

Employers' Secretariat's Preliminary Comments to Additional Notes on the ICJ Advisory Opinions prepared by the Office

After a thorough examination of the Office's three additional documents communicated to the ILO tripartite constituents on 20 October 2023, the Employers' secretariat unfortunately has to conclude that the information and analysis contained therein is legally inconsistent and can be strongly misleading for the following reasons. Comments on these three documents will be addressed separately below:

1. The binding legal effect of ICJ advisory opinions

Paragraph 3 of this document states that *"advisory opinions relating to the interpretation of the ILO Constitution or of an international labour Convention are endowed with binding effect because article 37(1) expressly provides so."* We consider this argument legally inconsistent.

The Office's line of argument seems to be that, as indicated in paragraph 5, while apart from rare cases ICJ advisory opinions are not binding, the *"requesting organ, agency or organization remains free to decide, as it sees fit, what effect to give to these opinions"* and that the ILO through Article 37(1) of ILO Constitution has determined for its constituents the binding nature of ICJ advisory opinions.

It should be noted, however, that **Article 37(1) is silent on the binding nature of ICJ advisory opinions**. Article 37(1) reads as follows: *"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."* Nowhere in the provision is provided that specifically ICJ advisory opinions are legally binding.

In particular, no legally binding effect for an ICJ advisory opinion can be derived from the term "decision". The term "decision" in Article 37(1) seems to be used as a generic term for all types of pronouncements that can be obtained from the ICJ under this provision, which are not only advisory opinions. For example, Article 37(1) may also be invoked by an individual member State to obtain a ruling in the event of a dispute over the interpretation of a Convention with another member State. A "decision" of the ICJ, which in this case would take the form of a judgment in the contentious proceedings, would indeed be binding.¹

Moreover, Article 37(2) provides that *"Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph."* From the absence of a corresponding formulation in Article 37(1) can be concluded that the binding nature of an ICJ advisory opinion is limited to any established tribunal under Article 37(2), and there is no binding effect for ICJ advisory opinions in the case of Article 37(1). This is also the view of the former ICJ President, Roberto Ago, who states that

¹ ILO, International Labour Conference, Provisional Record 2, Ninety-fifth Session, Geneva, 2006, p..2/8, first bullet point.

"As regards the ILO, however, the tribunal in question has never seen the light of day, and any request by the ILO Governing Body to the International Court of Justice could accordingly lead only to an advisory opinion, which, as such, would not have decisive effect".²

Third, given the sensitive nature of a possible binding effect of ICJ advisory opinions on national sovereignty, the requirements for clarity and unambiguousness of the wording in the relevant provisions should be rather high. As mentioned above, Article 37(1) is not clear and unambiguous in this respect.

Fourth, it is important to note that the Office itself, in documents prepared for the Governing Body in 2006 and 2007, has questioned the binding effect of ICJ advisory opinions for the ILO and its constituents:

*"However, apart from a question relating to the interpretation of the Convention, there are other questions that the Governing Body may wish to consider in the event that an advisory opinion is sought from the International Court of Justice. The first would concern the interpretation of the ILO Constitution. To the extent that the Governing Body decides to refer any question of interpretation to the International Court of Justice, **it would be logical to submit the complementary question as to whether such interpretation sought in the form of an advisory opinion could or should be recognized as binding for all Members under article 37(1) of the Constitution**. This question, which has for some time posed a theoretical issue, would immediately become of great practical significance should the Governing Body decide to submit a request for an advisory opinion to the Court."³*

*"[t]hought could also be given to **whether the Court could interpret article 37(1) as providing a basis for an advisory opinion on a question of interpretation to be considered as binding on the ILO and on the States parties to the Convention involved**".⁴*

As indicated above, it appears that the Office itself and also the former ICJ President were much more cautious when it came to the question of the possible binding nature of ICJ advisory opinions. In light of this, the Employers have doubts about the effectiveness of ICJ advisory opinions to resolve disputes over the interpretation of ILO Conventions with definitive legal certainty.

In any case, before any referral of the dispute on the right to strike is made to the ICJ under Article 37(1), the International Labour Conference (ILC) should necessarily have the opportunity to discuss and clarify the binding effect of a possible referral to the ICJ.

2. ICJ advisory proceedings – Relevant jurisprudence

As for this Office document, the Employers' Secretariat believes that it is of little relevance for the understanding of ICJ advisory opinions for ILO purposes. **Most of the ICJ advisory opinions**

² Roberto Ago, "Binding" Advisory Opinions of the International Court of Justice, p.449, footnote 44.

³ ILO, [Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 \(No. 29\)](#), GB 298, March 2007, INS/5/2, para. 5.

⁴ ILO, [Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 \(No. 29\)](#), GB 297, November 2006, INS 8/2, para 9.

presented here concern legal questions that **do not involve the interpretation of Conventions.**

It should also be noted that the ILO is unique and different from the UN and other UN organizations in that its organs are composed not only of government representatives but also of representatives of employers and workers. The ICJ advisory opinion jurisdiction concerning the UN and other UN organizations should therefore be viewed with great caution for ILO purposes.

Furthermore, while all ICJ advisory opinions that the ILO has sought in the past have been followed up by consensual decisions either by the ILC or the Governing Body, there is no automatism to declare ICJ advisory opinions legally binding.

3. Legal basis for requesting an advisory opinion

The Employers' Secretariat notes from this document that Art IX(2) of the 1946 UN-ILO Relationship Agreement is wider in scope than Article 37(1) of the ILO Constitution in that it authorizes the ILO to request advisory opinions from the ICJ "*on legal questions arising within the scope of its activities*" other than questions concerning the mutual relationships of the Organizations and the UN or other specialized agencies.

It is not quite clear why the third document was produced in the context of the interpretation dispute on the right to strike in C87. ICJ opinions issued on the basis of Art IX(2) of the 1946 UN-ILO Relationship Agreement are in any case not legally binding. This provision is completely silent on the binding nature of ICJ advisory opinions and the ICJ has itself declared that they are inherently not legally binding.⁵

While there is a legal basis in Article 37(1) of the ILO Constitution for referring a legal question or dispute concerning the interpretation of a Convention to the ICJ, there are other ways to resolve legal questions and interpretation disputes using the existing ILO's internal means of action. In particular, the International Labour Conference (ILC), the ILO's supreme body, has the competence and legal authority to settle disputes related to the interpretation of Conventions, through the adoption of revising Conventions or the adoption of Protocols.

Given the complexity and the multi-layered nature of the interpretation dispute on the scope and limits of the right to strike, the ILC also appears to be the most appropriate authority to settle this dispute as it allows all ILO constituents to actively contribute to and engage in the process. In fact, it is the only body that can ensure that any solution would be based on consensus or would enjoy broad support of ILO constituents, thus enhancing the desired legal certainty.

⁵ ICJ, [Advisory Jurisdiction](#) "*Contrary to judgments, and except in rare cases where it is expressly provided that they shall have binding force (for example, as in the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America), the Court's advisory opinions are not binding.*"