# THE ROLE OF THE INTERNATIONAL LABOUR OFFICE IN THE FRAMING OF NATIONAL LABOR LAW

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This paper intends to offer an overview on the technical assistance the International Labour Office (ILO) places at the disposal of ILO members to help them evaluate and, if need be, reformulate their labor law. Assistance to member States in the framing of their labor law is a constitutional obligation of the Office, for under Article 10(2) (b) of the ILO Constitution:

> Subject to such directions as the Governing Body may give, the [International Labour Office] shall . . . (b) accord to governments at their request all appropriate assistance within its power in connection with the framing of laws and regulations on the basis of the decisions of the Conference and the improvement of administrative practices and systems of inspection . . .

For a large part, the advice provided by the Office is based on ILO standards—conventions or recommendations—that, so to speak, are positioned *upstream* of national legislation. In this paper I will present what to some extent is located *downstream* of the ILO standards. In many cases the Office also draws in other legal sources, such as European Community Law, and more generally Comparative Labor Law and the practice of the ILO members. Here I will intend to successively review the history of ILO assistance in labor law, the various forms it can take, the way in which it is organized, and the use of ILO standards in the advice delivered by the Office. A number of examples of advice provided by the Office as regards labor law in several countries and the follow-up that was then given will close this paper.

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## I. SOME HISTORY

The history of ILO assistance to member States in the field of labor law goes back to before World War II, for the first request the Office had to honor came from Venezuela in 1936. Just released from the long dictatorship of General Gómez, who died in December 1935, Venezuela, like many other Latin American countries, undertook a process of overall political, social, and institutional modernization, which included review of its labor law. At the request of this country, which had joined the ILO in 1919, the Office fielded a mission,[1] during which ILO experts worked together with national experts in the drafting of a text. It eventually became the Labour Law of 1936. Some time later, another mission of the Office went to Bolivia, where the General Labour Law of 1938, revised in 1942, was particularly influenced by the Venezuelan 1936 Act.

However, the ILO technical cooperation program with regard to the framing of labor law in member States actually took off after the end of World War II. To a large extent, ILO involvement in the elaboration of the labor law in member States was closely linked to the decolonization process, which started in Asia soon after the end of WWII and in Africa since the late 1950s, but more especially in the 1960s.[2] Most of the newly independent countries joined the UN and the ILO. Then, confronted with challenges arising out of their new identity, they undertook an overall reassessment of their institutional and legislative frameworks. This rarely resulted in a rupture with the legal framework inherited from the former colonial powers; yet it led to a comprehensive review of these countries' laws and institutions, which in many cases called for far-reaching redrafting of the existing legislation. The countries newly arrived to the ILO accepted all of the international obligations that their old metropolitan powers had declared applicable on their territory before independence. It was

1. Indeed this was the first technical cooperation ever undertaken by the Office. Two ILO jurists, namely Messrs. David Blelloch and Wilfred Jenks, carried out the mission to Venezuela. Their Venezuelan national counterpart was a young lawyer, Rafael Caldera, then aged just twenty years old. More than thirty years later, in 1970, the ILO held its VII American Regional Conference in Caracas, Venezuela. Wilfred Jenks, then Director-General of the ILO, headed the Delegation of the Office, while the host of the Conference was Dr. Caldera, then President of Venezuela.

2. In April 2004 the ILO had 53 African members, of which only 4 (South Africa, Egypt, Ethiopia, and Liberia) formed part of ILO before WWII. In the decade of the 1950s, only 6 new African States joined the ILO, but in the 1960s, the number of new African members was 25. Thereafter 12, 4, and 2 African States joined the ILO respectively in the 1970s, the 1980s, and the 1990s. The last African state to come in was paradoxically South Africa, which had been one of its founding members in 1919, but left ILO in 1966 following the calling into question by ILO of its policy of apartheid. It was only in 1994 that South Africa rejoined the ILO.

therefore followed that the ILO standards that were already in force for these countries became embedded in the new labor laws and labor codes, as was the case of Guinea (1960), Mali (1962), Botswana (then Betchuanaland, 1963), Mauritania (1963), Ivory Coast (1964), Benin (then Dahomey, 1967), and Cameroon (1974). Many of the post-independence codes were revised in the following decades, and many of the revisions called for ILO technical support. In some cases, like Namibia in the early 1990s, the Office closely collaborated in the making of a Labour Act almost from scratch, for Namibia decided to repudiate apartheid-minded legislation that had applied in the country under South African rule.[3] Likewise the Office provided South Africa with advice, which was instrumental in dismantling the apartheid legislation, and lead to the adoption of the Industrial Relations Act of 1995.[4] More recently, the Office was involved in processes of overall reform of labor law in countries such as Burkina Faso, Madagascar, Guinea Bissau, Ghana, Kenya, Mozambique, Nigeria, or Tanzania. In addition it has provided technical advice on a project for a uniform Labour Code of the Organization for the Harmonization of Business Law in Africa (OHADA), made up of seventeen countries, mostly French-speaking ones.

The technical assistance of the Office in the reform of member States' labor laws did not remain limited to Africa, nor even less to challenges arising out of independence. The Office has been involved in processes of amendment of labor laws of ILO members on all continents. Thus, at the beginning of the last decade, it provided technical assistance in the revision of the labor law in several Latin American countries like Costa Rica, El Salvador, and the Dominican Republic, then blamed for the lack of guarantees offered by their legislation to workers who sought to establish or to join trade unions, and more generally to exercise their collective rights. In Asia and the Pacific, the Office collaborated in the drafting of labor acts and labor codes in countries like the Lao People's Democratic Republic, Vietnam, and more especially Cambodia, where it provided a decisive input to the Labour Code of 1997, as will be discussed later, this mirrors recent developments in other countries such as Indonesia.

3. Namibia became independent from South Africa in 1990. It repudiated apartheid-based law and asked the Office to send an expert on labor law, who helped in the drafting of the Labour Act, 1992, *available at* http://www.ilo.org/dyn/natlex/docs/WEBTEXT/29328/64850/E92NAM01.htm. 2004 saw this text overhauled, again with ILO technical assistance.

4. The ILO Report on the reform of Industrial Relations in South Africa was published in the ILO *Official Bulletin*, No. 75, 1992, Series B, Special Supplement. The Labour Relations Act is online at the government of South Africa's Web site at http://www.labour.gov.za/legislation/legislation_display.jsp?id=5540.

Very special mention should be made of the assistance provided to Timor-Leste, where ILO experts went on several occasions at the request of the interim UN Authority (UNTAET), and provided technical guidance in the drafting of a labor code. In the Caribbean region the Office provided assistance in legislation to countries such as Grenada and Guyana, and in the Arab-speaking region it advised on the labor laws of countries such as Bahrain, Kuwait, the United Arab Emirates, and Yemen. More recently it drafted a labor code for post-*Baas* Iraq.

Last but certainly not least, the Office assistance was extensively required and used in Central and Eastern Europe, in the aftermath of the demise of communist regimes. Most of the former communist countries undertook to review their labor legislation using a step-by-step methodology. First, they did away with communist-minded regulation of collective labor relations whereby no free trade unions were allowed to exist, no free collective bargaining was permitted to take place, and no strike was envisageable, though not legally ruled out. Starting as early as 1989, many of these countries repealed their laws on collective labor relations. Then they adopted new legislation, which drew inspiration largely from ILO standards and principles on freedom of association and collective bargaining. Some time later they undertook to review their laws regulating individual employment relations, which called for far-reaching reforms so as to keep pace with the introduction of the market economy. In a third stage several of these countries applied for membership to the European Union. Because EU membership requires that the *acquis communautaire* (i.e., the laws and case law of the European Community) be integrated into national law, EU candidate countries needed to further revise their labor laws and regulations.[5] Since 1991, the Office provided comprehensive opinions and sometimes legislative proposals to EU candidates such as Bulgaria, Czech Republic, Romania, and Slovakia, as well as to other Central and South European countries and territorial entities like Albania, the two entities composing Bosnia-Herzegovina, Serbia, and UN-administered Kosovo. The Office assistance currently continues in some of these countries, and it extends even to the Russian Federation, Ukraine, and some of the former Soviet republics of the Caucasus and Central Asia like Georgia and Kazakhstan.

5. *See* Arturo Bronstein, *Labour Law Reform in EU Candidate Countries: Achievements and Challenges* (In- Focus Programme on Social Dialogue, Labour Law and Labour Administration Working Paper, Feb. 2003), *available at* http://mirror/public/english/dialogue/ifpdial/downloads/papers/candidate.pdf.

On average, the Office receives some thirty requests per year, bearing on questions relating to labor law. Some of these relate to very specific topics, or are limited sometimes to a search of information. However, in many other cases they call for the Office undertaking comprehensive assessment of existing law, or if the case may be, in-depth study of draft legislation that a member is considering to adopt.

### *A. Some Key Features of the Office Assistance as Regards the Labor Law*

When a State undertakes to revise its labor law it is of course up to that State to decide whether it will request technical aid from the Office, from other international organizations, or any other expertise. Many States do not look for external opinions when they revise their labor law; many others seek some form of private expertise, and still some others rely on *bilateral assistance* from countries with which they have close links. For example French-speaking African countries frequently seek and receive labor law expertise from France, English-speaking countries look for that of the United Kingdom, and Latin American countries sometimes may seek advice from Spain. More recently German experts have advised on labor law in some former communist countries of Central Europe and Central Asia, which in certain cases have led to the labor law in these countries adopting some typically German labor law features.[6]

Besides the international financial institutions, namely the World Bank (WB), IMF and some regional development banks have also been active in the provision of labor law advice, more especially when cash relief from IMF or *structural adjustment* loans from the WB or regional banks were granted to some countries. Release of funds from international moneylenders has sometimes been made conditional upon the undertaking of labor market reforms, which called for the revision of the existing labor legislation in beneficiary countries.[7]

6. For example the German approach to plant-level workers' representation by non-union bodies (*betriebsradt*), or the German Protection Against Unjustified Dismissals Law were taken as a model in the formulation of the law in many of the former communist countries of Central and Eastern Europe.

7. International financial institutions generally demand that the State review the status of employees of state-run enterprises that should be privatized. Other policy changes they demand include the flexibilization of hiring and firing rules, minimum wage policy and hours of work. They also strongly advocate for exclusively enterprise-level collective bargaining and they demand that the government refrains from extending collective agreements to third parties.

It follows that the offer of the Office is, so to say, *in competition* with that of other countries, institutions, or people, vis-à-vis which it must show, not only that it has a technical expertise at the very least comparable with other suppliers of labor law assistance, but also that it can offer an added value the latter do not have. One may therefore ask which are these comparative advantages of the Office, and which is the added value it could offer, whose competitors do not have when providing labor law technical advice. The next sections discuss this question.

## II. A COMPETENCE RECOGNIZED BY THE UN

Let us first recall that ILO competence in the field of labor law draws legitimacy not only from the above-quoted provisions of the ILO Constitution but also from its status of specialized UN agency on social matters that the latter recognized to ILO under the terms of a 1945 agreement within the framework of Article 57 of the UN Charter.[8] Pursuant to this mandate, the Office has built a knowledge-based competence. The Office gathers and analyzes worldwide information on law developments and major labor law tendencies in ILO members. It recurrently monitors what is going on in the field of social and labor issues. The ILO Library doubtless has the world's greatest collection of labor law publications and periodicals, and ILO databases like NATLEX, LABORDOC, and ILOLEX[9] are indispensable research tools for the primary use of ILO officials (though they have also been made of public use through the Internet). This makes it possible for the Office to develop analytical capacity, which is both retrospective and prospective. It further helps basing the Office legislative opinion on a wealth of complete and diversified knowledge, which very seldom if ever can be found elsewhere.

8. U.N. Charter, art. 57 provides, "The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies."

9. ILOLEX (http://www.ilo.org/ilolex/index.htm) is the database on international labor standards. It contains over 75,000 full-text ILO documents. LABORDOC (http://labordoc.ilo.org) is the ILO library's catalogue and a major source of *information* on the world of work. Describes over 350,000 books, journal articles, reports, and other publications (including ILO's). NATLEX (http://www.ilo.org/dyn/natlex) is the ILO database of national labor, social security, and related human rights legislation. It contains over 55,000 records covering over 170 countries and territories. Records in NATLEX provide abstracts of legislation and relevant citation information, and they are indexed by keywords and by subject classifications. Where possible, the full text of the law or a relevant electronic source is linked to the record.

Also, the Office staff is made up of labor law specialists coming from almost all areas of the world, thus having a background drawn from different legal cultures. Such diversity makes it possible for the Office to provide advice, which can be placed in the context of the recipient country easier than when experts draw their expertise out of a single country experience. A combination of plurality and diversity of national expertise and experience builds the Office's capacity to formulate legal wording, which is often expressed through the proposal of alternate legal texts that the Office can bring to the consideration by governments that have requested advice. Office-proposed wording is drafted in a language that takes account of the legal system and even drafting styles of the country in question. This is a task for which the Office is particularly well-equipped, due to the multi-cultural nature of the group of specialists,[10] who not only understand the logic of their various home legal systems, but also the language in which their laws are expressed as well.

It should be added that it is rare that an ILO specialist works all alone when the Office is requested by a member to provide advice on a draft labor law. Quite the contrary: teamwork is a well-established practice in the Office. Indeed, though a legislative opinion required by a member is finalized and drafted by a labor law specialist, it normally has been based on contributions provided by different technical units in the various fields for which the Office has competence. Therefore, provisions relating, for example, to safety and health, hours of work, remuneration, employment services, or labor inspection will in practice be examined separately by the technical units specialized in each of these fields. These units will provide substantial technical inputs for a legal specialist of the Office finalizing a consolidated opinion, which the Office will submit to the member. In addition, the Office units that liaise with the employers' and the workers' organizations are also consulted so as to better identify aspects of the legislative drafts that raise the greatest problems from the viewpoints of the workers or the employers in the country concerned. This would help the Office advice being focused on these questions.

In short, the Office has considerable assets, on the basis of which an expertise has been developed and placed at the disposal of ILO members. As good as it can be, expertise that competitors of the

10. For example, the labor law unit in the ILO is currently staffed with jurists coming from Latin America, Eastern and Western Europe, and the Asia-Pacific region. Languages handled by this unit include English, French, Spanish, Russian, and occasionally Arabic.

Office can offer is in general built on a basis limited to only one country or in the best case to a small group of countries. When the Office examines draft labor legislation submitted by an ILO member State, it can draw to the latter's attention to what point the draft is coherent and consistent with comparative law and practice, in general or in certain areas of the world in particular, or if it goes against current comparative tendencies on the issues then at stake. This is something that ILO competitors can sometimes do and sometimes not.

## III. A NORMATIVE BASE LEGITIMATED BY THE SOCIAL ACTORS

The normative base of the opinions provided by the Office is, however, its greatest asset, because no other institution can call upon the ILO standards with as much authority as the Office itself. ILO standards, i.e., Conventions and Recommendations adopted by the ILO Conference, not only reflect a certain universal wisdom, they also enjoy a social legitimacy that would seem hard to challenge. In effect, far from being a product of Geneva-based bureaucrats' theoretical thought, ILO standards are always the fruit of a debate and very often the outcome of tight negotiations that take place between the delegates of governments and the two sides of industry from countries who attend the Conference. Any draft ILO standard is thoroughly discussed, negotiated, amended, and sub-amended, and once again discussed and renegotiated until a compromise text can be hammered out, and submitted to a vote that still requires the approval of two-thirds of the delegates attending the Conference for it to take the form of a Convention or a Recommendation.[11] One should add that, in practice, the bulk of the discussion around the adoption of an ILO standard by the Conference is taken up by the workers' and the employers' delegates, whereas the governments' delegates tend to play a role that is closer to that of a mediator than a stakeholder.

In brief, ILO standards are elaborated and approved by prospective users rather than by bureaucrats and diplomats. Apart from conferring strong social legitimacy to the standards adopted by the Conference this may lead one to presume that ILO Conventions

11. The ILO Conference has so far adopted 185 Conventions and 195 Recommendations, and the total number of ratifications of ILO Conventions was 7335 until August 31, 2005. It should, however, been recalled that the actual number of really operational ILO Conventions is somewhat lower than 185 for several Conventions never entered into force and many other Conventions have been revised by further conventions with the effect that they are no longer opened for new ratifications (they remain, however, in force for those countries that had ratified them and have not ratified the revised Conventions).

and Recommendations are meant to be down-to-earth instruments, which propose realistic solutions to concrete problems, and which in most cases ILO members would be able to translate to their own national law.

## IV. THE USE OF SOCIAL DIALOGUE

The use of social dialogue is an outstanding feature of the assistance provided by the Office to ILO members when the latter undertake to review or revise their labor law. Though not a written rule, it is standard practice that an opinion provided by the Office to a government, with a bearing on labor legislation, must be shared by the latter with both sides of industry.[12] Also, any on-the-spot mission by an ILO expert in labor law must obligatorily include consultations with the relevant employers' and workers' organizations, whose positions and viewpoints would not fail to be held in consideration at the time when the Office formulates an opinion or submits legislative proposals to a government.

Moreover, though seldom used by the interested parties, the Office labor legislation expertise is also at the disposal of the employers' and workers' organizations, who can always ask for an advisory opinion on bills, even on laws in force in their respective countries.[13]

## V. POLITICAL NEUTRALITY

A further remark would relate to the political neutrality of opinions given by the Office. It may happen that the start-up of reforms of the labor law causes emotional reactions, which may also bring in political strife likely to take dramatic turnings, very often disproportionate with the real stake of the reform in question.[14]

12. Some exceptions are, however, allowed with this rule. For example, a government can want to receive a very preliminary opinion when it considers various options of legislative policy. The Office opinion can therefore relate to a first draft or to a "White Paper" in which the government considers several possible approaches before a preliminary draft starts to take form. At this stage the Office opinion may remain confidential, because there is still no matter to discuss between a government, which has not yet decided a position and the two sides of the industry.

13. For example, in 2002 the employers' organizations of Slovakia requested an opinion from the Office on the Labour Code of that country. The ILO opinion was eventually shared by the employers with workers' organizations and the government. Some comments made by the Office were thereafter taken into account in the revision of the Labour Code, which took place in 2003.

14. One should remember the deadly riots in Panama, in 1995, after some unions called to demonstrate against the reform of the Labour Code, or more recently the killing in 2002, by the

Governments may in such cases expect that the Office play some advocacy role in addition to that of providing technical expertise in the elaboration of the reform then at stake. They presume that ILO support would de-dramatize the national debate, thus paving the way for the reform being more easily accepted by local stakeholders.

However, while the Office is held to provide technical aid to the governments it must also take care not to play a political role in negotiations that the latter would be carrying out with the social partners or the Parliaments in order to ensure their legislative proposals are adopted. It is doubtless the duty of the Office to analyze legislative proposals, to examine their conformity with ILO Conventions ratified by the country in question, and to deliver an opinion on the technical merits of legal texts that have been submitted to it. Yet it has also a political duty of neutrality that it is bound to honor. Political neutrality is of crucial importance for the Office to ensure its credibility vis-à-vis the ILO tripartite constituency. Being itself the secretariat of a tripartite organization, the Office must avoid taking sides with one of the constituents of the Organization when they seek to adopt legislation that another ILO constituent can, rightly or wrongly, regard as opposed to its interests.

It happens, however, that governments may seek to benefit from the presence of experts of the Office, or to present the opinions provided by it as if they were pledges of political support to the legislative projects under discussion. This can be at the origin of misunderstandings, which the Office must always clarify, even if it is sometimes at the price of tension with the government that has sought and is receiving ILO assistance.

Nonetheless, there are some specific situations where the Office can leave its reserve aside so as to play a more active part in the defense of a bill. For example, the Office would actively support the adoption of law when it aims to implement a ratified ILO Convention. Also, it would advocate the development of legislation that would permit the ratification and implementation of ILO Fundamental Conventions by a member State.[15] There is such a universal consensus

Red Brigades, of Professor Marco Biagi, who was then advising the government of Italy on the reform of the labor law.

15. Eight ILO Conventions have been identified by the ILO's Governing Body as being fundamental to the rights of human beings at work, irrespective of levels of development of individual member States. These rights are a precondition for all the others in that they provide for the necessary implements to strive freely for the improvement of individual and collective conditions of work. These Conventions relate to four fields, namely freedom of association, forced labor, discrimination, and minimum wage. These are the following (each *available at* http://www.ilo.org/ilolex/english/convdisp1.htm):

as to the importance of these Conventions that the Office feels it has the right and the obligation to play some political role when a State seeks to ratify a Fundamental Convention, and for this goal it must revise its national legislation. The legitimacy of such an intervention draws its source from the ILO Declaration on Fundamental Principles and Rights at Work, adopted by the ILO Conference in 1998, which made a call on the ILO to assist member States *in order to attain these objectives* (i.e., to promote and to realize, in good faith and in accordance with the ILO Constitution, the principles concerning the fundamental rights at work) by making full use of its constitutional, operational, and budgetary resources, including, by the mobilization of external resources and support as well as by encouraging other international organizations with which the ILO has established relations, pursuant to Article 12 of its Constitution, to support these efforts.[16]

Last, it goes without saying that the Office can only offer very strong support for the use of social dialogue in the development of any process to review or to revise the labor law in any ILO member.

### *A. Why do the Members Request ILO Assistance?*

The Office involvement in a process of labor law reform in a member State always remains subordinated to a request coming from the latter. It is clear that a country's labor law can be revised or reformulated only when (a) the government has decided to undertake the reform, and (b) the overall political environment is not

- ILO Convention (No. 87) Freedom of Association and Protection of the Right to Organize, July 9, 1948 (144 ratifications)
- ILO Convention (No. 98) Right to Organize and Collective Bargaining Convention, July 1, 1949 (154 ratifications)
- ILO Convention (No. 29) Forced Labour Convention, June 28, 1930 (168 ratifications)
- ILO Convention (No. 105) Abolition of Forced Labour Convention, June 25, 1957 (165 ratifications)
- ILO Convention (No. 111) Discrimination (Employment and Occupation) Convention, June 25, 1958 (163 ratifications)
- ILO Convention (No. 100) Equal Remuneration Convention, June 29, 1951 (162 ratifications)
- ILO Convention (No. 138) Minimum Age Convention, June 26, 1973 (141 ratifications)
- ILO Convention (No. 182) Worst Forms of Child Labour Convention, June 17, 1999 (156 ratifications).

Information on ratifications is updated to August 31, 2005. It is regularly updated in the ILOLEX database.

16. More details on the Declaration and its follow-up including ILO promotional and technical activities is on the DECLARATION Web site *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE.

unfavorable for the reform process to go on. Besides, it is obvious that, while ILO technical expertise is at any time placed at the disposal of the members, its effective participation in a process of labor law reform cannot take place unless the Office is invited thereto. It is thus timely to review the various situations in which an ILO member may have interest in requesting the Office to provide technical expertise with a view to revising the labor law.

## VI. ADVICE ON CONFORMITY WITH ILO STANDARDS

In many cases the Office is asked to give an opinion on the conformity of a legislative draft with a Convention that a member has ratified or is considering to ratify. A government that is drafting legislation in a field that is addressed by a ratified Convention has obvious interest that the Office provides a preliminary opinion on that draft law's compatibility with the Convention in question. To be sure, an opinion by the Office would not replace the normal procedures of supervision of the application of ILO standards. In particular, under no circumstances would it prejudge the position that the Committee of Experts on the Application of ILO Conventions and Recommendations (CEACR) could take, which is the independent body[17] that examines the reports submitted by the Governments pursuant to Article 22 of the ILO Constitution, on the measures taken to implement the Conventions the countries have ratified. However, since the opinions of the Office are generally built on the basis of CEACR doctrine, there are very good reasons to think that they would provide safe advice. Normally the governments can rely thereupon.

## VII. PROPOSAL OF LEGAL TEXTS

The formulation of an opinion on conformity is, however, seldom sufficient enough to ensure that a member fully applies a ratified Convention. Indeed, Conventions sometimes contain sufficiently detailed rules so as they can be transposed to the letter in the national

17. The Committee (CEACR) consists of twenty independent persons of the highest standing, with eminent qualifications in the legal or social fields and with an intimate knowledge of labor conditions or administration. CEACR members are all from different nationalities and they are drawn from all parts of the world. Most of them are experts on labor law or on international law while some others are magistrates. They are appointed in a personal capacity by the Governing Body of the ILO on the proposals of the Director-General, for a period of three years. Their term of office is renewable for successive periods of three years. They meet each year in November/December in Geneva.

legislation. However, and as is often the case, they can be obligatory as far as their objectives, but leave the care of taking steps for their implementation in the members' hands.[18] Such an approach is often reflected in the convention's wording, which specifies that the convention can be given effect by such or such measures *in accordance with national law and practice*. In this case it is up to each member to elaborate legislation or to take all other suitable measures with the intention of applying the Convention, of which it must report to the Office in keeping with Article 22 of the ILO Constitution.[19] Failing this, the CEACR may address an observation to the attention of the relevant State, or the Conference Committee on the Application of ILO standards can publicly discuss the issue, which in certain cases would imply a form of moral blame,[20] or still a complaint or a representation against that State may be submitted in accordance with Articles 24 or 26 of the Constitution.[21]

It is in this context that an opinion where the Office does no more than examine the conformity of a law or a bill with an ILO Convention can be only of short range, for it would merely state that

18. Thus, for example, the Hours of Work (Industry) Convention, the Protection of Wages Convention, and the Holidays with Pay Convention, can be followed almost to the letter by national legislation, whereas implementation of other Conventions like the Discrimination (Employment and Occupation) Convention or the Equal Remuneration Convention would call for the adoption of texts aiming at ensuring that the objectives of these Conventions are met. *Compare* ILO Convention (No. 1) Hours of Work (Industry), Nov. 28, 1919, ILO Convention (No. 95) Protection of Wages, July 1, 1949, ILO Convention (No. 132) Holidays with Pay, June 24, 1970 *with* Discrimination (Employment and Occupation) Convention, *supra* note 15, and Equal Remuneration Convention, *supra* note 15.

19. ILO CONST. art. 22 provides, "Each of the members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request."

20. Following the independent and technical examination carried out by the CEACR, the proceedings of the Conference Committee on the Application of Standards present an opportunity for representatives of governments, employers, and workers to review the manner in which members take measures to implement the Conventions they have ratified. The Conference Committee is tripartite, its officers (i.e., the Chair and two Vice-chairs coming respectively from Government, Employers', and Workers' benches) prepare a shortlist of observations contained in the CEACR report, in respect of which they consider it desirable to invite governments to supply information to the Committee. This often leads to a lively and sometimes dramatic discussion. The Committee's report may draw attention to cases discussed previously by the Committee where there has been continued failure over several years to eliminate serious deficiencies in the application of ratified Conventions. It can include a "special paragraph" to draw attention to particularly grave cases, something which is held to imply a blame.

21. Under Article 24 of the ILO Constitution, any national or international workers' or employers' organization can make a representation claiming that a given member State has failed to apply an ILO Convention it has ratified. Under Article 26 of the ILO Constitution a complaint can be filed against an ILO member that is not satisfactorily securing the effective application of an ILO Convention that it has ratified. The complaint can be submitted by another ILO member that has ratified the same Convention, or by any delegate to the International Labour Conference.

national law is not in breach of an international obligation. Yet such an advice would fall short of telling how a member could actually implement a ratified Convention. To really be useful in such cases, the Office should propose texts adapted to national realities, which would provide the measures enabling a member to implement a convention it has ratified or plans to ratify. This is what the Office usually does when it proposes draft legislation.

## VIII. BRINGING THE NATIONAL LAW IN CONFORMITY WITH RATIFIED ILO CONVENTIONS

Occasionally, it comes to the attention of an ILO member that his or her national legislation (or provisions thereof) do not conform with a Convention the ILO has ratified. Such is generally made under the form of an observation by the CEACR, though it may also be made by the Freedom of Association Committee should a complaint relating to lack of conformity of a national law with ILO standards and principles on freedom of association or collective bargaining be submitted to it. Though much more rarely, it can also be made by the ILO Governing Body if a complaint or a representation in accordance with Articles 24 or 26 of the ILO Constitution have been submitted to it. Observations so made to a member generally include a recommendation that the member requests the technical assistance of the Office with the intention of reviewing and revising its labor law so as to make it compatible with the Conventions it has ratified.

Moreover, the Office assistance can be required and received even when a State does not envisage ratifying an ILO Convention, or when it requests a technical opinion on matters that are not addressed by any ILO instrument. This in particular is the case of requests for the Office making an overall evaluation of a labor code or a draft labor code, which regulates a number of issues with respect to which no ILO standards exist. For example, the Office has very often delivered opinions, and sometimes proposed rules relating to topics like the form of the contract of employment, the employment relationship, transfer of enterprises, the law applicable to the contract of employment, non-competition covenants, probation, protection of personal data and the like. Whereas the Conference has not adopted standards relating to these questions, the Office closely monitors the legislative evolutions in the member States. In light of this monitoring, it can draw useful conclusions that may provide a basis for legislative advice to the members.

### *A. The Use of ILO Standards in the Technical Opinions of the Office With Regard to the Labor Law*

The elaboration of international labor standards was the principal means of action the ILO Constitution assigned to the ILO since its creation in 1919. To be sure, the ILO field of competence has been very considerably expanded since then and the Office is currently active in many fields distinct from strictly standard-setting and monitoring activities. Furthermore, there is now a reflection within the ILO for the contents and range of its standard-setting role.[22] Yet, it is not less true that standard-setting and the assistance to members in the implementation of ILO standards still remain at the heart of the mandate of ILO.

Thus the report entitled *Decent Work*, which current Director-General, Juan Somavia, submitted to the 87th Session of the ILO Conference at the beginning of his mandate in 1999, recalled that ILO Conventions and Recommendations constitute an average essence of protection for workers in the entire world. It also underlined that ILO must adopt a more voluntarist attitude in the application, and help the governments to give effect to Conventions that they choose to ratify. Concretely, this could consist in helping governments to revise their labor law, and also to improve their labor inspection services. More recently, the question was again addressed in *Reducing the Decent Work Deficit—A Global Challenge*, which the Director-General submitted to the 89th Session of the Conference in 2001.

As has already been stressed, ILO normative action is devoid of practical effect unless the adoption by the Conference of an international labor standard, be it a Convention or a Recommendation, is followed at the national level by the adoption of laws or regulations, or by other measures that a State may take to ensure that that standard is implemented. It is in this context that the technical aid by the Office can be instrumental for such a goal to be achieved, as the Office can and indeed is expected to provide labor law policy advice for member States to regulate thereabout. As was once put out by the Director-General: its goal is to help member

22. *See* ILO, *The ILO, Standard Setting and Globalization*, *Report of the Director-General, International Labour Conference, 85th Session* (1997), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc85/dg-rep.htm; ILO, *Decent Work, Report by the ILO Director-General to the 87th Session* (1999), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm; and ILO, *Reducing the Decent Work Deficit - a Global Challenge, Report of the Director-General to the 89th Session* (2001), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-i-a.htm.

States to operationalize the concept of Decent Work at the national level.

When an opinion of the Office relates to an ILO instrument, a distinction must be made according to whether or not the instrument in question is a Convention ratified by the ILO member which has required such an opinion. Advice relating to a ratified Convention ought to draw a member's attention to the international obligations arising from ratification. It must pay particular attention to provisions in the national law, which would be in deviance from that Convention. If the CEACR has already taken a view on that member's legislation, the Office advice will not fail to draw attention to any observations or direct requests that could have been made by CEACR. It will also propose texts, which would make it possible for the country to bring its national law into conformity with that Convention. When a Convention is to be implemented "in accordance with national law and practice" the Office advice would suggest appropriate wording, which may be used by national laws and regulations with a view to implementing the Convention. Though not obligatory, the opinion of the Office enjoys great credibility that a member may find it beneficial to recognize.

## IX. OTHER SOURCES

In addition to ratified Conventions, the Office can base its opinion on other ILO standards, such as unratified Conventions or Recommendations. Often regarded as second-class instruments, ILO Recommendations deserve to be better known and appreciated for their actual right value. Flexible by nature, they contain detailed orientations that supplement the principles set out in ILO Conventions. More concretely, they can propose criteria for the implementation of Conventions, which could be of great help for a country to elaborate legislation with a view to implementing a ratified Convention. Such criteria, let us recall, is the result of discussions within the Conference and of a vote that, just as for a Convention, must be acquired with a two-thirds majority, which confers on the Recommendation a strong social legitimacy. Recommendations contain either policy proposals or guidance for the adoption of legislation, and on some occasions both at the same time, whose endorsement is *recommended* by the Conference. In addition, they can relate to subjects that are not covered by Conventions. ILO Recommendations, without doubt, belong to the category of the *decisions* of the Conference mentioned in Article 10(2)(b) of the

Constitution, the basis of which the Office ought to build legislative opinions, upon request from ILO members.

Where appropriate, the Office advice may also use other ILO non-binding instruments, such as codes of good practice and guidelines. These instruments are elaborated by meetings of experts, which are convened by the Governing Body upon nominations made respectively by the governments and the workers' and employers' groups. They are subsequently submitted to and endorsed by the Governing Body, and brought to the ILO constituents' attention.[23]

However, the panoply of legal sources used by the Office is not limited to ILO instruments only. Thus when a European member requests an opinion from the Office, the advice that it receives would not fail to bring the so-called *acquis communautaire* to its attention. Also, the Office recurrently uses comparative law and practice; in particular of countries comparable with the one requiring advice. This is sometimes of great help for the interested member, giving additional thought to the practical bearing and sometimes also the economic effects of the labor law reforms it has put to the forefront.

Of course, among these various legal sources only ratified Conventions are obligatory standards for ILO members vis-à-vis the ILO. Even if a request comes from a European Union member or candidate country—and which for this reason is legally held to integrate the *acquis communautaire* in national law—the Office cannot treat European Community Law in the same way it treats ILO ratified Conventions, if only because follow-up and control of the implementation of EC Law does not fall within the competence of the ILO. However EU candidate countries as well as other European Members, which thus far are not eligible to EU Membership, may ask the Office to base its advice not only on ILO standards but also on EC Law, and as a matter of fact they always ask the Office to take EC Law into consideration as well. Under such circumstances the Office understands that its advice should go beyond what is strictly under ILO jurisdiction. It should therefore be ready to assess its members' draft legislation in light of other sources, including EC Law. If the Office provided an opinion strictly limited to ILO standards, members could reproach it, perhaps rightly, for not providing them a service of

23. More than twenty codes of good practice have so far been adopted by the ILO Governing Body, mostly relating to safety and health issues. Particularly noteworthy are the Codes on Protection of Workers' Personal Data, adopted in 1997 (*available at* http://www.ilo.org/public/english/protection/safework/cops/english/download/e000011.pdf) and the ILO Code of Practice on HIV/AIDS and the World of Work, adopted in 2001 (*available at* http://www.ilo.org/public/english/protection/safework/cops/english/download/e000008.pdf).

quality, as it would be very limited. This is why, except when members require that the Office delivers an opinion restricted to conformity of national texts with ratified Conventions, the Office will in principle refer to both ILO and non-ILO sources of law. Obviously, though the Office can use EC Law, it would not fail to remind that interpretation of EC Law falls within the competence of the European Court of Justice, not that of the ILO Committee of Experts.

### *A. Working Methods*

When the Office provides an opinion on a member's labor law, and more especially when it is accompanied by legislative proposals, it hopes of course that it bears fruit in the form of laws or regulations in line with the proposals it has made. However, the Office is conscious that any opinion it provides to a member must be compatible with the latter's legal system, as well as more in general with the member's overall social and political environment. Failing this, there are good reasons to believe that the Office advice will be put aside, unless it leads to a law badly applied or not applied at all. It follows that the Office should not seek to propose a *perfect* law, to suppose that *perfect laws* can exist, but rather to offer legislative proposals whose implementation could be realistically undertaken in the context of each country. To this end the Office would seek to find out workable compromises between national law and international or comparative law, and above all to propose texts that could be easily understood and applied by potential users.

Very often this leads to the Office proposals falling somewhat short of what is being done by the most advanced countries with regard to the subjects they address. Perhaps they may even fall short of what could be expected by the ILO supervisory bodies in respect to a Convention a member has ratified. Yet the goal of the Office is not to propose *state of the art law*; rather the Office would aim at proposing draft legislation that would be adapted to the country's social, economic, political, and cultural environment, even if it does not meet the expectations of everybody. To this end, the Office assistance may take different forms.

## X. COMMENTS BY THE OFFICE

The method that the Office favors is without doubt the delivering of an opinion under the form of comments on draft legislation prepared by national specialists. This method has the advantage of

permitting a dialogue between the national legal thought on the one hand, and international and comparative law, which is brought in by the Office comments, on the other hand. Local legal thought is elaborated in light of a country's historical, economic, social, and cultural environment; it reflects realities of the country where the law will apply. By contrast ILO comments draw inspiration from international and comparative experience. While they do not try to substitute Geneva-minded advice to local thought, they aim at enriching the latter's perceptions. These thoughts should be regarded as complementary, and in no way as antagonistic thoughts. Synergy between both is more than desirable, and the Office's comments should not seek to force the views of ILO nor even less to criticize the nationally prepared texts. Quite the contrary, they must seek to offer to a member's government, as well to both sides of industry, a prospect that one could qualify as "different," but not as "better," if one compares it with the way in which the latter has elaborated its own draft.

Together with these comments the Office may formulate proposals of legal texts, which it would draw to the member's attention. When these texts relate to the implementation of ratified Conventions, the Office, of course, hopes that the government will line up in its opinion and will follow its proposals. However, when the proposals relate to questions where there is no international obligation of the member, the Office texts would simply aim to encourage a national debate. This is why the Office would not fail to insist on the fact that its comments, and where applicable its proposals, are made exclusively on technical grounds. It rests on the member to assess the merits of the Office proposals, and to decide how best can they be used. Such a judgment is often the result of considerations of opportunity and sometimes of political stakes, the assessment of which falls well beyond the competence of ILO. It is important to note that very frequently the proposals made by the Office are followed partly, and much more rarely they are followed in their totality. . . . Sometimes they are not followed at all.

## XI. MISSIONS

The next step may be to send an ILO official to present the comments and proposals made by the Office, and to discuss these with the national interlocutors. Sometimes this will also imply discussions with the social and labor affairs commissions of legislative bodies. Such consultations often make it possible to better convey the

message of the Office. They can also sometimes be useful for the Office reviewing its original proposals in light of explanations or evidence available on the spot. Indeed, it is possible that the Office gives second thought to its proposals, judging that they are not as sensible as they appeared in Geneva. Once again, the Office seeks above all to make itself useful for the members. If necessary, it would not hesitate to withdraw proposals whose implementation would be likely to run up against too many difficulties, or still more serious, to lead to surrealistic laws, more adapted to give pleasure to international experts and bureaucrats than to render service to their true recipients.

Though very desirable in general, the fielding of a mission by an ILO official is, however, undertaken only when such has been expressly requested by a member. Usually it depends on political considerations, which as already pointed out, fall beyond the competence of the Office. As a matter of fact, missions follow only a part of the opinions delivered from Geneva.

## XII. DRAFTING OF TEXTS BY EXTERNAL CONSULTANTS

Another working method consists in the sending of external consultants whose role is to draft a text in close consultation with a national counterpart. This approach can be useful and indeed efficient when assistance is provided to countries where there is very little local expertise available. It is also very convenient when local expertise exists but the experts are challenged by any of the stakeholders on political grounds. This would make it desirable that proposals for labor law reform come from foreign experts, who ought to be independent and therefore not biased by local policy considerations.

The Office had extensively relied on external consultants in the 1960s and 1970s, in particular in Africa. This approach is, however, less used nowadays, because the countries where national legal expertise is not available are rather rare. In addition, missions by external consultants tend to be expensive and are somewhat difficult to organize. In particular they call for on-the-spot presence of relatively long duration. This is seldom possible, for ILO labor law consultants are themselves highly qualified lawyers, whose work schedules are very tight. More often than not, high-level consultants tend to be available on dates that are not convenient for governments,

and governments tend to request missions on dates that are not convenient for the consultants.[24]

Another difficulty can be due to the fact that external consultants, in spite of their high professional competence, do not necessarily have a thorough knowledge of the ILO normative system. Also, sometimes they can hold views that might differ from those of the Office. It is obvious, however, that vis-à-vis the ILO members, the Office must have a certain unit of thought, irrespective of whether the advice has been delivered by an external consultant or by the Office itself. Of course the Office would not address the same exact proposals to all the countries, for it must take legal frameworks as well as economic, political, and social contexts of each member into account. That being said, proposals made by the Office should be consistent with the Office overall approach to labor law issues. Within the Office this is known as *to provide advice d'appelation BIT contrôlée,* which might be translated as *ILO-labelled opinion*. Yet, an external consultant's opinion might perhaps not always adjust to this discipline. In such cases the consultant's work would call for thorough revision by the Office so that the advice eventually provided to a country is that of the Office, not that of an individual expert, however sharp he or she may be.

The most important difficulty stems, however, from the fact that once an external consultant has concluded his or her work, he or she leaves the country and leaves behind a text whose future is at the very least uncertain. If a consultant has worked in isolation or has not established good working relations with national interlocutors, there are good reasons to fear that the proposals made will be quickly forgotten, due to want of appropriate on-the-spot relay. This is very likely to occur when local interlocutors have the feeling that a text prepared by a consultant does not really belong to them. It is therefore indispensable for a consultant to deeply involve his or her national counterpart to the work he or she is doing so as to generate the latter's ownership in the elaboration of the labor law reform. This would eventually result in the latter becoming the advocates of the reform, so that, once finished, the work done by the international expert will be taken up by the locals.

24. Many ILO labor law consultants are labor law professors, whose availability is limited by the University calendar.

## XIII. CHOICE OF A NATIONAL COUNTERPART

Despite this warning it should be acknowledged that the Office has had successful experiences of collaboration between international consultants and their national interlocutors, which lead to draft texts, which eventually became law. Almost invariably this was the result of close understanding that was established between ILO consultants and national counterparts during missions undertaken by the former. This highlights the importance for the Office to rely on international consultants, who, in addition to being highly qualified lawyers, should have excellent communication capacities.

Of no less importance is the choice of the right national counterpart. There is not a precise profile of who can best do this task. However, there should be a preference for civil servants in the local Ministry in charge of labor, who generally have a very good knowledge of the country's realities. Labor inspectors in the case of French-speaking countries, and Labour Commissioners or their deputies in the case of English-speaking countries very frequently have the right qualifications to become the best counterpart for ILO consultants. They may perhaps not have the qualifications enabling them to write sophisticated legal texts, but they always have very good knowledge of local realities. Still more important, they have very clear judgment on what could be done and what might be unworkable in their country. Pooling the legal qualifications of the ILO expert and the national counterpart's practical knowledge of the country may make a good combination of assets, which may lead to the ILO proposing legal drafting that would be both technically sophisticated and practically down to earth.

## XIV. TRIPARTITE CONSULTATION

Again, it is important to give thought to the tripartite consultation that the Office must engage when a mission is being carried out. Far from being a formality, this consultation is simultaneously an obligation for the Office and a good opportunity for the Office proposals being confronted with what one could call the "test of reality." Even if the result of the consultations does not engage the Office, or as it arrives sometimes it is disappointing with regard to its contents it is only when these consultations have taken place that the Office can make its own idea on the perception that the government—but also both sides of industry in a member State—have built on the reforms then at stake.

Insofar as it is possible, consultations would be held in several phases. During a first phase the Office would present its opinion before the government alone, from which it would get some initial reactions. Thereafter the Office may meet with representatives of the government and the two sides of industry at a tripartite meeting. It would also hold separate (and sometimes private) meetings with the organizations of employers and workers. In a last meeting, with government representatives, the Office would report on the consultations it has held, and the results thereof.

Depending upon each case these consultations can be widened or (more rarely) restricted. Thus, the Office may wish to meet with international agencies operating in the country, or with personalities from the academic world or other circles. Sometimes, contacts with NGOs may also be useful. In addition, when a bill has already been submitted or is about to be submitted to Parliament, the Office may have interest to meeting the latter's Social Affairs Committee.

## XV. SOME EXAMPLES

### *A. El Salvador, 1993*

The assistance in labor law that the Office provided to El Salvador should be placed within the framework of the country's peace process, which started from the Chapultepec agreements, of January 1992. Chapultepec agreements put an end to thirteen years of civil war, and paved the way for the country's re-institutionalization under the supervision of a UN mission, the ONUSAL. During this process a Forum of Economic and Social Consultation was established, where for the first time the organizations of employers and workers met, and, little by little, started to accept themselves reciprocally; whereas during civil war years they had been generally aligned on the most extreme positions of the fighting factions. It is in this atmosphere that the Labour Code reform quickly became a key stake for the social dialogue then underway becoming credible. Very protective of the individual worker on the one hand, the 1972 Code, then in force, made it extremely difficult for the workers to establish trade unions, and even more to engage in collective bargaining or to go on strike on the other hand. As regards rural workers, the Code stated that the right to join trade unions was to be dealt with by ad hoc regulation, which had never been promulgated. Very wary with regard to ILO, El Salvador had at the time ratified only five conventions, among which only the Abolition of Forced Labour

Convention, 1957 (No. 105) belonged to the group of the ILO Fundamental Conventions.

In addition, El Salvador was then under threat of sanctions that were likely to affect its trade with the United States, under the form of withdrawal of custom privileges to which it was entitled under the U.S. Generalized System of Preferences (GSP). GSP rules bind the exemption of custom duties to several obligations to be met by a beneficiary country, including that of taking measures to ensure that so-called *internationally recognized workers' rights* are provided for and respected by national law. El Salvador had been the subject of complaints for failure to meet this obligation, and was then urged to revise its Labour Code *with ILO blessing*. It was in this context that the government decided to open a dialogue with the Office, which was invited to provide an opinion on the Labour Code and if appropriate to formulate proposals for a reform in view of their submission to the Forum of Economic and Social Consultation.

The Office advice was submitted in two parts, respectively in May and June of 1993; then a mission in El Salvador took place in October of the same year, during which the Office representative submitted a set of proposals to amend the Labour Code. A certain number of proposals were immediately agreed upon in the Forum of Economic and Social Consultation, which included the repeal of rules that prevented the unionization of rural workers. Also accepted were the Office proposals to amend the Labour Code so as to permit the ratification of several fundamental ILO Conventions, namely the Forced Labour Convention, 1930 (No. 29); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); and the Minimum Age Convention, 1973 (No. 138). By contrast, no agreement was reached on a number of issues relating to trade-union structures and the exercise of the right to strike. Always under the pressure of trade sanctions, the government finally submitted before Parliament its own bill, which the latter approved in April 1994.

Many of the new provisions closely followed the ILO proposals, which were largely based on the doctrine of ILO supervisory bodies. Yet some others would seem to still be in deviance from ILO doctrine.[25] Anyhow, many of the changes are noteworthy and some of them are quite innovative when compared with similar legislation in

25. El Salvador has not yet ratified ILO Conventions Nos. 87 and 98. The CEACR has so far not been able to formulate an opinion on the conformity of the Labour Code with these conventions. The Spanish text of the Labour Code with all the reforms until 1995 can be consulted in NATLEX http://www.ilo.org/dyn/natlex/docs/WEBTEXT/49592/65113/S95SLV01.htm.

Latin America. Among the new provisions one may quote those that protect trade union founders against dismissal or retaliation during early stages of the constitution of a trade union, or that provide a trade union is held to be legally established if the trade union registrar fails to register the union without reason for more than thirty days from the date when the trade union has applied for registration. Other changes reduced the required majority for a trade union assembly to declare a strike. Also, a strike is presumed to be legal as long as a court decision has not held that it is illegal; this is to a certain extent exceptional in Latin America where too frequently the legal framework for a strike is built in such a manner that it is barely possible for a union to declare a legal strike. Following this assistance a dialogue was developed between the Office and the government and the two sides of industry in El Salvador, and this last country has since ratified twenty-one other ILO Conventions.

### *B. Cambodia, 1994 and 2001*

Cambodia had promulgated a Labour Code in 1972, which was very largely inspired by French law. At that time the country was in prey with civil war and fell little afterwards under the Khmer Rouge dictatorship (1975–79). Then it was subsequently occupied by the Vietnamese (1979–89) and put under the temporary administration of the UN (UNAMIC, thereafter the UNTAC) until the holding of democratic elections in 1993, which put the country on the road to a normal institutional life.

The Labour Code of 1972 had remained dead wood under the Khmer Rouge and Vietnamese occupation. Under UN transitional authority a new Labour Code had been adopted, in 1992. Then the government resulting from the 1993 elections asked for a mission by the Office, for the preparation of a new Code in 1994. This mission took place at the beginning of May 1994, during which an ILO official worked in close collaboration with, and took advantage of the experience of two civil servants of the old administration, who almost by miracle had survived the Khmer Rouge genocide. It was agreed from the very beginning by the ILO official and his counterparts that the codes of 1972 and 1992 were suitable bases for a new Code. Indeed, these were very solid and complete texts. They were embedded in the country's legal culture, essentially made up of French tradition.

The Office assistance consisted of the preparation of amendments to the Code of 1992. They were submitted in four separate working papers.

The first paper, bearing on the general rules of application of the Code and the individual rights, was centered on eleven questions. These included the scope of the Code, alignment on the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), freedom of work of the worker and freedom of hiring of the employer, the loosening of administrative control at the time of the opening of companies, internal rules and discipline, contract work, fixed-term employment, suspension and termination of the contract of employment, minimum wage, collective agreements, protection of wages, and the work of minors. The government of Cambodia accepted most of the proposals made by the Office.

The second working paper addressed freedom of association. To a large extent freedom of association questions had not been addressed in the Code of 1992, which vaguely referred to the right to establish "associations" of employers and workers. The Office proposals clearly specified that workers' associations would be trade unions, and formulated rules in order to facilitate their constitution and to organize the workers' representation at the enterprise level. These proposals were partially accepted by the government.

The third working paper proposed to restore, with some technical adjustments, the Labour Advisory Commission, which had been created by the Code of 1972 but had not been retaken in that of 1992. The role of this commission was to offer an institutional framework to tripartite consultations. The proposals did not encounter problems and were accepted.

The fourth working paper proposed to restore old Chapter XIV of the 1972 Code, on the settlement of industrial disputes, with some important innovations with regard to the right to strike. The Office proposals very largely followed the ILO supervisory bodies' doctrine. With some minor changes the government also accepted them.

The following step consisted in the submission, in June 1994, of a technical memorandum on the ILO mission's work, to which a draft Labour Code was annexed. The government then took other opinions from sources distinct from the Office, and some political problems delayed the further treatment of the Code by Parliament. However, at the end of this process it was essentially the ILO draft that was taken for the drafting of a bill, which the Assembly voted in January 1997 and the King promulgated in March of the same year.

It remains that the Code of 1997 was elaborated on the basis of technical discussions between the Office and the government of Cambodia, in 1994. However, no consultations had been held with the two sides of industry, then not yet organized in the country. The covering memorandum of the draft Labour Code, which the Office had submitted to the government in 1994, precisely drew attention to this question. It recommended that in due time the Code be discussed on a tripartite basis, once the collective representation of the employers and workers would have been organized in the country, and once the experience drawn from the Code's implementation would be sufficient so as to give enough substance for an evaluation to be made by the Code's *users*.

Though this evaluation is still to be made, after a few years of operation of the Labour Code it became apparent that industrial relations in Cambodia were by far much more lively at enterprise-level than they were at industry-level. However, the Code provided for a system of branch-level representation by trade unions, while enterprise-level representation was to be discharged by elected delegates. It thus missed a legal framework for specifically union activity at the enterprise-level. Again, the government requested the Office services, and a new mission was received in July 2001. It was possible this time to hold tripartite consultations. After having taken the opinion of the ones and others the Office formulated proposals in the form of two draft decrees. The first one was elaborated after principles developed by the ILO Committee on Freedom of Association. It announced rules to facilitate the constitution of enterprise-level trade unions, and to determine their representativeness for collective bargaining purposes. It also organized the collective bargaining process at that level. The second draft provided for the functioning of a Council of Arbitration, which was to play a key role in the settlement of labor conflicts likely to lead to a strike. The government of Cambodia very largely accepted both drafts. Apart from some minor changes they were taken thereafter by two decrees (*prakas*) promulgated in November 2001.[26]

26. The text of these decrees as well as the Labour Code, in Khmer and English, can be consulted on the Cambodian Council of Arbitration's Web page, *available at* http://www.arbitrationcouncil.org/eng_arbitrationcouncil.htm; the French version of the Labour Code is *available at* http://www.ilo.org/dyn/natlex/docs/WEBTEXT/46560/65066/F97KHM01.htm.

### *C. Kosovo, 2001 and Timor-Leste, 2001*

The Office involvement in the making of the labor law in Kosovo and Timor-Leste was the result of a request from the UN, not the recipient country. The UN Security Council had established transitional authorities in each of these countries, which were to administer them until local governments were elected and able to take over from the UN. In order to discharge its responsibilities, the UN transitional authorities had asked for the collaboration of all the international organizations that are attached to the UN by agreements of specialized organizations, including the ILO.

#### 1. Kosovo

The territory of Kosovo was part of former Yugoslavia (now Serbia and Montenegro). Following exactions made against its Albanian population (80% of the total population in 1999, and 90% today), and after an international military campaign against Milosevic's Serbia, Kosovo was placed under UN administration in 1999 (UNMIK). In addition to humanitarian relief, UNMIK was to reorganize the country's institutional setting, and to progressively transfer Kosovo's administration to an authority elected by the Kosovars in 2001. The future statute of Kosovo, including its international personality, still remains to be settled. Yet it is clear that at the time of Kosovo's takeover by UNMIK, and with stronger reason today the labor legislation of old Yugoslavia had become null and void for all practical purposes. Not only was it based on the self-management patterns of old Titoism, which had broken down with the disintegration of Yugoslavia, but it was also devoid of legitimacy from the Kosovars' viewpoints as coming from what they considered an occupation. It was against this framework that the interim UN administration considered the elaboration of a labor law.

Two approaches were then opposed within the various so-called *pillars* of UNMIK. On the one hand, there was a current of neoliberal thought, which considered that any regulation aiming at protecting the workers was prejudicial to the economy and would do nothing but discourage investments. On the other hand, a different current advocated for the establishment of a minimum framework of rights and guarantees to protect the workers. Several bills then followed one another, which reflected either one or the other approach, and the Office was invited to provide an opinion in the form of comments to

the various projects then at stake. Finally, in October 2001 UNMIK promulgated a so-called *Essential Labour Law*.[27] Very concise—it is made up of only twenty-eight provisions of which the last three are formal—this law provides a basic legal framework for wage employment in Kosovo. As it is recalled in the Preamble, the Law draws inspiration from the ILO Declaration on Fundamental Rights at Work, 1999. First, it contains rules on prohibition of discrimination, minimum age, prohibition of forced labor, freedom of association, and collective bargaining. Then it provides straightforward though concise rules on the contract of employment, termination of employment, protection of wages, hours of work, holidays with pay, labor inspection, and penalties for infringements of the law.

It is enough to give a quick read to this law to appreciate that it has been very largely inspired by ILO standards. It should be stressed for Kosovo's situation vis-à-vis the ILO Conventions ratified by former Yugoslavia and accepted thereafter by Serbia-Montenegro remains unclear. Since Kosovo does not have a recognized international status it is not eligible for ILO membership and cannot be a party to any ILO Convention. It is therefore under a true voluntary choice by the authorities in Kosovo that ILO standards were taken as a reference for the making of Kosovo's Essential Labour Law.

At present the elected authorities of Kosovo have decided to replace the Essential Labour Law with an entirely new law. For this task, Office opinion was again required and provided.

### 2. Timor-Leste (East Timor)

A former Portuguese colony, Timor-Leste (East Timor) was abandoned by Portugal in 1975. A short while later, it was annexed by Indonesia, of which it became the 27th province. Following a referendum held in August 1999, where 80% of those voting decided for independence, and, after bloody disorders, Indonesia withdrew from Timor, and the country was placed under UN administration in October 1999. Like in Kosovo, the U.N. administration (UNTAET) was given mandate to provide humanitarian relief and to reorganize the country until a local government was elected and able to take up from UN. Elections were held in August 2001 and Timor-Leste became an independent State on May 20, 2002. It entered in the UN in September 2002 and joined the ILO in August 2003.

27. The law is *available at* http://www.unmikonline.org/regulations/2001/reg27-01.pdf.

UNTAET undertook to provide the country with an institutional framework, which included the enacting of some basic legislation, one of which was a labor code. The Office provided considerable technical input to this law. After two years of consultations with the employers, the workers, and different ONGs, the Code came into effect on May 1, 2002. It is a rather compact text: 46 articles, though the majority of those include many paragraphs divided into 5 chapters, which deal respectively with definitions, employment and labor administration, collective labor relations, termination of employment, and the minimum wage.

So far Timor-Leste has not ratified any ILO Convention. However, a very fast reading of this Code would be enough to appreciate that it has been largely developed in light of ILO standards and principles.

## XVI. CONCLUDING REMARKS

Throughout the years the advisory services of the Office in the field of labor law have had to respond to different challenges. Those of today are very varied. Sometimes, as in Kosovo and Timor-Leste, the challenge has consisted in working out a minimum legislative framework to protect the workers, but also to organize the collective relations between employers and workers. Sometimes, as in the new EU members or EU candidates, the ILO contribution has aimed to help these countries bring their labor law and industrial relations practices closer to current Western European patterns. Sometimes, like in many countries of the CIS or in old Yugoslavia the legislative assistance provided by the Office has intended to help these countries rid themselves from reminiscences of the old regime, still present in many legal texts.

Yet the overall task consists in permanently adapting and updating the labor law so that it keeps pace with emerging new challenges. Technological development, economic transformations and international economic competition, organizational changes, ideological attitudes, and societal values toward work have undergone dramatic changes since the mid-1970s. All these changes have had a deep bearing on the labor law. Until the 1970s, it was generally held that labor law would indefinitely continue to expand its scope, and could only evolve toward more and more protection of the workers. However, the true fact is that nowadays the scope of the labor law is narrowing, for the number of dependent workers who perform work or provide services outside the scope of an employment relationship is

on the increase. In addition, more often than not the protection that the labor law affords to workers who remain within its boundaries is revised to the bottom. Questions such as: Who is an employee? Who is an employer? Do we still need a labor law? have for many years seemed so obvious that they barely needed a reply. Today, they are at the heart of many debates.

Nonetheless it should be recognized that a worker's need of protection does not disappear simply because he or she is no longer in wage employment. The question therefore arises as to how to reformulate the labor law so that it can extend its protection beyond the scope of a standard employment relationship. Also, new issues have emerged, to which the labor law has been called upon to propose a response. Some of them are recurrently addressed in many countries: to what extent could a *parent enterprise* be made liable vis-à-vis outsourced manpower? How can the worker's privacy be protected against IT intrusions? How can a better equilibrium be worked out between certain fundamental rights of the workers as human beings, such as freedom of religion or belief, freedom of opinion, freedom of expression on the one hand, and the obligations and duties arising out of subordinated employment on the other hand? How can a better equilibrium be established between work related obligations and family life? How can bullying at work or AIDS and employment be addressed?

The ILO is committed to propose replies to many of these questions. Some replies can be elaborated in light of existing ILO standards. Some others might call for the revision of existing international standards. Still others would call for the elaboration of new instruments, whether standards or so-called *soft law*. In any event they all call today for more reflection and thought.