

## THE BINDING NATURE OF THE RECOMMENDATIONS OF THE COMMITTEE OF FREEDOM OF ASSOCIATION IN THE COLOMBIAN LEGAL FRAMEWORK\*

### *La naturaleza jurídica de las recomendaciones del Comité de libre asociación en el marco legal colombiano*

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#### ABSTRACT

This research analysis is to demonstrate that the recommendations of the Committee on Freedom of Association in relation with Conventions 87 and 98 in the Colombian case, are mandatory for all judicial officers.

**Key words:** Committee on Freedom of Association, international conventions, recommendations, International Labour Organization, ILO.

#### RESUMEN

El presente análisis investigativo tiene como finalidad demostrar que las recomendaciones del Comité de Libertad Sindical de la OIT, como organismo de control de los Convenios 87 y 98 en el caso colombiano, son de carácter obligatorio para todos los operadores judiciales.

*Fecha de recepción: 21 de abril de 2012. Fecha de aceptación: 24 de julio de 2012.*

\* This article is part of the research project entitled The ILO and Human Rights Law Research Group, Society and Development Research Center of the Corporación Universitaria Republicana.

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**Palabras clave:** Comité de Libertad Sindical, convenios internacionales, recomendaciones, Organización Internacional del Trabajo.

## INTRODUCTION

In international law of human rights protection mechanisms that have the most conventional of the institutions that protect these rights, within the United Nations and the international community is traditionally classified into three types<sup>1</sup>. In the first, non-contentious, there is exchange of information on human rights, supported dispute between the parties, as in reporting procedures and reconcile operating within the United Nations, Unesco and ILO. The second mechanism, quasi-litigation is initiated when there is a violation of a right enshrined in human rights conventions. This mechanism seeks to prevent the occurrence of human rights violations and make repairs. Its features are quasi-legal and can be given in the case of complaints among the Member States of the United Nations, specialized agencies of the ILO and UNESCO<sup>2</sup>.

The third judicial protection mechanism occurs in the case of the International Court of Justice, the International Court of Human Rights and the International Criminal Court, the European Court of Human Rights and the Inter-American Court of Human Rights<sup>3</sup>.

For this paper we study the decisions made by the International Labour Organization through the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations. These monitoring bodies are located in the second type of mechanism, is the quasi contentious.

## RESEARCH PROBLEM

The question that arises in this analysis is: What is the legal value in Colombia the recommendations of the committee of freedom of association? In this regard, it is possible to note that its recommendations approved by the Governing Body of the ILO are mandatory for all operators in Colombia, as part of the constitutional.

1 VILLAN DURÁN, Carlos. *Curso de Derecho Internacional de los Derechos Humanos*, Madrid: Editorial Trotta, 2002, pp. 379 y s.s.

2 SEARA VÁZQUEZ, Modesto. *Tratado General de la Organización Internacional*, México: Fondo de Cultura Económica, 1982, pp. 473 y s.s.

3 *Ibid.*, p. 383.

## WORKING HYPOTHESIS

The hypothesis to be resolved, arises from concerns about the legal obligation in domestic law the recommendations of the CFA, given the contradictions that arise in the ILO's own decisions -when it states that these recommendations are not mandatory- and in most of the decisions of the Constitutional Court, who have been arguing that these are part of the constitutional, so are mandatory.

## METHODOLOGICAL STRATEGY

The methodology used in this work is the analysis of documents from the methodology used by the sociology of law; therefore documents will be used by different authors and the jurisprudence of the Constitutional Court.

## RESULTS

Neither the Constitution nor the conventions and recommendations of the ILO were not clearly established that labor rights were human rights, it is clear that his philosophical framework for peace universal revolves around human labor protectionism. However, from the Declaration of Philadelphia of 1944, the Universal Declaration of Human Rights, the International Covenants in 1966 and the Declaration of fundamental principles of the ILO in 1998<sup>4</sup>, it is possible to indicate that there is no doubt to consider that the conventions of the ILO with its recommendations and rulings of the inspection bodies, deal with labor rights, to establish legal elements to solve the basic human existence setinfi in the world of work as the product of tripartite (government - employers and workers).

Human rights work is at the center of human rights first, second and third generation, because it is human labor from which governs its existence, its dignity, respect and protection. These rights are fundamental to the conception of human rights, including civil and political rights or even the so-called social rights.

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4 Organización Internacional del Trabajo. Declaración de la OIT relativa a los Principios y Derechos Fundamentales en el Trabajo. <http://www.ilo.org/public/spanish/standards/relm/ilc/ilc86/com-dtxt.htm>

In accordance with the criteria of the Constitutional<sup>5</sup> Court, the recommendations and observations of the international organizations on human rights are part of the constitutional and should be taken into account in interpreting the fundamental rights enshrined in the Constitution, as is the world of work.

In 1968, memories of the director general of the International Labour Conference, produced a document called *The ILO and Human Rights*<sup>6</sup> in which it is clear that the world of work has always been part of human rights since the emergence of this concept in United Nations system. Also, the world of work is part of the overall action in the international control of the implementation of human rights standards, such as freedom, equality, economic security and dignity<sup>7</sup>. This reference allows to establish that labor rights are

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- 5 Corte Constitucional. **Sentencia C -073/96** M.P. Magistrado Ponente: José Gregorio Hernández Galindo. *"The conformity of domestic legislation with international treaties and the obligations undertaken by the Colombian state to other states or supranational entities is more strictly required by the Constitution when it comes to the implementation and exercise of fundamental rights, Meridian is clearly as Article 93 of the Constitution, under which treaties and international agreements Congress has approved and ratified by the Executive, through which human rights are recognized and in which prohibit their limitation in states of emergency prevail in the domestic"* y **Sentencia C 355/06**. Magistrados Ponentes: Jaime Araújo Rentería y Clara Inés Vargas Hernández. *"In accordance with Article 93 of the Constitution, international treaties on human rights are part of the constitutional whether this figure narrowly defined or broadly. The jurisprudence of international bodies is an important guideline for the interpretation of policy statements contained in international instruments that are part of the constitutional, something different from this case law directly attribute to the character of constitutional block. Additionally, the Court has been emphatic in referring to the jurisprudence from international bodies, hinting that concerns only American Court of Human Rights, the only court in the Inter-American System. Therefore, with less reason could be attributed the status of constitutional block to the recommendations and observations made by other international agencies who have no judicial powers, which does not exclude that the recommendations and observations of organisms of this nature can be taken into account in interpreting the fundamental rights enshrined in the Charter of 1991 and its relevance varies according to their nature and function in the light of relevant international treaties."* <http://www.corteconstitucional.gov.co/relatoria>.
- 6 OFICINA INTERNACIONAL DEL TRABAJO. *La OIT y los Derechos Humanos*. Memorias del Director General (parte I) a la Conferencia Internacional del Trabajo, quincuagésima segunda reunión, Ginebra, 1968, pp. 18 y ss.
- 7 OFICINA INTERNACIONAL DEL TRABAJO. Documento Informativo sobre ratificaciones y actividades normativas. Informe III (parte 2). [http://www.ilo.org/wcmsp5/groups/public/-ed\\_norm/-relconf/documents/meetingdocument/wcms\\_152121.pdf](http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_152121.pdf)
110. International labour standards and the provisions of the United Nations human rights treaties related to them are complementary and mutually reinforcing. Close cooperation between the ILO and the United Nations in relation to its human rights treaties is therefore an important strategy to enhance the influence of ILO standards and to ensure consistency and coherence within the United Nations system with regard to human rights at work.

those rights enshrined in international human rights instruments, including ILO Conventions, recognizing, in terms of universality, workers, respect for human dignity and basic needs in the world of work<sup>8</sup>.

In Colombia, it is clear that the Constitutional Court repeatedly has stated that decisions<sup>9</sup> are direct sources of application in the world of work ratified international agreements that are part of the constitutional order to prevail in the domestic policy. Hence, in the case of Colombia, the International Labour Law by Conventions of the ILO in recent years has gained prominence as a direct source for policy implementation, which is why the terms of the self-executing agreements can be applied immediately since the non self-executing clauses require further legislative procedure.

Given the above, it may be noted that international<sup>10</sup> treaties ratified by Colombia, from the rule of law (Labor Code), prevail on him, either by being part of the constitutional or the principle of favorability or the declaration of unconstitutionality by the Constitutional Court or by way of exception of unconstitutionality by the judicial. In the latter case, judicial officers should be understood not only judges but also those agencies, lawyers, employers, directly or indirectly apply labor regulations.

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111. The Office has pursued the activities undertaken with the UN human rights bodies responsible for supervising the application of the following instruments:

- the International Covenant on Economic, Social and Cultural Rights;
- the International Covenant on Civil and Political Rights;
- the Convention on the Elimination of All Forms of Discrimination against Women;
- the International Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Rights of the Child;
- the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families;
- the Convention on the Rights of Persons with Disabilities.

- 8 AYMERICH OJEA, Ignacio. *Sociología de los Derechos Humanos: Un modelo weberiano contrastado con investigaciones empíricas*. Valencia: Tirant lo Blanch y Universitat de València, 2001, p. 269.
- 9 OSTAU DE LAFONT DE LEÓN, Francisco Rafael y NIÑO CHAVARRO, Leidy Ángela. «Aplicación de los Convenios de la OIT en Materia de Derecho de Asociación Sindical y Negociación Colectiva en las Decisiones de los Jueces Laborales en Colombia», En: *Revista Prolegómenos Derechos y Valores*, vol. XIII, núm. 26, julio - diciembre de 2010, Universidad Militar Nueva Granada, Bogotá, p. 163.
- 10 PLA RODRÍGUEZ, Américo. *Los convenios internacionales del trabajo*. Uruguay: Biblioteca de publicaciones oficiales de la Facultad de Derecho y Ciencias Sociales de la Universidad de la República (Uruguay), 1965, p. 15.

International Labour Conventions are instruments that arise out of tripartism as the recommendations and create legal obligations upon ratification. However, the recommendations are not endorsed because they only provide guidelines for enforcing those agreements<sup>11</sup>. However, the Conventions and Recommendations pursuant to article 19, paragraph 8 of the Constitution of the ILO<sup>12</sup> “can undermine any law, award, custom or agreement which ensures more favorable conditions for the workers of the agreements contained in or in the recommendation”.

Under Article 19 in paragraph 5, letter d) of the ILO Constitution, the States that ratify a Convention agree to “take the necessary measures to be effective the provisions of that agreement.” Paragraph 6 of that Article establishes obligations of members as to the recommendations arising for it the obligation to inform the director of the International Labour Office on the measures taken to comply with, provisions, amendments, etc.<sup>13</sup>... From the above, one might note that the legal obligations that arise for states to be ratified conventions as well as such compliance is to adopt the necessary measures to enforce compliance with the internal order. Indeed, within these measures include recommendations arising from the inspection bodies, so that the legal obligation is not only the compliance per se, but also the fulfillment of legal obligations arising from the Constitution of the ILO and compliance with decisions of the various control agencies involving ILO<sup>14</sup> conventions.

In matters of interpretation of conventions, we can mention two bodies, the Committee of Experts on the Application of Conventions and Recommendations and the Commission on implementation of standards. These bodies are regulatory mechanisms control the obligations under the Conventions and Recommendations, has its constitutional basis in Article 22<sup>15</sup>, which contains

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11 The above comments come from the consultation of: VALTICOS, Nicolás. *Derecho Internacional del Trabajo*, trad. Ma. José Triviño, Madrid: Editorial Tecnos, 1977; SEARA VÁZQUEZ, Modesto. *Tratado General de la Organización Internacional*, México: Fondo de Cultura Económica, 1982; Oficina Internacional del Trabajo. *Manual sobre procedimientos en materia de convenios y recomendaciones internacionales del trabajo*, Ginebra: Departamento de Normas Internacionales del Trabajo, 2006.

12 <http://www.ilo.org/global/lang-es/index.htm>

13 VALTICOS, Nicolás. *Derecho Internacional del Trabajo*, trad. Ma. José Triviño, Madrid: Editorial Tecnos, 1977, p. 119.

14 SÜSEKIND, Arnaldo. *Direito Internacional Do Trabalho*, Sao Pablo: LTR, 2000, p. 16.

15 ILO CONSTITUTION. Article 22. *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.* <http://www.ilo.org/ilolex/english/constq.htm>

the obligation of members to make annual presentation of a memorial on the measures taken to give the provisions of Conventions and Articles 19<sup>16</sup> and 35<sup>17</sup> of the Constitution of the ILO. Control these organisms produce a series of recommendations that have been converted in the course of time, interpretive elements of the ILO Conventions. This is without prejudice to remember that, in accordance with Article 37, paragraph 1 of the Constitution of the ILO, the International Court of Justice is the only body competent to interpret the Constitution and ILO<sup>18</sup> Conventions. However, there is no denying that the criteria of applicability of the inspection bodies approved by the Board of Directors have full legal requirement to be met by the States, and if a State does not agree with the interpretation of the agencies ILO will have to go to the International Court of Justice.

There are also special control mechanisms are based on Articles 24 and 25<sup>19</sup> of the Constitution of the ILO, which may come under the criteria of claims relating to the observance of ratified Conventions and complaints concerning the application of ratified Conventions articles 26, 27, 28, 29, 31, 32, 33 and 34<sup>20</sup>.

The Committee on Freedom of Association and the Board of Inquiry and Conciliation Commission on Freedom of Association are the bodies responsible for knowing about the complaints of violation of freedom of association and are responsible to comment on the legal force that may have the recommendations of the special control agencies. The first special procedure has its inner and its recommendations and conclusions are submitted to the Board of Directors. Similarly, the second body has a procedure similar to that of the Commission of Inquiry.

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16 See Annex 1.

17 See Annex 2.

18 ILO CONSTITUTION **Article 37.** 1. *Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice..*

19 ILO CONSTITUTION. **Article 23.** 1. *The Director-General shall lay before the next meeting of the Conference a summary of the information and reports communicated to him by Members in pursuance of articles 19 and 22.* 2. *Each Member shall communicate to the representative organizations recognized for the purpose of article 3 copies of the information and reports communicated to the Director-General in pursuance of articles 19 and 22.* **Article 25.** *If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.*

20 See Annex 3.

In the case of the Colombian case, there is concern about how our regulations, the legal obligation of the recommendations of the CFA, are applied by the administrative, judicial and all public and private operators.

In this regard, we must reiterate that the Constitution of Colombia in its Articles 9, 53 and 93 has established that the ILO International Conventions ratified by Colombia are part of internal rules. The Constitutional Court has constructed the theory of the constitutional, noting that some ILO conventions are part of it<sup>21</sup>. On several occasions this corporation has ruled on the enforceability of the recommendations of the Committee on Freedom of Association in Colombia, as in the case of Auto 078A/99<sup>22</sup>, Case T-568/99<sup>23</sup>,

21 OSTAU DE LAFONT DE LEÓN, Francisco Rafael y NIÑO CHAVARRO, Leidy Ángela. «Aplicación de los Convenios de la OIT en Materia de Derecho de Asociación Sindical y Negociación Colectiva en las Decisiones de los Jueces Laborales en Colombia». En: *Revista Prolegómenos Derechos y Valores*, vol. XIII, núm. 26, julio-diciembre de 2010, Universidad Militar Nueva Granada, Bogotá, p. 163.

22 Corte Constitucional. Auto 078A/99. Nueve (9) de diciembre de mil novecientos noventa y nueve (1999). M.P. Carlos Gaviria Díaz. La Corte Constitucional reitera la importancia de las Recomendaciones de la Conferencia General de la OIT, pero ciertamente «*las diferencia de las recomendaciones de sus órganos de control, el Comité de Libertad Sindical y el Consejo de Administración para el caso específico, quienes son los intérpretes legítimos de la Constitución de la OIT y de los Convenios aplicables a la queja que el sindicato actor presentó en contra de Colombia como Estado miembro y obligado por esas normas a acatar los resultados del trámite de las quejas. Es cierto que las recomendaciones del Comité citado, una vez acogidas por el Consejo de Administración, pueden ser impugnadas por el Estado miembro ante la Corte Internacional de Justicia (artículo 29 de la Constitución de la OIT), pero hasta donde consta, el Gobierno colombiano no hizo uso de esa atribución*».

23 Corte Constitucional. Sentencia T 568/99. diez (10) de agosto de mil novecientos noventa y nueve (1999). M.P. Carlos Gaviria Díaz. «*Los principales órganos de control y aplicación de los procedimientos son tres: las Comisiones de Encuesta, la Comisión de Investigación y de Conciliación, y el Comité de Libertad Sindical. Las primeras están previstas en la Constitución de la OIT (art. 26), y las dos restantes fueron creadas en desarrollo de las funciones del Consejo. El Comité de Libertad Sindical es el organismo especializado de la OIT que examina las quejas que se reciben sobre violaciones a la libertad sindical, y en ese proceso estudia las legislaciones domésticas sobre sindicalización, negociación y huelgas, y examina las medidas de hecho que se tomen en los Estados contra estas libertades. Es una instancia previa a la Comisión de Investigación y Conciliación. Sus recomendaciones están dirigidas al Consejo de Administración, a fin de que éste pueda decidir el rechazo de una queja, darle traslado a la Comisión para un examen más detenido o señalar a los gobiernos las anomalías encontradas y su posible solución, en relación con los derechos sindicales y su ejercicio dentro de un contexto necesario de respeto de los derechos humanos*». «*(...) los órganos de control también emiten recomendaciones y, en ocasiones son vinculantes. Es el caso, por ejemplo, de las que profiere la Comisión Interamericana de Derechos Humanos: 'La Comisión es competente, en los términos de las atribuciones que le confieren los artículos 41 y 42 de la Convención, para calificar cualquier norma del derecho interno de un Estado Parte como violatoria de las obligaciones que éste ha asumido al ratificarla o adherir a ella'; '39. Como consecuencia de esta calificación,*



Judgment and Sentence T-1211/00<sup>24</sup> T-603/03<sup>25</sup>, reaffirming the criterion that in Colombia the recommendations of the CFA are mandatory because they are part of the constitutional, coming this legal obligation for all judicial officers, arguments that the Constitutional Court has been holding and which could be summarized as labor rights and in this case the ILO Conventions are human rights conventions, which limited the Court has held that are part of the human rights considered as such by the same corporation.

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podrá la Comisión recomendar al Estado la derogación o reforma de la norma violatoria...'. Por último, 'Todos los órganos de los Estados Partes tienen la obligación de cumplir de buena fe las recomendaciones emitidas por la Comisión, no pudiendo ésta establecer el modo de ejecutarlas a nivel interno (...) siendo por tanto el Estado (...) el que debe determinar la forma de cumplir con las mismas».

*El Comité de Libertad Sindical es un órgano de control de la OIT; confronta las situaciones de hecho que se le presentan o las normas internas de los Estados, con las normas internacionales aplicables según los Tratados ratificados por los Estados involucrados (en este caso, la Constitución de la OIT y los Convenios sobre libertad sindical); luego, formula recomendaciones y las somete al Consejo de Administración, ya que éste es el órgano que puede emitir recomendaciones de carácter vinculante según las normas que rigen la Organización. En este caso, el Consejo recibió el informe del Comité y sus recomendaciones, y encontró que el asunto no requería mayor investigación, ni modificó los textos que se le presentaron; antes bien, los asumió, los incorporó a las actas de la reunión, y los publicó como parte de su informe oficial de esa sesión a la comunidad de Estados miembros; por tanto, esta recomendación constituye una orden expresa vinculante para el gobierno colombiano. Colombia está obligada, en virtud de su calidad de Estado Parte del Tratado Constitutivo de la OIT, a acatar las recomendaciones del Consejo de Administración (arts. 24 y ss)».*

- 24 Corte Constitucional. Sentencia T 1211/00. Dieciocho (18) de septiembre del dos mil (2.000). Magistrado Ponente: Alejandro Martínez Caballero. «(...) es claro que el bloque de constitucionalidad debe construirse a partir del Preámbulo de la Carta Política, e incluir los artículos 1, 5, 39, 53, 56 y 93 de ese Estatuto Superior, pues en esas normas están consagrados los derechos que reclama el Sindicato actor como violados; también procede incluir la Constitución de la OIT y los Convenios 87 y 98 sobre libertad sindical (tratado y convenios debidamente ratificados por el Congreso, que versan sobre derechos que no pueden ser suspendidos ni aún bajo los estados de excepción); además, los artículos pertinentes de la Declaración Universal de los Derechos Humanos, el Pacto Internacional de Derechos Económicos, Sociales y Culturales, y la Convención Americana de Derechos Humanos. Se confrontarán con ellos los artículos 430 y el 450 del Código Laboral, subrogado por el artículo 65 de la Ley 50 de 1990 ('casos de ilegalidad y sanciones'), puesto que en ellos se basaron el despido, los fallos de los jueces ordinarios y, en parte, las providencias bajo revisión; y, claro está, la recomendación del Comité de Libertad Sindical de la Organización Internacional del Trabajo».
- 25 Corte Constitucional. Sentencia T 603/03. veintitrés (23) de julio de dos mil tres (2003). M. P. Jaime ARAÚJO RENTERÍA. "Esta Corporación tuvo oportunidad de analizar la naturaleza y alcances de las recomendaciones del Comité de Libertad Sindical de la OIT. En efecto, en la sentencia T-568 de 1999 la Corte Constitucional estableció el carácter vinculante de esas recomendaciones, atendiendo a las obligaciones contraídas por el Estado colombiano, al suscribir y ratificar el Tratado constitutivo de la OIT. Para tales efectos diferencié entre las recomendaciones emitidas por la OIT y las de sus órganos de control. Así, dijo que a diferencia de los convenios, las recomendaciones pronunciadas por la OIT no son normas creadoras de obligaciones internacionales, sino meras directrices, guías o lineamientos que deben seguir los Estados partes en busca de las condiciones dignas en el ámbito laboral de sus países; mientras que las recomendaciones de sus órganos de control en ocasiones son vinculantes.

## CONCLUSION

For Xavier Beaudonnet<sup>26</sup> the legal status of pronouncements of the supervisory bodies at the international level that are mandatory and provide a definitive interpretation of the rules and conventions except for the reports of the Commission of Inquiry. This approach makes the argument that under the legal and institutional oversight bodies arises from the work of supervisory bodies, which in turn is an authoritative reading of the Conventions until proven otherwise by the International Court of Justice and that the good faith implementation of international treaties gives precisely that legal value.

For his part, Ernesto Molina Carlos Monsalve<sup>27</sup>, to do an analysis of the legal obligation of the recommendations of Colombia CFA through a study of some decisions of the Supreme Court, the Constitutional Court and the Council of State said they disagreed with the decision of the Constitutional Court to include in the constitutional law the recommendations of the CFA, especially from the Relief T 568/99. This position is primarily argued that the provisions of the Constitution of the ILO do not enshrine this requirement and that the doctrine of the CFA itself denies any such possibility.

In relation to legally binding decisions of the inspection bodies and, in particular, the Committee on Freedom of Association and the Committee of Experts from Member States to ratify the conventions, it is considered that:

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*Esta obligación surge de los compromisos adquiridos por el Estado colombiano en el ámbito internacional. Así, la Constitución Política de 1991 establece como un principio fundamental que las relaciones exteriores del Estado se fundamentan en el reconocimiento de los principios del derecho internacional aceptados por Colombia (art. 9º). En ese sentido Colombia reconoce como un principio del derecho internacional lo previsto en el artículo 26 de la Convención de Viena de los Derechos de los Tratados, aprobada por la Ley 32 de 1985, en el sentido de que «[t]odo tratado en vigor obliga a las partes y debe ser cumplido por ellas de buena fe» (...) De esa manera Colombia queda sujeta a las obligaciones que adquiere en virtud de los tratados y convenios que celebra y que son ratificados por el Congreso de la República. Los Convenios 87 y 98 de la OIT, sobre libertad sindical y derecho de sindicalización, aprobados por el Congreso de la República mediante las Leyes 26 y 27 de 1976, deben ser respetados y cumplidos por Colombia, y obviamente sujetarse a lo que dispongan los órganos de Control de la Organización Internacional del Trabajo, a cuyas determinaciones también se sujetó, al hacer parte del convenio constitutivo de dicha organización. En el orden interno el único medio judicial para lograr el cumplimiento de las recomendaciones de los órganos de control que protegen derechos fundamentales es la acción de tutela.*

26 BEAUDONNET Xavier (dir.) *Derecho Internacional del Trabajo: manual de formación para jueces, juristas y docentes en derecho*, Turín: Centro Internacional de formación de la OIT, 2009, p. 92.

27 MOLINA MONSALVE, Carlos Ernesto. *Las Normas Internacionales del Trabajo y su efectividad en el Derecho Colombiano*, Bogotá: Editorial Temis, 2005, p. 216.

Geraldo Von Potobsky<sup>28</sup> advocates the thesis requirement of the recommendations of the inspection bodies from the perspective of the legal obligation that comes with the ratification of the Conventions. This approach is a reading of the letter is quoted on the legal effect in domestic law for judicial officers of the ILO Conventions and their interpretations by agencies. However, it is necessary to refer to the text of the ILO Constitution Article 34<sup>29</sup>, which concludes that the recommendations of the Commission of Inquiry are mandatory. Hence, one could state that if the Commission of Inquiry considers the interpretive and the decisions of the supervisory bodies of the conventions-as is-these are mandatory, while recognizing that the latter interpretations of the agreements have the International Court of Justice. Accepting the thesis of Xavier Beaudonnet, pending a ruling of international judicial body, the interpretation of the internal control bodies of the international labor organization<sup>30</sup> is mandatory.

One of the arguments that are strong against the position of the binding recommendations of the CFA is the application of the Vienna Treaty on international treaties<sup>31</sup>, in which arise the duties to respect and guarantee the international conventions internally and the duty to adapt the law and establishes the responsibility of the States as the conventions, guidelines and principles on the authentic interpretation of international treaties. This does reinforce the argument that the ILO Conventions ratified by Colombia, and specifically the 87 and 98 Conventions ratified by law 26 and 27, 1976, while there is no interpretation of the International Court of Justice on its interpretation, are mandatory interpretive criteria CFA and its recommendations adopted by the Governing Body of the ILO. As a result of the foregoing, in the event that

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28 VON POTOBSKY, Geraldo. *Eficacia Jurídica de los Convenios de la OIT en el Plano Nacional*. [http://training.itcilo.it/ils/ils\\_judges/training\\_materials/spanish/Von%20Potobsky.pdf](http://training.itcilo.it/ils/ils_judges/training_materials/spanish/Von%20Potobsky.pdf)

29 CONSTITUCIÓN OIT. Artículo 34. *El gobierno acusado de incumplimiento podrá informar en cualquier momento al Consejo de Administración que ha adoptado las medidas necesarias para cumplir las recomendaciones de la comisión de encuesta o las contenidas en la decisión de la Corte Internacional de Justicia, y podrá pedir que se constituya una comisión de encuesta encargada de comprobar sus aseveraciones. En este caso serán aplicables las disposiciones de los artículos 27, 28, 29, 31 y 32, y si el informe de la comisión de encuesta o la decisión de la Corte Internacional de Justicia fueren favorables al gobierno acusado de incumplimiento, el Consejo de Administración deberá recomendar que cese inmediatamente cualquier medida adoptada de conformidad con el artículo anterior.* <http://www.ilo.org/ilolex/spanish/constq.htm>

30 VON POTOBSKY, Geraldo W. y BARTOLOMEI DE LA CRUZ, Héctor G. *La Organización Internacional del Trabajo. El Sistema Normativo Internacional. Los Instrumentos sobre Derechos Humanos Fundamentales*. Buenos Aires: Editorial Astrea, 1990, p. 153.

31 LEY 194 de 1995 - *Por medio de la cual se aprueba la "Convención de Viena sobre el Derecho de los Tratados entre Estados y Organizaciones Internacionales"*, hecha en Viena el 21 de marzo de 1986. <http://www.secretariassenado.gov.co/senado/basedoc/arbol/2802.html>

judicial authorities in Colombia do not implement the recommendations of the CFA, the Colombian State must answer for the violation of the agreements in accordance with the Vienna Convention on international treaties<sup>32</sup>.

It is also necessary to note that in application of Articles 26-29 and 31 of the Constitution of the ILO, particularly Resolutions 239 of two (2) August Nineteen Forty-Nine (1949) and 277 of 17 February, nineteen hundred fifty (1950) Economic and Social Council of the UN, and 110 of the Meeting of the Board, the recommendations of the Committee on Freedom of Association adopted

32 ÁLVAREZ LONDOÑO, Fernando. «Algunas observaciones a propósito de la responsabilidad internacional por violaciones de derechos humanos». En: 112 Aniversario de la Academia Colombiana de Jurisprudencia. Bogotá, septiembre 25 de 2006. [http://www.acj.org.co/activ\\_acad.php?mod=112%20aniversario](http://www.acj.org.co/activ_acad.php?mod=112%20aniversario).

*“No cabe duda, entonces, que, de acuerdo con este artículo y con los desarrollos jurisprudenciales del sistema interamericano, las obligaciones principales de los Estados en materia de derechos humanos son las de respeto y garantía. En este sentido, la sentencia de fondo del caso Velásquez Rodríguez, fallado por la Corte Interamericana de Derechos Humanos, traza los lineamientos más importantes para comprender en qué consisten y qué implican estas obligaciones: 164. El artículo 1.1 es fundamental para determinar si una violación de los derechos humanos reconocidos por la Convención puede ser atribuida a un Estado Parte. En efecto, dicho artículo impone, a cargo de los Estados Partes, los deberes fundamentales de respeto y de garantía, de tal modo que todo deterioro a los derechos humanos reconocidos en la Convención que pueda ser atribuido, según las reglas del Derecho internacional, a la acción u omisión de cualquier autoridad pública, constituye un hecho imputable al Estado que compromete su responsabilidad en los términos previstos por la misma Convención. 165. La primera obligación asumida por los Estados Partes, en los términos del citado artículo, es la de ‘respetar los derechos y libertades’ reconocidos en la Convención. El ejercicio de la función pública tiene unos límites que permiten que los derechos humanos sean atributos inherentes a la dignidad humana y, en consecuencia, superiores al poder del Estado. Como lo ha afirmado la Corte ...: la protección a los derechos humanos, en especial a los derechos civiles y políticos recogidos en la Convención, parte de la afirmación de la existencia de ciertos atributos inviolables de la persona humana que no pueden ser legítimamente disminuidos por el ejercicio del poder público. Se trata de esferas individuales que el Estado no puede vulnerar o en los que sólo puede penetrar limitadamente. Así, en la protección de los derechos humanos, está necesariamente comprendida la noción de la restricción al ejercicio del poder estatal (La expresión ‘leyes’ en el artículo 30 de la Convención Americana sobre Derechos Humanos, Opinión Consultiva OC-6/86 del 9 de mayo de 1986. Serie A No. 6, párr. 21). La segunda obligación de los Estados Partes es la de ‘garantizar’ el libre y pleno ejercicio de los derechos reconocidos en la Convención a toda persona sujeta a su jurisdicción. Esta obligación implica el deber de los Estados Partes de organizar todo el aparato gubernamental y, en general, todas las estructuras a través de las cuales se manifiesta el ejercicio del poder público, de manera tal que sean capaces de asegurar jurídicamente el libre y pleno ejercicio de los derechos humanos. Como consecuencia de esta obligación los Estados deben prevenir, investigar y sancionar toda violación de los derechos reconocidos por la Convención y procurar, además, el restablecimiento, si es posible, del derecho conculcado y, en su caso, la reparación de los daños producidos por la violación de los derechos humanos. Más aún, señala la Corte, La obligación de garantizar el libre y pleno ejercicio de los derechos humanos no se agota con la existencia de un orden normativo dirigido a hacer posible el cumplimiento de esta obligación, sino que comparta la necesidad de una conducta gubernamental que asegure la existencia, en la realidad, de una eficaz garantía del libre y pleno ejercicio de los derechos humanos”*

by the Board of Directors, in accordance with the procedure established by the Governing Council decisions taken between its 117th (November 1951) and 209th (May-June 1979) meetings are mandatory for Member States of the ILO whose failure behavior of the measures implementing an agreement of the the ILO has originated.

The Constitution of Colombia provides in the first paragraph of Article 93, which human rights treaties that prohibit their limitation in states of emergency prevailing in the internal order and in the second paragraph, that the rights enshrined in the Constitution must be construed in accordance with human rights treaties ratified by Colombia.

Colombia's Constitutional Court, the body of the Judicial Branch of the Public Power, responsible for the care of the Constitution and interpreter of it, has been established on the basis that Article 93 of the Constitution, which human rights treaties referred to the first paragraph of that article up the "constitutionality block in the strict sense," which contains the rules are the parameter of constitutional validity of other rules under control. Moreover, based on the same concept and the second paragraph of Article 93, the Constitutional Court has considered that some human rights treaties, although not part of the "constitutionality block strictly" under the first paragraph of the provision, will be part of it, "broadly" as parameters to interpret the content of fundamental rights, and then to determine the validity of a rule under control against the Constitution.

Based on the foregoing, the Constitutional Court, after making inaccurate statements about the mandatory recommendations of the CFA at the domestic level, set its position on the issue under discussion, and stated that only the recommendations of the freedom of Association adopted by the Board are binding internally, and are in turn control parameters of the constitutional validity of rules on trial before it, as they involve the "constitutionality block in the broad sense" under the second paragraph Article 93 of the Constitution, a situation that is repeated by the same corporation in the T 171 Judgement of March 14, 2011, stating that "the recommendations of the Committee on Freedom of Association approved by the Governing Council are binding"<sup>33</sup>.

Notwithstanding the foregoing, and international obligations for the Colombian State, including its judicial organs of the membership of the ILO in terms of international standards cited, the Constitutional Court adopted decisions in specific cases in which it has denied under guardianship in relation to labor

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33 Corte Constitucional. Sentencia T-117 de 2011. M.P. Jorge Iván Palacio Palacio.

rights recognized by the recommendations of the Committee on Freedom of Association adopted by the Governing Body of the ILO.

Indeed, in the Judgement T-695 protection 2004, the Constitutional Court ignored the precedent set by herself in the mandatory recommendations of the Committee on Freedom of Association adopted by the Governing Body of the ILO in relation to States members of that organization, in Case T-568, 1999 and T-603, 2003. Such ignorance is specific for two reasons: firstly, it ignored the precedent set by the First Board of Review in Case T-603, 2003, which reiterated the criteria that informed the decision T-568, 1999, as which the guardianship is the appropriate legal instrument to implement the recommendations of international monitoring bodies on human rights, including the Committee on Freedom of Association, on the other hand, under international and constitutional standards already mentioned, binding all for Colombia, it is clear that the Constitutional Court, the ruling said, did not recognize that the recommendations of the Committee on Freedom of Association adopted by the Governing Body of the ILO must be met by the Colombian government, by not applying a precedent of that Judgement T-603, 2003, when ignored for the case that, in its June 2002 meeting, the Governing Body of the ILO approved the recommendations in the Report 328 by the CFA in relation to the plaintiff in the writ of protection mentioned in the Judgement, namely the T-695, 2004.

For judicial officers, in accordance with the Constitutional Court, in Case C 037/96<sup>34</sup>, where the project is revised statutory administration of justice on the scope of Article 48 of the Administration of justice statute that establishes the scope of the rulings in control the exercise of constitutional review judgments of the Constitutional Court in which it predicts the content and scope of constitutional rights serves as an auxiliary criterion of the activity of judges, but if they decide to depart from the jurisprudential line drawn on them must substantiate sufficient and adequate reason to do that takes you on pain of violating the principle of equality.

Faced with this decision is also possible to recall the sentence C 335, 2008<sup>35</sup>, in which the Constitutional Court established the criteria for the malfeasance of action jurisprudence, both for public officials, including judges and individuals exercising public functions. All this allows to point out that judicial authorities in Colombia are mandatory decisions of the CFA and all watchdogs of the ILO, which are part of the constitutional.

34 Corte Constitucional. Sentencia C-037/96. De cinco (5) de febrero de mil novecientos noventa y seis (1996). Magistrado ponente: Dr. Vladimiro Naranjo Mesa. <http://www.corteconstitucional.gov.co/relatoria/1996/C-037-96.htm>

35 Corte Constitucional. Sentencia 335/08. «El artículo 243 constitucional señala que: 'Los fallos que la Corte dicte en ejercicio del control jurisdiccional hacen tránsito a cosa juzgada constitucional.

## ANNEX 1

### ILO CONSTITUTION. Article 19

1. When the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of an international Convention, or (b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.
2. In either case a majority of two-thirds of the votes cast by the delegates present shall be necessary on the final vote for the adoption of the Convention or Recommendation, as the case may be, by the Conference.
3. In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.
4. Two copies of the Convention or Recommendation shall be authenticated by the signatures of the President of the Conference and of the Director-General. Of these copies one shall be deposited in the archives of the International Labour Office and the other with the Secretary-General of the United Nations. The Director-General will communicate a certified copy of the Convention or Recommendation to each of the Members.
5. In the case of a Convention:
  - (a) the Convention will be communicated to all Members for ratification;

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*Ninguna autoridad podrá reproducir el contenido material del acto jurídico declarado inexecutable por razones de fondo, mientras subsistan en la Carta las disposiciones que sirvieron para hacer la confrontación entre la norma ordinaria y la Constitución', lo que quiere significar que, por mandato constitucional, todas las autoridades públicas en Colombia, incluidos los jueces, deben acatar lo decidido por la Corte en sus fallos de control de constitucionalidad, so pena de incurrir en delito de prevaricato por acción por violación directa de la Carta Política. En caso de tratarse de un fallo de exequibilidad, no le sería dable al juez recurrir a la excepción de inconstitucionalidad, en tanto que si se está ante una declaratoria de constitucionalidad condicionada, igualmente le está vedado a cualquier juez acordarle una interpretación distinta a la norma legal que ha sido sometida al control de la Corte, siendo vinculante en estos casos tanto el decusum como la ratio decidendi. De igual manera, la administración pública no puede apartarse de lo decidido por la Corte Constitucional, so pena de incurrir en la mencionada conducta delictiva». <http://www.corteconstitucional.gov.co/relatoria/2008/C-335-08.htm>*

- (b) each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the Conference, bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action;
- (c) Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Convention before the said competent authority or authorities, with particulars of the authority or authorities regarded as competent, and of the action taken by them;
- (d) if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention;
- (e) if the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.

#### Obligations of Members in respect of Recommendations

#### 6. In the case of a Recommendation:

- (a) the Recommendation will be communicated to all Members for their consideration with a view to effect being given to it by national legislation or otherwise;
- (b) each of the Members undertakes that it will, within a period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months after the closing of the Conference, bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action;



- (c) the Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Recommendation before the said competent authority or authorities with particulars of the authority or authorities regarded as competent, and of the action taken by them;
  - (d) apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.
7. In the case of a federal State, the following provisions shall apply:
- (a) in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system for federal action, the obligations of the federal State shall be the same as those of Members which are not federal States;
  - (b) in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action, the federal government shall:
    - (i) make, in accordance with its Constitution and the Constitutions of the states, provinces or cantons concerned, effective arrangements for the reference of such Conventions and Recommendations not later than 18 months from the closing of the session of the Conference to the appropriate federal, state, provincial or cantonal authorities for the enactment of legislation or other action;
    - (ii) arrange, subject to the concurrence of the state, provincial or cantonal governments concerned, for periodical consultations between the federal and the state, provincial or cantonal authorities with a view to promoting within the federal State coordinated action to give effect to the provisions of such Conventions and Recommendations;
    - (iii) inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring such Conventions and Recommendations before the appropriate federal state, provincial or cantonal authorities with particulars of the authorities regarded as appropriate and of the action taken by them;

- (iv) in respect of each such Convention which it has not ratified, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent States, provinces or cantons in regard to the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement, or otherwise;
  - (v) in respect of each such Recommendation, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent states, provinces or cantons in regard to the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as have been found or may be found necessary in adopting or applying them.
8. In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.

## ANNEX 2

### ILO CONSTITUTION. ARTICLE 35

1. The Members undertake that Conventions which they have ratified in accordance with the provisions of this Constitution shall be applied to the non-metropolitan territories for whose international relations they are responsible, including any trust territories for which they are the administering authority, except where the subject-matter of the Convention is within the self-governing powers of the territory or the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions.
2. Each Member which ratifies a Convention shall as soon as possible after ratification communicate to the Director-General of the International Labour Office a declaration stating in respect of the territories other than those referred to in paragraphs 4 and 5 below the extent to which it undertakes that the provisions of

the Convention shall be applied and giving such particulars as may be prescribed by the Convention.

3. Each Member which has communicated a declaration in virtue of the preceding paragraph may from time to time, in accordance with the terms of the Convention, communicate a further declaration modifying the terms of any former declaration and stating the present position in respect of such territories.
4. Where the subject-matter of the Convention is within the self-governing powers of any non-metropolitan territory, the Member responsible for the international relations of that territory shall bring the Convention to the notice of the government of the territory as soon as possible with a view to the enactment of legislation or other action by such government. Thereafter the Member, in agreement with the government of the territory, may communicate to the Director-General of the International Labour Office a declaration accepting the obligations of the Convention on behalf of such territory.
5. A declaration accepting the obligations of any Convention may be communicated to the Director-General of the International Labour Office:
  - (a) by two or more Members of the Organization in respect of any territory which is under their joint authority; or
  - (b) by any international authority responsible for the administration of any territory, in virtue of the Charter of the United Nations or otherwise, in respect of any such territory.
6. Acceptance of the obligations of a Convention in virtue of paragraph 4 or paragraph 5 shall involve the acceptance on behalf of the territory concerned of the obligations stipulated by the terms of the Convention and the obligations under the Constitution of the Organization which apply to ratified Conventions. A declaration of acceptance may specify such modification of the provisions of the Conventions as may be necessary to adapt the Convention to local conditions.
7. Each Member or international authority which has communicated a declaration in virtue of paragraph 4 or paragraph 5 of this article may from time to time, in accordance with the terms of the Convention, communicate a further declaration modifying the terms of any former declaration or terminating the acceptance of the obligations of the Convention on behalf of the territory concerned.
8. If the obligations of a Convention are not accepted on behalf of a territory to which paragraph 4 or paragraph 5 of this article relates, the Member or Members or international authority concerned shall report to the Director-General of the

International Labour Office the position of the law and practice of that territory in regard to the matters dealt with in the Convention and the report shall show the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and shall state the difficulties which prevent or delay the acceptance of such Convention.

### ANNEX 3

#### ILO CONSTITUTION

##### Article 26

1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.
2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.
3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.
4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.
5. When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.

##### Article 27

The Members agree that, in the event of the reference of a complaint to a Commission of Inquiry under article 26, they will each, whether directly concerned in the

complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject-matter of the complaint.

### **Article 28**

When the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.

### **Article 29**

1. The Director-General of the International Labour Office shall communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments concerned in the complaint, and shall cause it to be published.
2. Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice.

### **Article 30**

In the event of any Member failing to take the action required by paragraphs 5 (b), 6 (b) or 7 (b) (i) of article 19 with regard to a Convention or Recommendation, any other Member shall be entitled to refer the matter to the Governing Body. In the event of the Governing Body finding that there has been such a failure, it shall report the matter to the Conference.

### **Article 31**

The decision of the International Court of Justice in regard to a complaint or matter which has been referred to it in pursuance of article 29 shall be final.

### **Article 32**

The International Court of Justice may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry, if any.

### **Article 33**

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 Inquiry,

or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

### Article 34

The defaulting government may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the Commission of Inquiry or with those in the decision of the International Court of Justice, as the case may be, and may request it to constitute a Commission of Inquiry to verify its contention. In this case the provisions of articles 27, 28, 29, 31 and 32 shall apply, and if the report of the Commission of Inquiry or the decision of the International Court of Justice is in favour of the defaulting government, the Governing Body shall forthwith recommend the discontinuance of any action taken in pursuance of article 33.

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