments.

#### **6.2.4. Unratified ILO Conventions and Recommendations**

The Governing Body may request reports on Recommendations and unratified Conventions from ILO member States under articles 19(5)(e) and 19(6)(d) of the ILO Constitution. The aim is to promote the continuing ratification and implementation of international labour standards. These reports bear on national law and practice with respect to standards embodied in ILO Recommendations and unratified Conventions, specifically, on the extent to which effect is or is proposed to

be given to such standards at the national level and “the difficulties which prevent or delay the ratification” of the Conventions in question.

The Governing Body may request government reports on specific Conventions and Recommendations or groups of such instruments on given subjects. The Committee of Experts on the Application of Conventions and Recommendations then carries out a 'General Survey' of specific instruments on the basis of the aforementioned reports, the reports submitted to the ILO by organizations of employers and workers, and other information available to the International Labour Office, such as legislation and other official documents. These 'General Surveys' are submitted to the Conference Committee on the Application of Conventions and Recommendations (as part of the Committee of Experts' report), which then discusses the 'General Survey' each year.<sup>80</sup>

### 6.2.5. Core ILO Conventions<sup>81</sup>

In June of 1998, the International Labour Conference adopted the *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*. This Declaration states that all ILO member States are bound “to respect, to promote and to realize, in good faith” four fundamental or core principles and rights, regardless of whether or not they have ratified the core Conventions enshrining them. This obligation flows from membership in the ILO and the voluntary acceptance by member States of the principles contained in the ILO Constitution and in the *Declaration of Philadelphia*.

The four core principles and eight associated core Conventions in issue are:

- **freedom of association and the right to collective bargaining**, enshrined in the Freedom of Association and Protection of the Right to Organize Convention (No. 87) and the Right to Organize and Collective Bargaining Convention (No. 98);
- **the elimination of all forms of forced or compulsory labour**, enshrined in the Forced Labour Convention (No. 29) and the Abolition of Forced Labour Convention (No. 105);
- **the abolition of child labour**, enshrined in the Minimum Age Convention (No. 138) and the Worst Forms of Child Labour Convention (No. 182); and

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<sup>80</sup> ILO website at <[www.ilo.org](http://www.ilo.org)> and Handbook of procedures at para. 54(k).

<sup>81</sup> See ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up.

- **the elimination of discrimination in employment**, enshrined in the Equal Remuneration Convention (No. 100) and the Discrimination (Employment and Occupation) Convention (No. 111).

The Follow-Up procedure annexed to the *Declaration on Fundamental Principles and Rights at Work* complements the ILO's regular system of supervision: it is not a substitute for it. This means that where an ILO member State has ratified one or all of the core Conventions, its compliance with the ratified Convention(s) will be monitored using the established supervisory mechanisms.

#### **i. Applicability of the Follow-up Procedure**

The Follow-Up procedure only applies to those ILO member States which have not ratified all the core Conventions and only in respect of the particular non-ratified Convention(s). The Follow-Up procedure is based on article 19(5) of the ILO Constitution which provides for government reports on unratified Conventions.

#### **ii. The Process**

- a) Submission and review of reports. It requires ILO member States that have not yet ratified all the core Conventions to submit annual simplified reports on any changes which may have taken place in their law and practice with respect to these Conventions and efforts to comply with the core principles they enshrine. These reports are reviewed by the Governing Body and experts appointed by it.
- b) Preparation of global report. In addition, a Global Report is prepared by the ILO each year, dealing with one of the four core principles in turn. This Global report is prepared on the basis of the annual reports submitted by States which have not yet ratified the core Conventions and on reports by ILO member States which have ratified the Conventions in question.

The Global Report is to be submitted to the International Labour Conference for tripartite discussion.

- c) Plan of action. The Governing Body then draws conclusions from the International Labour Conference's discussion as to what the priorities and plans of action for technical cooperation should be for the following four-year period.

## 6.3. Special Systems of Supervision

### 6.3.1. Article 24 Representation Procedure<sup>82</sup>

Under article 24 of the ILO Constitution, “an industrial association of employers or of workers” may make a representation to the International Labour Office that an ILO Member “has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party...”

#### i. Receivability Requirements

According to article 2(2) of the *Standing Orders*, to be receivable, a representation:

- must be communicated to the International Labour Office in writing;
- must emanate from an industrial association of employers or workers;
- must make specific reference to article 24 of the ILO Constitution;
- must concern a member of the Organization (or former member which remains bound by the Convention in question);
- must refer to a Convention to which the ILO Member State against which it is made is a party; and
- must indicate in what respect it is alleged that the ILO member State against which it is made has failed to secure the effective observance within its jurisdiction of the said Convention.

To determine whether or not the State has ratified the Convention in question, see the chapter with the Table of Ratifications of ILO Conventions or use the ILOLEX database found on the ILO website which contains copies of all ILO Conventions and links to ratification tables, listing the States that have ratified a given Convention, the date when they did so, and any flexibility the clauses invoked.

#### ii. The Process

- a) Submission of representation. A representation can be filed by trade unions and employers’ organizations. The representation should be submitted in writing to the Director-General of the International Labour Office in Geneva, Switzerland. The address is:

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<sup>82</sup> See Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization [hereinafter Standing Orders], which can be found on the ILO website [www.ilo.org](http://www.ilo.org).

Director-General  
International Labour Office  
4, route des Morillons  
CH 1211 Geneva 22 SWITZERLAND

- b) Acknowledgement of receipt. The International Labour Office acknowledges receipt of the representation, informs the government concerned and brings the matter before the Officers of the Governing Body.
- c) Determining receivability of representation. The Governing Body determines whether or not the representation meets the formal receivability requirements, based on the report of its Officers. The government concerned is invited to send a representative to take part in the Governing Body's private meetings/deliberations on this matter. This government representative has speaking rights, but no voting rights.

The Governing Body of the ILO alone determines whether or not an organization constitutes an "industrial association of employers or workers". Unless the organization filing the representation is well known, it is advisable for it to submit proof of its status as an 'industrial association' of either workers or employers. However, this does not mean that the organization must be officially registered in its country to qualify as an 'industrial association'.

A concrete example of the above points is found in the *Report of the Committee set up to examine the representation submitted by the National Trade Union Co-ordinating Council (CNS) of Chile under article 24 of the ILO Constitution, alleging non-observance by Chile of international labour Conventions Nos. 1, 2, 24, 29, 30, 35, 37, 38 and 111*. The Government of Chile requested that the representation filed by the CNS be declared 'irreceivable' on the basis that the CNS lacked the legal capacity to make the representation and was therefore not an 'industrial association' of workers. The CNS was an organization that existed in fact, but which was not officially recognized in Chile because it had not complied with the formalities required by Chilean law even though it was in a position to do so. The Committee set up to examine the representation concluded that it was for the Governing Body to determine whether or not the representation was receivable. The Governing Body had decided that the representation was receivable, and by implication, that the CNS was indeed an 'industrial association' of workers. The Committee had to accept this finding and the fact that the CNS was not a legal person under Chilean law did not render the representation 'irreceivable'.

There are no formal requirements as to the language of the representation. However, it is worth noting that the ILO's working

languages are English, French, Spanish, German, Russian and Chinese. So long as the language is a widely-used one, the representation should be receivable.

If the Governing Body determines that the representation is receivable, it will establish a special Ad-Hoc Tripartite Committee to examine the content of the representation. This Committee is “composed of members of the Governing Body chosen in equal numbers from the Government, Employers’ and Workers’ groups”. Representatives or nationals of the State against which the representation has been filed cannot be members of this Ad-Hoc Committee, nor can persons occupying an official position in the industrial association lodging the representation.<sup>83</sup>

If the representation is receivable and deals with freedom of association, it may be referred to the Governing Body’s Committee on Freedom of Association (see below for more information).<sup>84</sup>

- d) Examination of the representation. The Ad-Hoc Tripartite Committee (Ad-Hoc Committee) meets to examine the substance of the representation. All the steps taken in the procedure before it are confidential.<sup>85</sup> . At this stage in the process, it may:
- request further information from the association which has made the representation or the government concerned after it has responded;
  - communicate the representation to the government concerned without inviting it to respond; and/or
  - communicate the representation and any further information supplied by the industrial association to the government concerned and invite the government to respond to the representation; and/or

These various steps are subject to time-limits which may be extended by the Committee.<sup>86</sup>

- e) Ad-Hoc Committee report. Once it has finished considering the substance of the representation, the Ad-Hoc Committee reports back to the Governing Body. The Ad-Hoc Committee’s report to the Governing Body describes the steps undertaken to examine the representation, sets out the Committee’s conclusions on the issues raised, and recommends a course of action.<sup>87</sup>

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83 *Standing Orders* at art. 3(1).

84 *Ibid.* at art. 3(2).

85 *Ibid.* at art. 3(3).

86 *Ibid.* at art. 4.

87 *Ibid.* at art. 6.

- f) Consideration of report by the Governing Body. The Governing Body considers the Committee's report in private, although the government concerned is invited to send a representative. The Governing Body determines the extent to which the allegations have been substantiated, and whether or not the government has adequately refuted the allegations or justified its actions.<sup>88</sup>

The International Labour Office will communicate the Governing Body's decisions on the matter to the government concerned and the industrial association that filed the representation.<sup>89</sup>

If the Governing Body accepts the government's explanations, the procedure is closed. The parties' allegations and replies *may* be published.<sup>90</sup>

- g) Governing Body's decision and action. If the Governing Body finds the government's explanations for the allegations unsatisfactory, it *may* publish the representation with the government's reply and its own discussion of the case.

Therefore, the only sanction against the government in question is a finding of non-compliance with the Convention in issue and the possible publication of this conclusion.

The Governing Body may also decide to initiate a complaint based on the same case, using article 26 of the ILO Constitution (see below for more information).<sup>91</sup>

The ILO's regular system of supervision will usually conduct its own follow-up to the representation whether or not the Governing Body finds the government's explanations satisfactory. This means that the Committee of Experts and the Conference Committee on the Application of Conventions and Recommendations may raise questions that they consider merit further inquiry.

For more detailed information on the representation procedure see *Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization*.

### **6.3.2. Article 26 Complaints Procedure**<sup>92</sup>

Under articles 26(1) and (4) of the ILO Constitution, "any of the [ILO] Members shall have the right to file a complaint with the International

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<sup>88</sup> *Ibid.* at art. 7.

<sup>89</sup> *Ibid.* at art. 9.

<sup>90</sup> *Ibid.* at art. 8.

<sup>91</sup> *Ibid.* at art. 10.

<sup>92</sup> The following information has been taken from the ILO's website at [www.ilo.org](http://www.ilo.org) and Section XI. B. of the Handbook of procedures.

Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified... the Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.”

The complaints procedure is the most formal and far-reaching procedure among the ILO’s supervisory mechanisms. However, it has been used infrequently due to a variety of reasons. Firstly, the initiation of complaints’ proceedings or their threatened use has often led to the settlement of disputes. Secondly, organizations of employers and workers have, for the most part, opted to actively participate in the regular system of supervision rather than make use of these more formal procedures. This is because the examination of State reports is generally perceived as an effective means of ensuring government compliance with international labour standards. In addition, active participation in the reporting system is probably more cost-effective for these organizations than the use of complaints procedures. As for governments, they are deterred from filing complaints by the risk of counter-complaints being filed against them and their general fear of reprisals, as well as the significant cost of establishing a Commission of Inquiry. Therefore, the ILO complaints’ mechanisms tend to be used exceptionally - as a last resort in cases where a more thorough investigation than that possible under the regular supervisory machine is required.<sup>93</sup>

A complaint is lodged against a State for breaching its obligations under a Convention it has ratified. To determine whether or not the State has ratified the Convention in question, see the chapter with the Table of Ratifications of ILO Conventions or use the ILOLEX database found on the ILO website.

Normally, the State in question will also be a member of the ILO. However, a complaint may be filed against a State that is no longer a member of the ILO as long as it retains obligations under the ratified Convention in question.

#### **i. Who can file a complaint**

Article 26 of the ILO Constitution states that a complaint may be filed by:

- an ILO member State which has also ratified the Convention in question and which alleges that another State Party to the Convention is violating its provisions; (Such a complaint was once lodged in 1986 by the Government of Tunisia concerning the observance by the Libyan Arab Jamahiriya of the *Protection of Wages*

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<sup>93</sup> ILO website at [www.ilo.org](http://www.ilo.org) .

*Convention, 1949 (No. 95), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Equality of Treatment (Social Security) Convention, 1962 (No. 118). The complaint was filed following the expulsion of Tunisian and Egyptian migrant workers from Libya. However, the state filing the complaint or its nationals need not be directly prejudiced by the alleged offender's non-compliance with the Convention.)*

- the Governing Body which may institute complaint proceedings in two ways: (a) of its own motion or (b) by transforming a representation into a complaint; (An example of the former are the complaints proceedings instituted by the Governing Body concerning the observance by Chile of the *Hours of Work (Industry) Convention, 1919 (No. 1)*, and the *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, following a 1974 resolution by the International Labour Conference. An example of a representation becoming a complaint is the 1985 representation by the World Federation of Trade Unions alleging the failure by the Federal Republic of Germany to implement the *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, which was then referred to a Commission of Inquiry under article 26 of the ILO Constitution following a request by Germany.)
- a delegate or group of delegates to the International Labour Conference, that is representatives of employers or workers at the Conference. In this case, the complaint will be made during the Conference session; (An example of such a complaint is that made in 1996 by delegates to the 83rd Session of the Conference concerning the non-observance by Myanmar of the *Forced Labour Convention, 1930 (No. 29)*.)

## ii. The Process

- a) Filing the Complaint. A complaint must be submitted to the Director-General of the International Labour Office. The address is:

Director-General  
International Labour Office  
4, route des Morillons  
CH 1211 Geneva 22 SWITZERLAND

There are no requirements as to the form and language of the complaint. However, it is worth noting that the ILO's working languages are English, French, Spanish, German, Russian and Chinese. So long as the language is a widely-used one, the complaint should be receivable.

- b) Determining the Complaints' admissibility. If the complaint is admissible, the Governing Body may begin its examination by

communicating the complaint to the State concerned and inviting the government to comment on the complaint.

If the complaint involves freedom of association, it may be referred to the Governing Body's Committee on Freedom of Association.

The Governing Body may appoint a Commission of Inquiry to investigate the complaint in a quasi-judicial fashion, that is, as a court would do. A Commission of Inquiry is independent and composed of three prominent persons appointed for their expertise.

Although the Governing Body is not required to appoint a Commission of Inquiry it has usually done so. An example of a complaint for which such a Commission was *not* appointed was that filed by the Tunisian government against the Libyan government in 1986. The Governing Body deferred the establishment of a Commission of Inquiry to allow the parties to conduct negotiations with the ILO's assistance. The Tunisian and Libyan governments came to an agreement and therefore, a Commission was never established.

- c) Commission of Inquiry Procedures. A Commission of Inquiry sets its own procedure for investigating the complaint and has the ability to collect its own evidence. This procedural flexibility is needed in order to examine effectively the usually complex and delicate cases. However, a Commission's procedures must be in accordance with the ILO Constitution and with the general guidance provided by the Governing Body. Moreover, certain practices have become more or less established through usage. These include:
- requests for written submissions, such as statements and documentary evidence, from both parties to the complaint. These requests are often made at several stages in the process;
  - the communication of such submissions to the other party to the complaint, which may then comment on them;
  - requests for information from non-governmental organizations (especially international organizations of employers and workers);
  - request for information from States bordering on or having close economic ties to those involved in the complaint, as provided for under article 27 of the ILO Constitution;
  - the hearing of the parties' representatives;
  - the calling and hearing of witnesses; and
  - the use of on-site visits to the countries involved so as to gather first-hand information.

A Commission of Inquiry fully considers the complaint by reviewing the evidence presented; makes findings of fact; draws conclusions from these facts; and may formulate recommendations to the parties.

A Commission of Inquiry's report will contain a conclusion as to whether or not a given state is in compliance with its international obligations as contained in the ratified Convention(s) in question. In a case where the state is found to have breached its obligations, the Commission's report can be used by NGOs as a tool to educate the public on the situation faced by workers in that State and to shame the government concerned. Even where the report contains findings favourable to the government concerned, it can be used as a means of fostering public discussion on the importance of promoting and protecting labour rights.

In addition, a Commission of Inquiry's report may contain recommendations as to how the government concerned can fulfill its obligations under the Convention in question, as well as a time-frame for their implementation. NGOs can use these recommendations as advocacy tools that legitimize their own demands because they come from an international body.

- d) Communicating the Commission of Inquiry's report. The Director-General communicates the Commission of Inquiry's report to the ILO's Governing Body, the complainant, and the government concerned. The report on the complaint is also published in the ILO's Official Bulletin.

Under article 29(2) of the ILO Constitution, a government concerned in the complaint may refer the complaint to the International Court of Justice (ICJ) if it does not accept the Commission's recommendations. According to articles 31 and 32 of the ILO Constitution, the ICJ may affirm, vary or reverse the Commission's findings or recommendations, and its decision is final. At present, no government has appealed a Commission report to the ICJ.

- e) Securing Compliance. If the government in question fails to implement the Commission of Inquiry's recommendations or those of the ICJ within the specified time, the Governing Body may recommend what it considers to be appropriate measures to the International Labour Conference in order to secure compliance. The language of article 33 of the ILO Constitution allowing such an action is broad and unrestricted. However, no such action has yet been taken against a recalcitrant State.

Article 34 of the ILO Constitution allows a type of appeal from any action instituted against a government under article 33 of the ILO Constitution. Under article 34, the 'defaulting government' may request that the Governing Body constitute a new Commission of

Inquiry to verify “that is has taken the steps necessary to comply with the recommendations” of the original Commission or with those of the ICJ, as the case may be. If the government in question is found to have complied with the recommendations made to it, the Governing Body will then “recommend the discontinuance of any action taken in pursuance of article 33”. Like article 33, article 34 of the ILO Constitution has not been used to date.

The 'complaints procedure' is also reinforced by the ILO's regular system of supervision. The State against which the complaint was filed must continue to submit periodic reports on the Conventions it has ratified, including information on the steps it has taken to implement the Commission's recommendations. These reports are reviewed by the Committee of Experts and the Conference Committee on the Application of Conventions and Recommendations (see above for more information). In this manner, a government's progress towards compliance with its international legal obligations can be monitored.

### 6.3.3. Freedom of Association Procedures

The *Procedure for the examination of complaints alleging infringements of trade union rights*<sup>94</sup> (or the *Freedom of Association Procedure* for short) is the most widely used ILO grievance procedure. **It can only be used where the complaint concerns an alleged violation of freedom of association.**

While at first glance, this procedure might seem to be of little relevance to migrant workers, it can, in fact, be of great practical importance to them. This is because one of the ways in which migrant workers may lobby for the recognition of their rights as human beings and workers is by forming their own organizations and unions or by working with existing workers' organizations that are willing to lobby governments and employers on their behalf. Therefore, an important means of bettering the situation of migrant workers and promoting their rights is curtailed or impeded altogether if freedom of association in a given State is infringed or denied.

The complaints procedures concerning freedom of association were established so as to protect trade union rights. These rights are enshrined in the ILO Constitution and in ILO Conventions dealing with freedom of association such as the *Freedom of Association and Protection of the Right to Organize Convention, 1948* (No. 87) and the *Right to Organize and Collective Bargaining Convention, 1949* (No. 98).

A complaint alleging the infringement of trade union rights can be filed against an ILO member State regardless of whether or not that State has

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94 Available on the ILO sebsite at [www.ilo.org](http://www.ilo.org) .

ratified Convention No. 87 or Convention No. 98. This flows from the fact that an ILO member State is bound to abide by the obligations contained in the ILO Constitution -- obligations which it freely consented to when joining the ILO. As previously mentioned, the ILO Constitution recognizes and adopts the principle of freedom of association as fundamental to its mandate.

Since the early 1950s, matters concerning violations of freedom of association have been referred to two specialized ILO bodies: the Governing Body's Committee on Freedom of Association (or CFA for short) and the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC).

The CFA is a tripartite organ of the ILO's Governing Body, composed of nine of its members, nine substitutes, and an independent Chair. It receives complaints lodged directly by organizations of workers or employers and by governments, and reports back to the Governing Body. The CFA meets three times a year.<sup>95</sup>

The FFCC may deal with complaints referred to it by the State concerned or by the Governing Body following the CFA's recommendation.<sup>96</sup> The FFCC also has the mandate to consider complaints lodged against States which are not members of the ILO but which are members of the United Nations when the UN Economic and Social Council (ECOSOC) refers such cases to the FFCC and the State in question consents to the referral.<sup>97</sup>

#### **i. The Committee on Freedom of Association (CFA)**

A complaint submitted to the CFA must allege a specific violation (or specific violations) of freedom of association.

The principle of freedom of association is a broad one encompassing various sub-rights and freedoms. The CFA has considered the ILO Constitution, and ILO Conventions and Recommendations on freedom of association when interpreting the meaning of this freedom.<sup>98</sup> The principle of freedom of association binds all ILO member States, regardless of whether or not they have ratified the relevant instruments.

Freedom of association encompasses the following principles:

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95 Handbook of procedures at paras. 79, 81.

96 These complaints may relate to member States which have ratified ILO Conventions on freedom of association and those which have not, provided they consent to the referral.

97 Handbook of procedures at para. 82.

98 In addition to Conventions No. 87 and 98, see Conventions No. 11, 135, 141, and 154. Also see the following ILO Recommendations: R91, R143, R149, and R163.

- the right to form organizations of workers and employers;
- the right of such organizations to exist and function independently;
- the right to join or become affiliated with larger groups, such as federations and confederations of trade unions;
- freedom from and protection against anti-union discrimination and harassment;
- the right to engage in collective bargaining;
- the right to strike; and
- the right to basic civic liberties, such as freedom of expression, without which trade union rights cannot be freely exercised.

#### a) Receivability Criteria

For a complaint to be receivable it must:

- come from an organization of workers or employers or from another government;
- concern an ILO member State, regardless of whether or not it has ratified the ILO's Conventions on freedom of association, and even without its consent (on the basis that this principle is enshrined in the ILO Constitution and therefore applies to all member States); and
- allege one or more specific violations of the principle of freedom of association, and include proof of these allegations.<sup>99</sup>

The complainant need not exhaust all national remedies before the CFA will consider the complaint, although the use of national legal procedures is taken into consideration.<sup>100</sup>

#### b) Who can file complaints to the CFA

1) *Organizations of workers or employers.* This includes three types of organizations:

- national organizations of workers or employers with a direct interest in the matter;
- international organizations of employers or workers having consultative status with the ILO<sup>101</sup>; and

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<sup>99</sup> Handbook of procedures at paras. 79-81.

<sup>100</sup> Freedom of Association Procedure at paras. 31-33.

<sup>101</sup> Examples of such organizations include the International Confederation of Free Trade Unions (ICFTU); the World Confederation of Labour (WCL); the World Federation of Trade Unions

- other international organizations of employers or workers (without consultative status) where the allegations pertain to matters directly affecting their affiliated organizations.<sup>102</sup>

Unless the complainant organization has consultative status with the ILO or its status as an organization of workers or employers has been recognized by the CFA, it should furnish the CFA with documentation substantiating its status.

The CFA determines whether the organization filing the complaint qualifies as an 'organization of employers or workers'. The fact that a group is not registered or recognized by the government concerned is not determinative. The CFA may also accept complaints from organizations in exile or which have been dissolved by a government. However, the CFA may ask the organization filing the complaint to submit additional information on issues such as the size of its membership, its affiliations, and the content of its statutes to make this determination.<sup>103</sup>

Complaints filed by bodies with which it is not possible to correspond, because no return address is provided with the complaint or the address or body is a temporary one, will not be examined.<sup>104</sup>

*2) Governments alleging violations of the principle of freedom of association by other governments.*

The State of the government filing the complaint need not have ratified any of the ILO's Conventions on freedom of association. No government has yet filed a complaint against another government using this procedure.

The complaint may be lodged directly with the ILO or through the United Nations. Complaints lodged with the ILO must be submitted to the Director-General of the International Labour Office. The address is:

Director-General  
International Labour Office  
4, route des Morillons  
CH 1211 Geneva 22 SWITZERLAND

Complaints must be in writing, signed by a representative of a workers' or employers' organization (or by a government representative if the

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(WFTU); the Organization of African Trade Union Unity (OATUU); and the International Organization of Employers (IOE).

<sup>102</sup> Handbook of procedures at para. 80(b).

<sup>103</sup> Freedom of Association Procedure at paras. 34-40.

<sup>104</sup> *Ibid.* at para. 45.

complainant is another government), and contain an official return address.<sup>105</sup>

The allegations contained in the complaint should be as specific as possible (i.e. point to specific infringements of freedom of association), and the information adduced to substantiate them should be as detailed as possible.<sup>106</sup> The complainant only has one month (from the date on which receipt of the complaint is acknowledged by the Director-General) to send additional information supporting the complaint to the Director-General of the International Labour Office. This deadline may be extended if the complainant was not in a position to communicate the evidence in question within the one month period.<sup>107</sup>

Complaints are classified as urgent or less urgent. Urgent cases involve human life or personal freedoms, changing conditions affecting the freedom of action of a trade union movement as a whole, cases arising out of a continuing state of emergency, and cases involving the dissolution of an organization. They are given priority of treatment as are cases on which a report has already been submitted to the Governing Body.<sup>108</sup>

### **c) The Process**

1) *Determination of receivability.* The CFA determines the receivability of the complaint. If it is receivable, the Committee will inform the government concerned of the complaint and ask it to provide written observations on the allegations. The complainant may be invited to respond to the government's observations.<sup>109</sup>

The CFA may decide to hear one or both parties during its sessions so as to obtain more complete information. It may also contact government representatives during the annual International Labour Conference and ask representatives of the Director-General to conduct on-site visits so as to gather more evidence.<sup>110</sup>

2) *Examination of Complaint.* The CFA will examine the substance of the complaint on the basis of the above-mentioned written, oral and real evidence.

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105 *Ibid.* at para. 43.

106 Handbook of procedures at para. 80(a).

107 Freedom of Association Procedure at para. 47 and Handbook of procedures at para. 81(b) and (c).

108 *Ibid.* at para. 55.

109 *Ibid.* at para. 54.

110 *Ibid.* at paras. 65-66.

The CFA may proceed with its examination of a complaint even if the complainant requests that it be withdrawn. The CFA will determine whether or not the request was made independently and ensure that it was not motivated by external pressure, such as threats made against the complainant(s).<sup>111</sup>

3) *Conclusion.* If the CFA concludes that there has been no violation of freedom of association or that the alleged violation has ceased, it will stop examining the allegations.

If the CFA concludes that the allegations are substantiated and violations of the principle of freedom of association have taken place, it will formulate recommendations to the parties concerned so as to remedy the situation.<sup>112</sup>

For example, the CFA may recommend that the government concerned abandon or adopt certain practices or that it amend or repeal certain legislation. The complainant organization must also be prepared to receive recommendations since the CFA may suggest that it modify its activities if they have 'contributed to the problem'.<sup>113</sup>

4) *Recommendations and Follow-up.* The CFA's findings and recommendations are contained in a report that it submits to the Governing Body. After the report is approved, it is published in the ILO's Official Bulletin.<sup>114</sup>

The CFA may request that the government concerned continue reporting to it if it determines that the government needs assistance in meeting its obligation to respect and guarantee freedom of association.

The Committee of Experts on the Application of Conventions and Recommendations will conduct its own follow-up using the regular system of supervision in cases where the State concerned has ratified relevant ILO Conventions on freedom of association.<sup>115</sup>

Finally, the CFA may recommend that the Governing Body refer a given complaint of infringement of trade union rights to the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC). This may be done in cases where the State concerned has ratified the Freedom of

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111 *Ibid.* at para. 52.

112 Handbook of procedures at para. 81(f).

113 Swepston at 112.

114 Handbook of procedures at para. 81(g).

115 *Ibid.* at para. 81(h).

Association Conventions and even where it has not, although in the latter case, the consent of the State concerned is required for a referral.<sup>116</sup>

## ii. Fact-Finding and Conciliation Commission on Freedom of Association (FFCC)<sup>117</sup>

The FFCC is composed of nine independent persons appointed by the Governing Body on an ad-hoc basis. The FFCC is essentially a fact-finding body and its mandate is to examine alleged violations of the principle of freedom of association.<sup>118</sup> While this is also the mandate of the Committee on Freedom of Association (CFA; discussed above), the FFCC tends to examine the more serious allegations and the most politically sensitive. Unlike the CFA, the FFCC also has the mandate to enter discussions on the matters referred to it with the governments concerned, the objective being to settle the problems by agreement. The complaint referred to the FFCC must however concern freedom of association.

The FFCC's procedures cannot be directly accessed by individuals or non-governmental organizations. The FFCC only deals with cases that are referred to it and the only two parties that may refer a case to the FFCC are:

- the ILO's Governing Body; and
- the UN Economic and Social Council (ECOSOC).

### For NGOs: Referring cases to the FFCC

NGOs may lobby these two parties to refer a case to the FFCC and provide them with information to support the case against the government concerned. As is the case with most ILO mechanisms, NGOs must learn to work within the limits of the ILO's tripartite structure. This requires ingenuity and perseverance, but above all, it requires a willingness to network with organizations of workers (and even those of employers where possible) that are represented at the International Labour Conference and more specifically, on the ILO's Governing Body.

The Governing Body may decide to refer a case to the FFCC based on the recommendation of the CFA (which has itself already dealt with the case in question) or of the International Labour Conference. It may also do so on the request of a government that is alleged to have infringed the principle of freedom of association.

ECOSOC can refer allegations to the FFCC against member States of the United Nations which are not members of the ILO. ECOSOC has done so

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116 *Ibid.* at para. 81(f).

117 Unless otherwise indicated, the following information was taken from the ILO website at [www.ilo.org](http://www.ilo.org) and the Handbook of procedures.

118 Handbook of procedures at para. 82.

in cases involving Lesotho, the United States, and South Africa, all of which had ceased to be ILO members by the time the complaints against them were filed (all three States have since rejoined the ILO).

The complaint referred to the FFCC may pertain to the following States:

- ILO members which have ratified ILO Conventions on freedom of association, regardless of whether or not they consent to the referral;
- ILO members which have not ratified the relevant ILO Conventions *and* which consent to the referral; and
- those which are not members of the ILO but which are members of the UN *and* which consent to the referral by ECOSOC.

The procedure followed by the FFCC is similar to that followed by a Commission of Inquiry (see article 26(3) of the ILO Constitution).

The FFCC begins by requesting information from the complainants and government concerned, as well as from international and national organizations of workers and employers. The FFCC's secretariat then prepares an analysis of the relevant national legislation.

Afterwards, hearings of the parties' representatives and of witnesses are held in Geneva. The FFCC may call witnesses and it decides whether a witness will be heard and on what matters he or she will speak.

The FFCC may also conduct visits to the country concerned and meet with individuals of its choosing in order to obtain more information.

Once the process is complete, the Commission drafts a final report with its conclusions and recommendations for resolving the problems in question.

The FFCC has no powers to enforce its recommendations. However, compliance with such recommendations may be monitored by the CFA or using the regular system of supervision. Moreover, the International Labour Conference, the Governing Body, and ECOSOC (when it has referred a case to the FFCC) may also conduct their own follow-up.

#### **6.4. Ad-Hoc Supervisory Mechanisms**

The ILO may adopt other adhoc measures to enforce international standards when necessary. Many of these came as a result of International Labour Conference resolutions and/or Governing Body decisions.

#### **6.4.1. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>119</sup>**

Although voluntary in nature, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy is the only universal document that relates to the labour and social aspect of the activities of multinational enterprises. With the advent of multinational enterprises and the globalization of the economy, the ILO has intensified its efforts in promoting the Declaration and at the same time encouraged the implementation of labour standards that are directly related.

Governments of ILO member States are asked to report to the Governing Body every three years on the effect given to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Body in 1977. In the event of dispute over its application, governments, employers' or workers' organizations may request for an interpretation of the provisions of the Declaration.<sup>120</sup>

#### **6.4.2. Direct Contacts<sup>121</sup>**

The government concerned or the ILO's supervisory bodies may request that "direct contacts" take place between the government and the ILO to help the former meet its obligations under ILO instruments or deal with obstacles to the ratification of given instruments.

Upon receiving such a request, the Director-General of the ILO appoints a representative to discuss the situation with the government in question and the tripartite partners in the country. This results in the suspension of the ILO's supervisory system vis-à-vis that State for one year in order to develop solutions to the problems raised. This procedure requires the government's consent.

The Director-General's representative reports back to the Committee of Experts on the information he has collected, the advice given, and any agreement reached. The Committee of Experts and the Conference Committee will continue to monitor the government's compliance with its obligations.

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119 <http://www.ilo.org/public/english/employment/multi/> (9 November 2004).

120 For details, see

[http://www.ilo.org/public/english/standards/norm/enforced/ad\\_hoc/mne\\_pro.htm](http://www.ilo.org/public/english/standards/norm/enforced/ad_hoc/mne_pro.htm) (31 October 2004)

121 See para. 86 of the *Handbook of procedures*.

### 6.4.3. Special Studies on Discrimination

The Governing Body adopted this mechanism in 1974, but it has yet to be used successfully. As the name suggests, these Surveys involve the examination of broad discrimination issues related to government policy in a given State, not individual cases as such (only to the extent that they evidence a pattern of discrimination).

The Governing Body has stated that the Surveys might be based on the principles and definitions set out in the *Discrimination (Employment and Occupation) Convention, 1958* (No. 111). This Convention contains the following general definition of discrimination: “any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction, or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.

These Surveys are of particular relevance to women migrant workers who are at risk of being discriminated against on the basis of race, color, sex, and national extraction.

A Special Survey on Discrimination in Employment can be undertaken with respect to any ILO member State, regardless of whether or not it has ratified a Convention on discrimination, so long as the State in question consents to the Survey.

The following parties may submit a request for such a Survey to the Director-General of the International Labour Office:

- the government of the State in question;
- another State which has an interest in the situation;
- organizations of workers or employers with a direct interest in the matter or the affiliates of which are directly concerned; and
- organizations of workers or employers which have consultative status with the ILO.

The arrangements for conducting the Survey will be determined by the Director-General in consultation with the government of the State concerned. It is not yet clear what procedures will be used to carry out such surveys nor the type of action that may follow their completion.<sup>122</sup>

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<sup>122</sup> Swebston at 114-115.

#### **6.4.4. Pattern or Practice Studies<sup>123</sup> (of the exploitation of migrant workers not falling under Convention-based procedures)**

Provision for these studies is made in article 3.1, Annex III of the *Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration* which states as follows:

- Where widespread and persistent exploitative practices are known to the [International Labour] Office or brought to its attention by ILO constituents, the Director-General should additionally:
  - inform the government concerned and solicit its observations on the matter; and
  - inform the relevant Committee of the Governing Body of this matter with a view to proposing to the government concerned that a pattern or practice study be carried out in the territory of the member State under whose jurisdiction the exploitation is viewed as occurring.

Pattern and practice studies are independent of the provisions of ILO instruments, yet complement them. The procedure is triggered when allegations of persistent and widespread exploitation of migrant workers in a State are submitted to the ILO by organizations of workers or employers. Pattern and practice studies may also be initiated when a government requests advice on incidents involving migrant workers in its territory. The ILO then proceeds to investigate these allegations and/or incidents.

The findings and conclusions of such studies are submitted to an informal gathering of representatives of the government, and of workers' and employers' organizations for discussion.

Pattern and practice studies are characterized by their informality and less public nature. This can prove to be an advantage in certain situations where one or more of the ILO constituents in question might be alienated from the discussions by the initiation of the ILO's more formal and highly public Convention-based procedures.

### **6.5. Technical Cooperation and Technical Advisory Services<sup>124</sup>**

A substantial part of the ILO's activities in the area of migration involve assisting countries of emigration and immigration develop migration policies and relevant legislation that are in keeping with the standards set

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<sup>123</sup> Approved by the Governing Body at its 265th session in 1996.

<sup>124</sup> The following information was taken from the ILO website at [www.ilo.org](http://www.ilo.org).

out in ILO instruments. This includes assistance to formulate and implement measures to fight irregular migration and employment, and to protect the fundamental human rights of migrant workers.

Moreover, the ILO provides assistance on migration issues to organizations of employers and workers. Concrete examples of this work include a workers' seminar held in Tunisia for representatives of North and West African trade unions; helping Poland's Ministry of Labour and Social Policy to organize and host a regional conference on labour migration in Central and Eastern Europe; and visits to Costa Rica and Nicaragua in 1995 to advise these two Central American nations on the issue of irregular migration flows.

## **ILO's Supervisory System – A Summary**

### **1. Regular System of Supervision.**

Member States are required to submit reports on measures taken to implement ratified Conventions and newly adopted Conventions and Recommendations; and their position with respect to unratified Conventions.

### **2. Special Systems of Supervision.**

#### a) Article 24 Representation Procedure.

Any national or international organization of workers or employers can file a "representation" when a member State has failed to implement a Convention it has ratified.

#### b) Article 26 Complaints Procedure.

A member State or any delegate to the International Labour Conference can lodge a complaint against another member State for breaching its obligations under a Convention it has ratified. The Governing Body may institute complaints proceedings of its own motion or by transforming a representation into a complaint.

#### c) Freedom of Association Procedures.

The complaint procedures concerning freedom of association were established so as to protect trade union rights which are enshrined in the ILO Constitution and in Convention No. 87 and Convention No. 98. A complaint alleging the infringement of trade union rights can be filed against an ILO member State regardless of whether or not that State has ratified these Conventions.

### **3. Ad-Hoc Mechanisms**

When necessary, ad-hoc measures may be adopted by the ILO to enforce international labour standards.

- a) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. Every three years, governments of ILO member States are asked to report to the Governing Body on the effect given to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.
- b) Direct Contacts. The government concerned or the ILO's supervisory bodies may request that "direct contacts" take place between the government and the ILO to help the former meet its obligations under ILO instruments or deal with obstacles to the ratification of given instruments.
- c) Special Studies on Discrimination. These Surveys involve the examination of broad discrimination issues related to government policy in a given State.

