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Sent: 13 October 2023 14:48
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Subject: India's comments on the issue of right to strike
Attachments: India comments Article 37 13-10-23 1557.docx; 230831_DG letter to Member States.pdf; ILO-art37-ICJ-request-background-report-Sept2023-EN.pdf

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Dear Team ILO,

In reference to the DG-ILO's letter dated 31 Aug 2023 to member states inviting comments in relation to the background report (issued by the ILO) that provides factual information on the origins and scope of the dispute and the legal and procedural aspects of a possible referral to the International Court of Justice, the comments of India are enclosed herewith.

Regards,

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India's comments on Interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike by the International Court of Justice for decision in accordance with article 37(1) of the Constitution

1. A dispute exists between the Employers' and Workers' groups at the International Labour Organization (ILO) concerning the interpretation of aspects of the 'right to strike' as outlined in ILO Convention No. 87. In light of the long standing nature of the dispute, it is now being suggested to refer the dispute to the International Court of Justice (ICJ) for a decision under Article 37(1) of ILO Constitution under the following referral questions:-

“1. Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?

2. Was the Committee of Experts on the Application of Conventions and Recommendations of the ILO competent: (a) to determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and (b) in examining the application of that Convention, to specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?”

2. It is noteworthy that Article 37(1) provides for referral of questions or disputes to ICJ on matters pertaining only to interpretation of ILO's Constitution and conventions, and not all matters. The relevant part of Article 37 is reproduced below-

*‘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.’*

3. It can be concluded that the Article 37(1) provides for referral of questions or disputes for decisions in form of an advisory opinion, which are not binding.¹
4. There was an agreement between United Nations (UN) and ILO in 1946 as per which International Labor Conference (ILC)-ILO could request ICJ to provide advisory opinion on a legal matter as per article IX (2). ILC-ILO delegated this power to the ILO-Governing Body (GB). Article IX (2) is reproduced below-

‘The General Assembly authorizes the International Labour Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies.’

5. Till date, total six requests have been made by ILO to the Permanent Court of International Justice under article 14 of the Covenant of the League of Nations in the period 1922–32, which included one related to the interpretation of a convention.

¹ [Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty and information on other action points in the work plan \(ilo.org\)](#) (Page 05- Para 02)

6. It is noteworthy that no dispute or legal question has been referred by ILO to ICJ to date either under Article IX (2) of the UN-ILO Agreement of 1949 or Article 37(1) of the ILO Constitution.
7. It is also pertinent to note that no procedural framework for referral to ICJ under Article 37(1) has not been decided or adopted by ILO yet. A proposal for a framework was discussed during 347th March GB meeting. However, the GB could not adopt the framework and deferred the item for discussion to a future session.² It is not clear how in the absence of the procedural framework under Article 37(1), can a referral be made to ICJ either by the GB or the ILC?
8. For 347th March GB Meeting, the Office background document stated that “advisory opinions are in essence non-binding”³. The rationale presented by the Office behind the binding effect of these advisory opinions is based on acceptance of the same indicated by employers’, workers’ and regional groups in their past statements. In the lack of any legal and written agreement by all the constituents to this effect, the acceptance by few constituents of ILO of ICJ’s advisory opinion does not hold water. What would be the effect of the advisory opinion if at present or in the future some other ILO constituents or these ILO constituents do not accept that these opinions are binding? Also, in the context of Convention 87, it is unclear if the opinion would be binding on whom – only ratified member States or all member States given that C87 is fundamental convention recognized under the 1998 Declaration on the Fundamental Principles and Rights at Work?
9. In the background report shared by the ILO Office on this matter in Sep-2023, the negotiating history of C-87 settles several key questions unambiguously while raising some serious new concerns. It can be safely concluded from the report that the intention of an overwhelming majority of constituents and the Office was clearly not to incorporate right to strike explicitly in the convention on right to freedom of association. No evidence or record has been presented on the constituents and the Office changing their opinion and coming to an agreement that right to strike was an implicit and integral part of right to freedom of association under Article 03 of the Convention, therefore, there was no need of laying it explicitly in the convention. (Page 13-Para 41,42,43,44).
10. Moreover, as per the report, in 1956, the ILO Governing Body and the ILO Committee on Standing Orders and the Application of Conventions and Recommendations decided that “the Freedom of Association and Protection of the Right to Organize Convention does not cover the right to strike.”⁴ (Page 14, Para 50)
11. In 1991, the Governing Body while deciding against a proposal to place a standard setting item concerning the right to strike on the agenda of the Conference noted that “the question of the right to strike has never so far been considered as a possible subject for an international labour Convention. Only the Voluntary Conciliation and Arbitration Recommendation, 1951(No.92), and the Abolition of Forced Labour Convention, 1957 (No.105), deal **indirectly** with the right to strike.” In doing so, the GB acknowledged that that the right of strike was not a subject of C-87 even implicitly. (Page 15, Para 50)

² https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_879411.pdf (page 67)

³ [Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty and information on other action points in the work plan \(ilo.org\)](#) (Page 07- Para 13)

⁴ [09601\(1956-131\).pdf \(ilo.org\)](#) (Page 188, Para 06)

12. It is clear that the constituents firstly voted for adoption of and then ratified the C-87, 1948 under their own interpretation reinforced by consensual understanding especially within the ILC that the right to strike is not an integral or implicit part of C-87. What will be the implication of the ICJ referral and opinion on those ILO constituents who ratified the convention before 1957 i.e. when CEACR briefly interpreted the right to strike as a part of C87 for the first time?
13. Is it appropriate to expect such Constituents and others member states to accept substantially altered and expanded intention, interpretation and meaning of the Convention much later after it was adopted, whether in the form of a CEACR interpretation or an ICJ opinion?
14. In addition, the questions put before the ICJ are to decide whether the right to strike is covered under ILO's Convention No. 87 and whether the ILO Committee of Experts has the competence to determine the scope of the right to strike. However, the dimensions of right to strike specifying certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise etc., form part of the core mandate of the of the ILO i.e. standard setting. This question is going beyond the confines of mere interpretational referral to ICJ and is an invitation to the ICJ into the core mandate of the ILO in the area of standard setting. Moreover, an ICJ ruling on the competence of the Committee of Experts will impact not only on the interpretation of Convention No. 87, but also other ILO instruments under examination by the Committee of Experts.
15. Given this background, there is a need to settle this interpretation issue within the International Labour Organization (ILO) inclusively through dialogue rather than resorting to approaching the International Court of Justice (ICJ). The ILO operates on a tripartite structure that includes governments, employers, and workers, emphasizing social dialogue and cooperation as the cornerstone of its approach to labor-related issues. By fostering collaboration and negotiation among these key stakeholders, the ILO should promote development of amicable, inclusive and sustainable solutions to labour issues, such as through standard setting to ensure legal certainty.
16. Moreover, the negotiating history presented by the Office indicates that the understanding of constituents and the Office while of C-87 was clear that right to strike was not a part of the C-87. Inclusion of right to strike as a part of C-87 much after the Convention was adopted could tantamount to retrospective standard setting. This has the potential to snowball into a crisis of trust regarding the potential liberal and starkly diverse (to the original intent) interpretation of other present and future conventions.
17. The ILO may go ahead with standard setting with respect to the right to strike as this process recognizes the diverse perspectives and interests of all parties involved. Resorting to the ICJ, although a valid option has the potential to aggravate disagreement and create and widen a trust deficit amongst constituents eventually affecting the interests of workers globally.