



International
Labour
Organization

► **The Director-General**

Ms Alena Douhan
Special Rapporteur
Office of the United Nations High
Commissioner for Human Rights
Palais Wilson
52 rue des Pâquis
1201 GENEVA

9 May 2023

Dear Special Rapporteur,

Further to my letter dated 27 April 2023, I am now in a position to forward the observations of the International Labour Office on the matters raised in your communication of 25 April 2023 (Ref. OL OTH 29/2023).

The Office is well aware of the role of the system of the Special Procedures of the Human Rights Council in monitoring respect for all human rights from a thematic and country-specific perspective and appreciates your interest in the ILO's constitutional procedures and practices with relation to the supervision of international labour standards.

The Office has given to your communication the in-depth consideration it deserves. I have forwarded a copy of the same to the Officers of the ILO Governing Body. You will find attached an Office memorandum which provides clarifications in respect of the constitutional procedures and practices concerned, the background of the case of Belarus and the latest Governing Body decision of March 2023. Your communication will also be brought to the attention of the Conference Committee which will be considering in the first instance the draft resolution on possible measures under article 33 in the case of Belarus before it is transmitted to the plenary.

In this context and pending the views and decisions of the ILO governance organs, I must express my deep concern about the thrust and tone of your communication, and notably your suggestion that recourse to the ILO's constitutional procedures for enforcing the application of international labour standards might result in the ILO engaging its international responsibility for violations of international human rights law and basic principles enshrined in the UN Charter. I wish to recall that these procedures are not only expressly provided for in the ILO Constitution but have also served as a model across the UN system, in particular in the field of human rights.

When it became the first UN specialized agency in 1946, the ILO was already equipped with a consolidated body of labour standards and a solid machinery to ensure the universal promotion, respect and realization of labour rights, including the procedure which the Governing Body decided to activate in March 2023 and which is at the origin of your communication. This is particularly the case as regards the core rights to freedom of association and collective bargaining, of which the ILO has been recognized the custodian by the United Nations system at large through a 1950 agreement with ECOSOC.

As explained in the attached memorandum, the central issue at stake, and which has led to the decision of the Governing Body last March, is the effective observance of those fundamental rights at work in Belarus. The constitutional function of the ILO is to contribute to the effective realization of the fundamental principle of freedom of association, as one of the primary safeguards of social justice and peace. In fulfilling its constitutional responsibility, the Organization must examine and act, as may be necessary, in those individual cases which are of such a character as to affect substantially the attainment of its aims and purposes as set forth in its Constitution, including the Declaration of Philadelphia, and the various Conventions concerning freedom of association.

It is indeed the ILO's responsibility to use all means of action at its disposal to ensure the respect of the rights which are at the very heart of its mandate, to enable all human beings the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity. One such means is action decided by the International Labour Conference under article 33 of the Constitution. Accordingly, 'unilateral coercive measures' are not relevant in this context, while I do appreciate that the subject matter of your mandate raises difficult questions and continues to be debated on international fora. I also consider that the concerns you express in your communication about the possibility that ILO Member States may resort to excessive and non-proportionate 'sanctions' are unjustified and exaggerated. The letter and the spirit of the Governing Body resolution adopted in March 2023 leave no doubt that any measure taken pursuant to that resolution must respect the overarching principles of the UN Charter and international human rights law. The ILO's action has long been guided by the principle that rights at work can only make true headway towards their full realization, if respect for other human rights is guaranteed at the same time.

The Office response – which I hope you will find useful and informative – seeks to contribute “to establish the facts, based on objective, reliable information emanating from relevant credible sources”, as set forth in articles 6 (a) and (c) the Code of Conduct for Special Procedures by which UN Special Rapporteurs are bound.

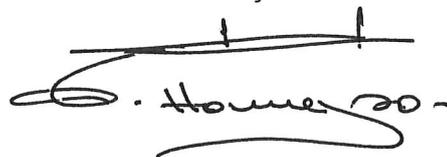
Bearing in mind the principles of cooperation and transparency and the role of the Special Procedures in enhancing the capacity of the Human Rights Council to address human rights situations, I have taken the liberty to share your communication together with the Office response with the UN Special Rapporteur on the situation of human rights in Belarus, the UN Special Rapporteur on the protection of the right to freedom of opinion and expression, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, the UN Special Rapporteur on the independence of judges and lawyers and the Chairperson of the Coordination Committee of the Special Procedures.

It is my strong belief that multilateral institutions, through the implementation of their respective procedures, should closely cooperate in deploying unrelentless efforts for the realization of human rights, including human rights at work, that are universal and inalienable.

Finally, I would be grateful if this letter together with the Office memorandum are published in your website.

Please accept the assurances of my highest consideration.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'G. Houngbo', with a horizontal line above it and a flourish below it.

Gilbert F. Houngbo

► Office of the Legal Adviser

► Office Memorandum in response to Joint communication from Special Procedures (Ref. OL OTH 29/2023)

This Memorandum provides clarifications on the legal questions raised in the communication of the UN Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, dated 25 April 2023, concerning the decision of the ILO Governing Body, adopted at its 347th Session (March 2023), to recommend that the International Labour Conference consider at its forthcoming June 2023 Session measures under article 33 of the Constitution with a view to securing compliance with the recommendations of the Commission of Inquiry established to examine the observance by the Government of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

I. The complaint procedure under articles 26 to 29 and 30 to 34 of the ILO Constitution

1. The implementation of article 33 of the ILO Constitution¹ involving complementary action of the ILO's two governance organs, i.e. the International Labour Conference and the Governing Body, is the apex of the ILO system for the supervision of international labour Conventions, set forth in the Constitution since its adoption in 1919. It is thus critical to bear in mind that the implementation of article 33 is not an isolated procedure but rather the final possible step in the implementation of a judicious and balanced procedure relating to the examination of a complaint submitted under article 26 of the Constitution.²

¹ The Constitution of the International Labour Organisation is an international treaty, originally included in Part XIII of the 1919 Paris Peace Treaty; see https://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/genericdocument/wcms_441862.pdf It has been substantively amended through the adoption of the Instrument of Amendment Adopted by the International Labour Conference at its 29th Session (1946); see [https://www.ilo.org/public/libdoc/ilo/P/09604/09604\(1946-29-4\)203-253.pdf](https://www.ilo.org/public/libdoc/ilo/P/09604/09604(1946-29-4)203-253.pdf).

Amendments to the ILO Constitution have been duly registered with the United Nations in accordance with article 102 of the United Nations Charter.; United Nations, Treaty Series, Vol. 2, p. 17; United Nations, Treaty Series, Vol. 15, p. 35; United Nations, Treaty Series, Vol. 191, p. 143; United Nations, Treaty Series, Vol. 466, p. 323; United Nations, Treaty Series, Vol. 958, p. 167; United Nations, Treaty Series, Vol. 3124.

In accordance with the international customary law principle *pacta sunt servanda*, all ILO Member States have accepted and are thus bound to respect the provisions of the Constitution; see also, PCIJ, Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, Advisory Opinion No. 1, p. 19.

² See Ebere Osieke, *Constitutional Law and Practice in the International Labour Organisation*, 1985, pp. 221-234 ; Jean Zarras, *Le contrôle de l'application des conventions internationales du travail*, 1937, pp. 265-332; Nicolas Valticos, « Les commissions d'enquête de l'OIT », *Revue générale du droit international public*, 1987, pp. 847-879.

2. The complaints procedure is open to a Member of the Organization if it is not satisfied that another Member is securing the effective observance of any Convention which they have both ratified (article 26, paragraph 1), to a delegate to the Conference, or the Governing Body (article 26, paragraph 4). The Governing Body “may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, [...] communicate with the government in question”, and it may invite the government to make a statement on the complaint. If the Governing Body does not think it necessary to communicate the complaint to the government, if the government does not respond, or if the response is unsatisfactory, the Governing Body “may appoint a commission of inquiry to consider the complaint and to report thereon” (article 26, paragraph 3).
3. As a matter of practice, all fourteen (14) Commissions of Inquiry³ so far established were composed of three members selected among eminent personalities who serve in an individual and personal capacity.⁴ Upon taking up their functions, they are invited by the ILO Director-General to make a solemn declaration to “honourably, faithfully, impartially and conscientiously perform their duties and exercise their powers”. These terms correspond to those of the declaration made by the judges of the International Court of Justice. Each commission determines its procedure, in conformity with the relevant provisions of the Constitution and the practice followed by previous Commissions. In so doing a Commission of Inquiry would often stress the judicial nature of the procedure and the need to safeguard the right of the parties to a fair procedure as recognized in international law.⁵ In discharging its responsibilities, a Commission of Inquiry is bound to review and analyse the effective observance in law and practice of the Convention(s) on the basis of which the complaint was lodged. In general, Commissions of Inquiry extensively review the comments and observations of other ILO supervisory bodies which have examined the same case in the past. They can also rely also on the work of UN bodies to the extent of their relevance for the review of the implementation of the Conventions concerned.
4. Article 27 of the Constitution requires all Members to cooperate and place at the disposal of the Commission of Inquiry all information in their possession. Article 28 of the Constitution details the content of the report of the Commission: findings on all questions of fact “relevant to determining the issue between the parties”; and recommendations “as to the steps which should be taken [...] and the time within which they should be taken”. The recommendations contained in the Commission of Inquiry’s report often pertain to three types of actions: taking legislative measures to bring domestic laws in line with the Convention in question (either by repealing, amending or enacting laws), taking other positive actions to ensure compliance with the Convention, and ceasing violations in practice.
5. The report of the Commission is communicated to the Governing Body and to the government(s) concerned and must be published (article 29, paragraph 1). The government concerned must indicate “within three months [...] whether or not it accepts the recommendations” of the Commission and, if not, “whether it proposes to refer the complaint to the International Court of Justice” (article 29, paragraph 2). The Court, whose decision shall be final (article 31), may affirm, vary or reverse the findings or recommendations of the Commission of Inquiry (article 32). The Governing Body takes note of the report which is submitted for its information. The recommendations of Commissions of

3 See <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang-en/index.htm>

4 They may be judges or former judges of the International Court of Justice, members of the Permanent Court of Arbitration, former judges of higher-level national courts, law professors or former senior UN officials.

5 The judicial nature of the inquiry has been affirmed by Judge Jessup in his separate opinion in the South West Africa cases, ICJ Reports, 1962, p 427. In practice, Commissions of Inquiry have consistently followed a work plan that comprises a first session devoted to written submissions including lists of persons proposed to be heard as witnesses; a second session in private devoted to receiving evidence and cross-examining witnesses; and a third phase consisting in traveling to the country concerned with a view to ascertaining the facts and collecting information on the spot.

Inquiry also designate other ILO supervisory bodies to ensure the follow-up by the Government concerned to the Commission's conclusions and recommendations. In most cases, the follow-up is undertaken by the independent *Committee of Experts on the Application of Conventions and Recommendations*,⁶ which was established in 1926 to examine the reports submitted by governments on the application of ratified Conventions and carry out an impartial and technical evaluation thereon. The Governing Body may also assign the follow-up to its tripartite *Committee on Freedom of Association*,⁷ which was established in 1951 for the purpose of examining complaints of violations of freedom of association, whether or not the country concerned had ratified the relevant Conventions.

6. It is only in the event that a Member does not apply the recommendations of the Commission of Inquiry that the Governing Body may activate article 33 of the Constitution, and "recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith". The Constitution does not set any timeframe for initiating the process under article 33. The only condition is that the Governing Body must have first determined that the Government has failed to implement the recommendations of the Commission of Inquiry within the time specified. A defaulting government "may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations" and "may request it to constitute a Commission of Inquiry to verify its contention" (article 34). An action taken under article 33 must be lifted if a decision in favour of the government in question is adopted by the Commission of Inquiry constituted in accordance with article 34, or by the International Court of Justice.
7. The role of the Governing Body in relation to the stages of the complaint procedure subsequent to the submission of the report of the Commission of Inquiry is solely to secure compliance with the recommendations of the Commission. In fulfilling its responsibility, the Governing Body enjoys large discretion as to the measures it can adopt or propose with a view to ensuring compliance with the findings of the Commission of Inquiry. Recommending to the Conference action under art 33 is optional. While the Governing Body may decide to recommend measures under article 33 to the Conference immediately upon observing the failure of the Member concerned to implement the recommendations of the Commission of Inquiry, it should be recalled that from its early origins the ILO's supervisory machinery has been conceived as a system of graduated measures to be taken in case of non-compliance by a Member State.
8. In its original version of 1919, article 33 (article 419 of the Treaty of Versailles) provided *inter alia* that in the event a Member failed to carry out the recommendations of the Commission of Inquiry or the decision of the Permanent Court of International Justice, another Member might "take against that Member the measures of an economic character indicated in the report of the Commission or in the decision of the Court." Under the 1919 Constitution, the responsibility as regards the nature of measures to be taken, with an expressed reference to measures of an economic character, was vested with the Commission of Inquiry and the Permanent Court of International Justice. The Commission on International Labour Legislation, which prepared the draft text of the Constitution, stated in its report that:

⁶ See <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang-en/index.htm>

See also ILO, *Monitoring compliance with international labour standards: The key role of the ILO Committee of Experts on the Application of Conventions and Recommendations*, 2019; ILO, *The Committee of Experts on the Application of Conventions and Recommendations: its dynamic and impact*, 2003).

⁷ See <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang-en/index.htm>

See also ILO, *70 Years of the ILO Committee on Freedom of Association: A Reliable Compass in Any Weather*, 2022; ILO, *The Committee of Freedom of Association: Its impact over 50 years*, 2002.

► *“It will be seen that the [constitutional procedures have] been carefully devised in order to avoid the imposition of penalties, except in the last resort, when a State has flagrantly and persistently refused to carry out its obligations under a convention. It can hardly be doubted that it will seldom, if ever, be necessary to bring these powers into operation, but the Commission consider that the fact of their 'existence is nevertheless a matter of almost vital importance to the success of the scheme [...] The Commission while taking the view that it will in the long run be preferable as well as more effective to rely on the pressure of international public opinion rather than on economic measures, nevertheless considers it necessary to retain the possibility of the latter in the background. If all forms of sanction were removed, the effectiveness of the scheme, and, what is almost equally important, the belief in its effectiveness, would be in great measure destroyed”.*⁸

9. Article 33 was amended in 1946 as part of a broader set of specific amendments aimed at ensuring the effective discharge of the ILO functions after its separation from the League of Nations and in view of its association with the United Nations. With respect to the ILO's supervisory system, the aim was to introduce specific adjustments and not to carry out an overhaul of the system the value and unique nature of which were universally acknowledged. Adjustments were made both to take into account the adoption of the Charter of the United Nations and to provide for an enhanced oversight role of the Governing Body in case of failure by a Member State with its constitutional obligations as regards standards.⁹

10. In this framework it was felt that the newly established International Court of Justice would consider itself unable to decide on measures of an economic character and would therefore be preferable to delete the reference to such measures in relation to the Court. With respect to the recommendations of a Commission of Inquiry, the rationale underlying the amendment was explained as follows:

► *“It is [...] almost equally inappropriate that Commissions of Enquiry consisting of persons acting in a personal capacity on behalf of the Governing Body should be left with the discretion entrusted to them by the present terms of the Constitution to indicate the measures, if any, of an economic character against a defaulting Government which they consider to be appropriate and consider other Governments would be justified in adopting [...] The device of Commissions of Enquiry, which the ILO has not yet had occasion to use, can develop into a valuable part of the machinery of the Organisation, but that it can only so develop if the functions of Commissions of Enquiry are confined to finding the facts and making Recommendations concerning the measures which it would be appropriate for Members to take to discharge the obligations which they have assumed by the ratification of Conventions [...] paragraph 2 of Article 28, which gives Commissions of Enquiry the power to indicate measures of an economic character, should be deleted from the Constitution [...]*

The deletion of paragraph 2 of Article 28 and of the second part of Article 32 would involve consequential amendments in Articles 33 and 34 which refer to the application by Members of the Organisation of measures of an economic character indicated by a Commission of Enquiry or the Permanent Court [...] There should be substituted for these provisions a general clause providing that in the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the Report of the Commission of Enquiry, or in the decisions of the International Court of Justice, as the case may be, the Governing Body may recommend such action as it may deem wise and expedient to secure compliance therewith. *Such a general clause would leave the Governing Body a discretion to adapt its action to the circumstances of the particular case, and permit it to make*

⁸ See Report presented by the Commission on International Labour Legislation, *Official Bulletin*, Vol. 1, pp. 265-266. From the beginning military sanctions were excluded; see Ernest Mahaim, « *L'Organisation permanente du travail* », *Recueil des Cours*, 1924, vol.152, p. 155.

⁹ International Labour Conference, 29th Session, 1946, Report II(1), *Constitutional questions. Part 1: Report of the Delegation for Constitutional Questions*, para. 61.

recommendations to the Member of the Organisation or, if appropriate, to draw a case of such failure to the attention of the Security Council of the United Nations” (emphasis added).¹⁰

11. As it was clarified in 1999, at the time article 33 was implemented for the first time, “the 1946 constitutional amendment was intended to broaden the range of measures that might be recommended, which had previously been limited to economic sanctions.”¹¹ The 1946 amendment did not aim, therefore, at excluding measures of economic character but rather at transferring the determination of these measures to the ILO governance organs and, by the same token, enabling these organs, starting with the Governing Body, at exercising wide discretion as regards the measures to be implemented.
12. By providing that “the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance [with the recommendations of the Commission of Inquiry]”, the Constitution compels the Governing Body, while exercising discretion, to seek to ensure that the measures fall within the competence of the Conference and are specifically designed to ensure compliance with the recommendations of the Commission of Inquiry.
13. When article 33 was first implemented, the Office further elaborated on the parameters within which the Governing Body would exercise its discretion as follows:
 - ▶ *“The discretion left to the Governing Body is very broad and allows it to choose between various options, ranging from measures involving the Member itself to measures that can be considered as penalties – on the understanding, however, that for the reasons already given to the Governing Body such measures cannot entail either expulsion from the Organization or suspension of a Member’s voting rights. On the other hand, the Conference is still at liberty to adopt a resolution inviting a Member to draw all the appropriate conclusions from its persistent refusal to comply with its international obligations under the Convention, which derive from a principle that has been recognized as being essential to membership of the ILO. The proposals that the Governing Body may be called upon to adopt must meet three criteria: they must come within the terms of reference of the Conference, they must derive from the recommendations of the Commission of Inquiry (the measures to be taken must correspond to the purpose of the recommendations of the Commission of Inquiry, which is to put an end to the widespread exaction of forced or compulsory labour in Myanmar), and they must be conducive to securing the implementation of the Commission of Inquiry’s recommendations.”¹²*
14. From the above, it is clear that any recommendations made under article 33 of the Constitution may only be made following, first, a failure to comply with a ratified international labour Convention, and second, a failure to carry out recommendations of a Commission of Inquiry duly observed by the Governing Body in light of the analysis made by the ILO supervisory bodies. It is also clear that any action recommended under article 33 must aim exclusively at securing compliance with the recommendations of a Commission of Inquiry. It accordingly results that the conception and design of any recommendations made under article 33 are genuinely collective and international – and not unilateral. It is also of utmost importance that these measures are validated by decision of the International Labour Conference, which is the most representative organ of the Organization’s tripartite constituency.

¹⁰ Ibid, paras. 63-64.

¹¹ GB.276/6, Measures, including action under article 33 of the Constitution of the International Labour Organization, to secure compliance by the Government of Myanmar with the recommendations of the Commission of Inquiry established to examine the observance of the Forced Labour Convention, 1930 (No. 29), para. 19.

¹² Ibid, para. 12.

15. In the same context, it is important to clarify the scope and meaning of the term “recommendations” employed in different provisions of the Constitution, especially since the communication of the UN Special Rapporteur reflects a certain misunderstanding in this respect.
16. As explained above, in the context of action taken under article 33 of the Constitution, the term “recommendations” is to be construed in its literal meaning. It reflects a division of responsibilities between the Governing Body, which develops proposals and the Conference which makes an informed decision on the basis of those proposals. In contrast, article 19 of the Constitution governs the adoption by the Conference of international labour standards, which may take the form either of Conventions or of Recommendations. Accordingly, there is a fundamental difference between the measures recommended by the Governing Body under article 33 in the specific framework of complaints filed pursuant to article 26 of the Constitution and the international labour Recommendations as normative instruments adopted by the Conference in the framework of standard-setting under article 19 of the Constitution.
17. It flows from the above that, as indicated in the Office document that served as basis of the Governing Body discussions in March 2023, the Conference has “every latitude to retain one or other or even all the measures proposed, while also making it possible for the Conference to add further measures in the light of any developments that might occur in the meantime” (see doc. [GB. 347/INS/14\(Rev.1\)](#), para. 7). No assumption can be made at this stage on the type and scope of measures that could ultimately be adopted by the Conference.

II. The Commission of Inquiry in the case of Belarus and its aftermath

II.1 Background

18. The government of then Byelorussian Soviet Socialist Republic ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) on 6 November 1956 (see [ILO, Official Bulletin, Vol. XXXIX, 1956](#), pp. 670-671). The question of the observance by Belarus of its obligations under Conventions Nos 87 and 98 was the subject of three complaints made to the Committee on Freedom of Association, in Cases Nos. [1849](#) (1995), [1885](#) (1996) and [2090](#) (2000), and the regular monitoring by the Committee of Experts on the Application of Conventions and Recommendations.

II.2 The article 26 complaint

19. The formal process was started by a complaint filed by 14 workers delegates during the 91st Session of the International Labour Conference in 2003 (doc. [GB.288/8](#), Annex). In accordance with article 26, paragraph 4 of the Constitution, the Governing Body decided on 19 November 2003 to refer the complaint to a Commission of Inquiry (doc. [GB.288/PV](#), pp. III/6-7).
20. The Commission of Inquiry issued its [report on the complaint](#) on 23 July 2004. The main conclusions of the Commission of Inquiry were as follows:
 - (i) The legal framework for the registration of a trade union or an organizational structure “operates in a manner that impedes the free formation of trade union organizations, and has impacted uniquely on those which are outside the structures of the [Federation of Trade Unions of Belarus] or oppose its leadership. As such it amounts to a condition of previous authorization for the formation of a union contrary to the right of workers to form and join organizations of their own choosing without previous authorization provided for in Article 2 of Convention No. 87” (para. 598);

- (ii) "The trade union movement has been and continues to be the subject of significant interference on the part of Government authorities. [...] The Commission concludes that this interference has resulted in undermining one of the most essential prerequisites of freedom of association: trade union independence" (para. 614);
- (iii) "The Government has not complied with its obligation under Convention No. 98 to ensure effective measures of protection against anti-union discrimination, accompanied by sufficient and dissuasive sanctions, nor has it properly ensured the right of all workers to form and join organizations of their own choosing as provided in Article 2 of Convention No. 87" (para. 617);
- (iv) "Several provisions of the Law on Mass Activities constitute a violation of the right of workers' organizations to organize their activities freely, without interference by the public authorities, as provided for in Article 3 of Convention No. 87" (para. 627);
- (v) "Many of the acts of interference and anti-union discrimination, as well as the consequences of non-registration caused by Decree No. 2, have resulted in a denial of the collective bargaining rights of a number of primary level trade unions" and "these various acts of interference already examined above have further hindered the rights of these organizations to enter into negotiations with their employer" (para. 628);
- (vi) "The incomplete development of the industrial relations system in a manner better adapted to a system of Government where social partners are separate and distinct entities has facilitated interference in trade union affairs" (para. 631). The Commission queried "whether access to the courts in the current circumstances is indeed an adequate recourse for redressing trade union rights violations" (para. 632).

- 21.** Following these conclusions, the Commission of Inquiry formulated, "with a view to Government action to remedy the unsatisfactory application of Conventions Nos. 87 and 98" (para. 633), a set of 12 recommendations to the Government of Belarus (para. 634). The Commission of Inquiry opined that all its recommendations could and should be "carried out without further delay", and that eight out of these 12 recommendations "should be completed at the latest by 1 June 2005 (para. 635). The Commission of Inquiry considered that the monitoring of the implementation of its recommendations should be undertaken by the Committee on Freedom of Association.
- 22.** As a concluding observation, the Commission of Inquiry stated that "many of [the] basic civil liberties [of trade union members and leaders], in particular, the right to freely express one's opinion and to freely seek and impart information and ideas through the media, as well as freedom of assembly, have been seriously infringed in Belarus" and that its recommendations had been made "with the entire Belarussian society in mind so that free and independent trade unions may take their rightful place as vital players in the social and economic development of the country" (paras 639-640).
- 23.** The Government of Belarus replied to the Report of the Commission of Inquiry on 1 November 2004. While it expressed its disagreement with some of the conclusions of the Commission of Inquiry, the Government indicated its willingness to adopt measures with a view to complying with the recommendations of the Commission of Inquiry (see doc. [GB.291/6/1](#), Annex; [GB.291/PV](#), pp. 18-19).
- 24.** The Governing Body took note of the Report by the Commission of Inquiry and of the reply by the Government of Belarus and entrusted the Committee on Freedom of Association with the supervision of the follow-up to the recommendations of the Commission of Inquiry (see doc. [GB.291/PV](#), p. 21).

II.3 Aftermath of the Report of the Commission of Inquiry

- 25.** While the Committee on Freedom of Association took lead responsibility for following up on the recommendations of the Commission of Inquiry, the Committee of Experts on the Application of

Conventions and Recommendations and the Conference Committee on Application of Standards examined the application by Belarus of Conventions Nos 87 and 98 through the submission of reports by the Government under article 22 of the Constitution.

26. The Committee on Freedom of Association first examined this matter in its 339th Report (November 2005), which was approved by the Governing Body at its 294th Session and for the second time, in its 341st Report (March 2006), which was approved by the Governing Body at its 295th Session. On the latter occasion, the Committee, inter alia, felt obliged

▶ *“to express in the strongest terms its deep concern that, rather than making good faith efforts to implement the recommendations of the Commission of Inquiry, the Government was on a path to eliminating all remnants of an independent trade union movement in Belarus, apparently hoping that in this way there in effect would be no further sources of complaint. The Committee could only, therefore, reiterate its previous recommendations and urged the Government in the strongest of terms to take appropriate and concrete measures immediately so as to ensure that workers may form and join organizations outside the FPB freely and without pressure or intimidation on the part of enterprise management or the public authorities and that these organizations may exercise their activities without Government interference”.*

27. At its 95th Session (June 2006) of the International Labour Conference, in the framework of its examination of the measures taken by the Government of Belarus to give effect to the provisions of Conventions Nos 87 and 98, the Conference Committee on Application of Standards adopted conclusions in which it

▶ *“deplored the continued failure by the Government to implement the recommendations of the Commission of Inquiry and shared the sense of urgency deriving from the comments of the Committee of Experts in relation to the survival of any form of independent trade union movement in Belarus. It deplored the fact that it had to note that nothing the Government had said demonstrated an understanding of the gravity of the situation investigated by the Commission of Inquiry, or the necessity of rapid action to redress the effects of these severe violations of the most basic elements of the right to organize. It called upon the Government to take concrete steps for the implementation of these recommendations so that real and tangible progress could be noted by the November session of the Governing Body. If no such progress could be noted, the Committee trusted that the Governing Body would begin to consider, at that time, whether further measures under the ILO Constitution should be considered. The ILO should make available any technical assistance the Government might request provided that such assistance was needed for the concrete implementation of the recommendations of the Commission of Inquiry and the Committee of Experts. The Committee further trusted that the situation of independent trade unions in Belarus would be closely monitored by the ILO and that appropriate action would be taken in the event of repressive measures by the Government.”*

28. In November 2006, the Governing Body considered the question of the measures taken by the Government of Belarus to implement the recommendations of the Commission of Inquiry. This constituted the first discussion in the Governing Body of the possibility to take action under article 33 of the Constitution (see doc. GB.297/PV, para. 166).¹³

¹³ Thereafter, the Governing Body monitored on a regular basis developments on the measures taken by the Government of Belarus to implement the recommendations of the Commission of Inquiry (see docs GB.298/6 and related conclusions; GB.300/9 and GB.300/9/1 and related conclusion; GB.301/17/4 and related conclusion; GB.303/19/2; GB.304/14/3; GB.320/INS/7).

29. In the period 2007-2022, the Committee on Freedom of Association continued to monitor the situation in Belarus (see [345th Report](#) (2007), [352nd Report](#) (2008), [361st Report](#) (2011), [366th Report](#) (2012), [369th Report](#) (2013), [379th report](#) (May 2016), [385th Report](#) (March 2018), [390th Report](#) (June 2019), [394th Report](#) (March 2021) and [398th Report](#) (March 2022)). During its last examination, the Committee submitted the following recommendation to the Governing Body:
- ▶ *“Noting with deep regret the serious retreat on the part of the Government from its ILO constitutional obligations and its commitment to implement the Commission of Inquiry recommendations 17 years ago, the Committee draws this serious situation to the attention of the Governing Body so that it may consider any further measures to secure compliance therewith.”*
30. In June 2022, at the 110th Session of the Conference, the Conference Committee on Application of Standards adopted [conclusions](#), subsequently approved by the Conference, in which, it “expressed its deep concern that, 18 years after the Commission of Inquiry's report, the Government had failed to take measures to address most of the Commission's recommendations.” The Committee referred the matter to the Governing Body to consider any further measures, including those foreseen in the ILO Constitution, to secure compliance with the recommendations of the Commission of Inquiry.
31. Further to the recommendations of the Committee on Freedom of Association and the conclusions of the Committee on the Application of Standards, the Governing Body held a first discussion at its 346th Session (November 2022). The Governing Body *inter alia* requested the Director-General to submit to the Governing Body at its 347th Session (March 2023) a document detailing options for measures under article 33 of the ILO Constitution as well as other measures to secure compliance by the Government of Belarus with the recommendations of the Commission of Inquiry taking account of the views expressed. The Governing Body also decided to place on the agenda of the 111th Session (2023) of the International Labour Conference an item concerning measures under article 33 of the ILO Constitution to secure compliance by the Government of Belarus with the recommendations of the Commission of Inquiry (see doc. [GB.346/INS/13\(Rev.1\)](#) and related [decision](#)).
32. In the event, at its 347th Session (March 2023), the Governing Body decided to recommend to the Conference to consider at its 111th Session (2023) measures under article 33 of the Constitution and adopted a draft resolution to this effect. It is important to recall that the Governing Body has transmitted a *draft* resolution to the Conference for its consideration, in accordance with relevant constitutional procedures.

III. ILO standards supervision and international human rights law

33. The Office notes that the communication of the UN Special Rapporteur draws upon a number of postulates as regards the lawfulness of the action that might be decided by the Conference at its next 111th Session in relation to item IX on its agenda and potential implications. The following paragraphs seek to demonstrate that those postulates are not founded.

III.1 An open-ended authorization of sanctions against Belarus

34. In her communication, the UN Special Rapporteur expresses the view that the possible Conference resolution on measures under article 33 of the Constitution to secure compliance of Belarus with the recommendations of the Commission of inquiry “may have a number of international law implications, including possible violations of economic, social and cultural rights of workers in Belarus, their families, as well as vulnerable groups who rely on social support programs.”
35. The UN Special Rapporteur further opines that “the decision by the Governing Body provides for a very broad interpretation of the list of measures which can/shall be taken by member States, employer and workers[...] this broad interpretation might be interpreted as providing for the

authorization to impose unilateral sanctions towards Belarus, Belarussian companies and nationals, targeting multiple areas and sectors, including the economy in general, its specific sectors, as well as sports, art and academia. Such recommendation may be interpreted as constituting a tacit encouragement for excessive de-risking and over-compliance with such sanctions by non-state actors, including donors, businesses and the financial sector.”

36. The Office wishes to make the following three observations in this connection: first, in the case of Belarus, an independent and quasi-judicial Commission of Inquiry was established by the Governing Body to examine the observance by the Government of Conventions Nos. 87 and 98 -- two of the ten ILO fundamental Conventions protecting fundamental human rights at work – which resulted in a set of 12 recommendations to the Government of Belarus to remedy the unsatisfactory application of those Conventions.
37. Secondly, the sole purpose of any action that might be taken under article 33 would be to induce the Government of Belarus to conform to the obligations it has voluntarily accepted both by joining the Organization and ratifying the Conventions in question.
38. Thirdly, ILO constituents have always placed particular emphasis on the *necessity* and *proportionality* of any measures to be recommended under article 33. The relevant discussions either at the Governing Body or at the International Labour Conference that eventually led to the adoption of article 33 measures against Myanmar in 2000 demonstrate the special concern about ensuring a measured response. For instance, at the 276th Session (November 1999) of the Governing Body, it was explained that
 - ▶ *“the provisions of article 33 do not stipulate the nature of the measures that the Governing Body may recommend for adoption by the Conference where a Member flagrantly and persistently fails to carry out its obligations. The 1946 constitutional amendment was intended to broaden the range of measures that might be recommended, which had previously been limited to economic sanctions. While the range of measures is extremely broad, the Governing Body nevertheless has good reason for basing its decision on two criteria. The first ensues from the recommendations of the Commission of Inquiry themselves; that the measure to be taken must correspond to the objectives of the Commission’s recommendations. The second criterion ensues from article 33 itself and concerns the fact that the measures must be deemed by the Governing Body to be appropriate for securing compliance with the recommendations of the Commission of Inquiry”* (see doc. [GB.276/6](#), para. 19).
39. Most recently, at the 347th Session (March 2023) of the Governing Body, it was recalled that the measures under article 33 must “satisfy the principles of proportionality and necessity, meaning that they should not exceed what is practically necessary for ensuring effective and timely compliance” (see doc. [GB. 346/INS/13 \(Rev.1\)](#), para. 14 and [GB.347/INS/14 \(Rev.1\)](#), para. 8).
40. In addition, the UN Special Rapporteur considers that “the use of the reference to economic and other measures by the Governing Body is inadmissible, especially in view of any references of this kind having been removed from the ILO Constitution in 1946”. In this respect, it is recalled that following the amendment of article 33 of the Constitution, the Governing Body’s discretion to recommend measures to the Conference is very broad and permits the Governing Body to choose between various options, ranging from measures involving the Member itself to measures that can be considered as penalties – on the understanding, however, that such measures cannot entail the expulsion from the Organization or the suspension of a Member’s voting rights.
41. There is nothing in the *travaux préparatoires* that led to the constitutional amendment of 1946 to support the assertion of the UN Special Rapporteur that the reference to “economic sanctions has been removed from the text of the ILO Constitution as it contradicted the UN Charter and the international law principles of the non-use of force, prohibition to intervene into the domestic affairs of states and sovereign equality of states.” As it has been written, “the purpose of these amendments,

as the discussion at the time makes clear, was not to take the option of sanctions off the table. It was rather to leave the essentially political decision on what measures to take to a political organ (the Governing Body) rather than a Commission of Inquiry, and to give the Governing Body the discretion to adapt the action to the circumstances of the individual case.”¹⁴

42. Moreover, in view of the clear and unambiguous wording of article 33 (“the Governing may recommend to the Conference such action as it may deem wise and expedient to secure compliance”, or, in French, “le Conseil d’administration pourra recommander à la Conférence telle mesure qui lui paraîtra opportune pour assurer l’exécution de ses recommandations”), no possible question of interpretation arises. Accordingly, it is not accurate to suggest that “the approach to interpret [article 33] as the possibility to broaden the list of measures which can be imposed by states [...] would be against the principles of interpretation of articles 31-33 of the Vienna Convention on the Law of Treaties of 1969.”
43. Furthermore, the UN Special Rapporteur is of the opinion that “the UN Charter explicitly endows the UN Security Council with the unique powers to decide the use of military and non-military sanctions, without any possibility for other actors to engage in this activity.” However, it is well-established that the constituent instruments of other international organizations may foresee sanctions vis-à-vis their member States.¹⁵ In the Office’s view, the explanations provided above concerning the object and purpose of article 33 as well as the institutional safeguards surrounding its application, are sufficient to dispel any doubt as to the legality of the recommendations of the Governing Body under international law and the ILO’s authority, as an independent international organization, to implement the procedures set forth in its Constitution -- a treaty formally accepted by its 187 Member States -- to carry out its mandate.

III.2 ILO’s international responsibility for circumventing its international obligations

44. In her communication, the UN Special Rapporteur expresses the view that “any unilateral coercive measures with reference to the ILO decision in the absence of authorization of the UN Security Council against the Government of Belarus, might render the ILO responsible alongside its member States for any breaches of the international legal norms as well as violations of human rights, in accordance with article 17 of the Draft articles on the international responsibility of international organizations 2011.”
45. Article 17 of the above-referenced Draft articles is not relevant to the upcoming Conference discussion on possible action to be taken under article 33 in the case of Belarus. The reading of the International Law Commission’s Commentary on draft article 17 confirms that the “circumvention” of international organizations that this article purports to address is unconnected with the type of action that might be considered at the forthcoming International Labour Conference. It is recalled that draft article 17 suggests that an international organization may engage its international responsibility if it tries “to influence its members in order to achieve through them a result that the organization could

¹⁴ See Richard Horsey, *Ending Forced Labour in Myanmar – Engaging a pariah regime*, 2011, p.39.

¹⁵ As it is stated in one of the reports of the UN Special Rapporteur, “it is also generally agreed that international organizations may impose sanctions on member States in accordance with their constituent documents”; A/HRC/48/59, para. 71, and A/HRC/45/7, paras 100, 103. See also Kirsten Schmalenbach, “International Organizations or Institutions, Supervision and Sanctions” in *Max Planck Encyclopedias of International Law*, para. 31; Henry Schermers and Niels Blokker, *International Institutional Law - Unity Within Diversity*, 5th ed., 2011, paras 1445, 1450-1452; Frédéric Dopagne, “Sanctions and countermeasures by international organizations” in Richard Collins and Nigel White (eds.), *International Organizations and the Idea of Autonomy*, 2011, p. 182; Yann Kerbrat, “Sanctions et contre-mesures: Risques de confusion dans les articles de la CDI sur la responsabilité des organisations internationales”, *Revue belge de droit international*, 2013, p. 107.

not lawfully achieve directly.”¹⁶ In the Office’s view, there is simply nothing in the context of the upcoming Conference proceedings that would match or come anywhere close to the situation draft article 17 purports to cover.

46. In fact, the Conference acting upon the Governing Body’s recommendation, as expressly provided for in article 33 of the ILO Constitution, may possibly exercise its discretionary authority to adopt measures intended to induce the Government of Belarus to honour its duties and obligations vis-à-vis the Organization. Concretely, among the recommended measures deemed ‘wise and expedient’ by the Governing Body, the Conference may decide to invite the Organization’s tripartite constituents to review the relations that they may have with the Government of Belarus and take *appropriate* measures to ensure that the Government cannot take advantage of such relations to perpetuate or extend the violations of workers’ rights in respect of freedom of association.
47. It is, therefore, difficult to see how the constitutional process that is being scrupulously followed in respect of the relevant decisions of the Governing Body and the International Labour Conference could be construed as seeking to “circumvent” an international obligation incumbent upon the Organization, and even less so how it might be seen as an internationally wrongful act per se. Inviting ILO member States to review their relations with the Government of Belarus and take *appropriate* measures so that the Government may not take advantage of such relations to perpetuate violations of workers’ rights in respect of freedom of association entails no circumvention of any international obligation nor does it qualify as an authorization for member States to commit internationally wrongful acts.¹⁷
48. In this connection, reference should rather be made to the draft articles on countermeasures, in particular article 22, paragraph 3, which provides that “countermeasures may not be taken by an international organization against a member State in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules”. The International Law Commission’s Commentary to draft article 22 further clarifies as follows: “Sanctions, which an organization may be entitled to adopt against its members according to its rules, are *per se* lawful measures and cannot be assimilated to countermeasures” (p. 72).
49. It is recalled that at its 88th Session (2000) the Conference adopted measures in almost identical terms in the case of Myanmar, the legality of which was never questioned. In fact, the resolution was brought to the attention of the ECOSOC in July 2001 under the agenda item concerning social and human rights questions. The ECOSOC adopted by consensus a resolution in which it took note of the resolution adopted by the Conference and requested the Secretary-General to keep it informed of developments in this matter. The Governing Body was informed about the adoption of the ECOSOC resolution at its 283rd Session (March 2002) (see document GB.283/7).¹⁸

¹⁶ See Draft articles on the responsibility of international organizations, with commentaries, *Yearbook of the International Law Commission*, 2011, vol. II, Part Two (Commentary), p. 68.

¹⁷ It is interesting to note that according to the International Law Commission’s Commentary, “the term “appropriate means” refers to those lawful means that are readily available and proportionate, and offer a reasonable prospect for inducing compliance at the time when the international organization intends to take countermeasures” (pp. 72, 93). It is also important to note that as the Commentary specifies, an “organization would clearly not be responsible for any other breach that the member State to which the authorization is addressed might commit” (p. 69).

¹⁸ See Francis Maupain, “Is the ILO Effective in Upholding Workers’ Rights?: Reflections on the Myanmar Experience” in Philip Alston (ed.), *Labour Rights as Human Rights, Collected Courses of the Academy of European Law*, 2005.

III.3 Inconsistent Conference resolution

50. In her communication, the UN Special Rapporteur maintains that “the recommendation to all stakeholders to take measures [...] would contradict the main objectives of the Global Jobs Pact of 2009 as well as guarantees of part III of the ILO Centenary Declaration for the future of work [...]”. This disregards the fact that should the Conference decide to take any action under article 33 of the Constitution, it would do so within the strict parameters of the ILO’s constitutional framework and on the premise that such action has become necessary and appropriate in light of the persistent failure of the Government of Belarus to fully comply with obligations arising from its membership.
51. From this perspective, any reference to the Global Jobs Pact or the Centenary Declaration is barely relevant. The Conference is, in accordance with the authority vested upon it by the Constitution, called upon to consider whether to exercise its clear constitutional prerogatives in the overall context of ensuring compliance of Member States with ratified Conventions.

III.4 Non-applicability of international humanitarian law

52. With respect to the UN Special Rapporteur’s observation that “international humanitarian law referred to in the draft recommendation [of the Governing Body] is not applicable to the situation in Belarus”, the Office wishes to clarify that the final text of the resolution adopted by the Governing Body does not refer to “humanitarian law” but to “international law”. Indeed, in response to a question raised by the spokesperson of the Workers’ group as to the appropriateness of referring to international humanitarian law in relation to the principle of non-refoulement, the Office explained that this principle is recognized in different branches of international law, that it actually constitutes the cornerstone of the International Refugee Protection Convention of 1951, and hence it would be more accurate to delete the specific reference to humanitarian law (the Minutes of the 347th Session of the Governing Body are not yet publicly available).

IV. Follow-up to a possible Conference decision

53. In her communication, the UN Special Rapporteur wishes to receive “information on the procedures to monitor and assess the scope, proportionality and length of the measures undertaken by ILO’s constituents under article 33, including legality assessment.” The UN Special Rapporteur further requests “information on the measures and procedures aimed to prevent over-compliance of the non-state actors which can affect economic, labour and social rights of workers in Belarus.”
54. It should be recalled, in this respect, that the draft resolution now before the International Labour Conference for consideration contains a series of concrete measures aimed at ensuring that the situation is properly followed up. In the first instance, the Conference may decide to hold in future sessions a special sitting of the Committee on Application of Standards in order to discuss the application of Conventions Nos 87 and 98 by Belarus and the implementation of the recommendations of the Commission of Inquiry. Such special sitting will provide a regular opportunity to review in a tripartite setting the evolution of the situation, including the scope and effectiveness of any measures taken by ILO constituents.¹⁹

¹⁹ A similar measure was implemented in the case of Myanmar with twelve special sittings (normally half-day meetings) of the Committee on Application of Standards having been held from 2001 to 2012.

- 55.** The Conference may also decide to request the Organization’s constituents to report through the ILO Director-General to the Governing Body on measures taken to contribute as far as possible to the implementation of the recommendations of the Commission of Inquiry and may also decide to instruct the Director-General to report periodically to the Governing Body on the outcome of his action intended to inform public international organizations and engage with relevant mandate-holders of the UN Office of the High Commissioner of Human Rights.
- 56.** Such multi-faceted engagement with stakeholders at the national and international levels can safeguard that the Governing Body and the Conference may debate, evaluate and make informed decisions based on full and reliable information. Apart from the follow-up measures contained in the proposed Conference resolution, reference should also be made to the continued monitoring of the application of Conventions Nos 87 and 98 by the Committee of Experts on the Application of Conventions and Recommendations (known as ‘regular supervision’), which offers additional opportunity to review measures taken and progress made.
- 57.** As indicated above, any measures adopted by the ILO under article 33 of its Constitution would be discontinued, in accordance with article 34, as soon as the Government has fully implemented the recommendations of the Commission of Inquiry.²⁰

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²⁰ In the case of Myanmar, the measures under article 33 were discontinued through two resolutions adopted by the Conference respectively in 2012 and 2013.