MINISTRY OF FOREIGN AFFAIRS
REPUBLIC OF INDONESIA

Jakarta, 15 May 2024

No: D/01186/05/2024/08

The Registrar
International Court of Justice
Peace Palace
The Hague
The Netherlands

Sir,

I have the honor to transmit to you, in accordance with the Court's Order No. 191 on 16th November 2023 and Article 66 Paragraph 2 of the Statute of the Court, the enclosed written statement of the Government of the Republic of Indonesia on the request for an advisory opinion on right to strike under ILO Convention No. 87. As a member of the United Nations, Indonesia respectfully conveys this written statement to assist the Court in rendering the advisory opinion requested by the ILO.

Please Accept, Sir, the assurances of my highest consideration.

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Director General for Legal Affairs and International Treaties / Legal Adviser
Ministry of Foreign Affairs of the Republic of Indonesia

RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87
(REQUEST FOR ADVISORY OPINION)

WRITTEN STATEMENT SUBMITTED BY
THE GOVERNMENT OF THE REPUBLIC OF INDONESIA
TO THE INTERNATIONAL COURT OF JUSTICE

MAY 2024

I. INTRODUCTION

1. The Government of the Republic of Indonesia, as a State party to the Freedom of Association and Protection of the Right to Organise Convention (No. 87), submits this written statement pursuant to the International Court of Justice (the Court) Order of 16 November 2023, so as to furnish information on the question submitted to the Court for an advisory opinion.

2. On 10 November 2023, at its 349th *bis* (special) Session, the Governing Body (GB) of the International Labour Organization (ILO) adopted a resolution to request the Court to urgently render an advisory opinion under Article 65, paragraph 1, of the Statute of the Court (the Statute), and under Article 103 of the Rules of Court, on the following question:

   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)?

3. Indonesia recognizes the right to strike and guarantees the protection of such rights through its national laws, including, among others, Law No. 13/2003 concerning Manpower as well as the Minister of Manpower and Transmigration Decree No. 232/MEN/2003 concerning the Legal Consequences of Unauthorized Strikes. These regulations provide a legal framework for the exercise of the right to strike.

4. With regard to the ILO Convention No. 87 (C-87), Indonesia noted with concern that the right to strike has been an ongoing contentious issue for decades between the workers and the employers. Such dispute amounting to compelling reason for the Court, as will be explained in the subsequent part of this submission, to exercise its discretion to decline to respond to the request for this advisory opinion.

5. In regard to this, Indonesia is of the view that the most prudent course of action to resolve the dispute is to seek tripartite consensus in line with the core spirit and the unique characteristic of the ILO. Such a tripartite mechanism through the International Labour Conference (ILC) provides an inclusive avenue where all respective parties, including the employers and workers, can fully consent and contribute to the decision-making process, including to the discussion on whether the right to strike is protected under C-87. The ILO may bring this matter to the ICJ for advisory opinion after exhausting such internal mechanism.

II. THE QUESTION POSED RELATES TO AN ONGOING DISPUTE BETWEEN ILO CONSTITUENTS

A. The Employers and the Workers are the Constituents of ILO

6. ILO has consistently upheld its distinctive tripartite structure, affirming equality among the governments of ILO Member States, the employers, and the workers' organizations.[1] This unique framework epitomizes social dialogue in practice, where the collaborative input of workers and employers together with the governments shapes ILO labor standards, policies, and programs.[2]

7. The tripartism of the ILO is reflected in the composition of its organs. The ILC assembles the representatives of the ILO members, which comprise the delegates from the employers, the workpeople, and the government.[3] Each delegate has individual voting and speaking rights in the decision-making process of the ILC,[4] the highest body to discuss and adopt international labor standards.[5]

8. The ILO's tripartite character is also manifested within the structure of its GB. The GB consists of 28 delegates representing governments, 14 delegates representing employers, and 14 delegates representing workers.[6] As a governing body, the GB functions to, *inter alia,* appointing Director-General of ILO,[7] directing the International Labour Office's activities,[8] determining the agenda of the ILC,[9] and discussing matters related to international labor standards.[10]

9. It is apparent that both organs employ tripartism in performing their functions, with each organ performing different roles in the process of setting standards, developing policies, and promoting decent work for all. The GB exercises the governmental function of ILO, while the ILC, in particular, signifies as the 'parliament of labor'.[11]

B. The Binding Character of the Advisory Opinion of the Court to ILO and its Constituents

10. It is generally acknowledged that the Court's advisory opinions are non-binding in nature[12] and "... *given not to States, but to the organ which is entitled to request*

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[1] *ILO Constitution* Article 3. ('*ILO Constitution*'). Articles 7 and 17 also express that the ILO Governing Body shall consist of equal representatives from the Workers and Employers Organization.
[2] 'How the ILO works', ILO (Web Page) <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm>.
[3] *ILO Constitution* (n 1).
[4] *Ibid,* Article 4.
[5] 'International Labour Conference', ILO (Web Page) <https://www.ilo.org/about-ilo/how-ilo-works/international-labour-conference> ('*International Labour Conference*').
[6] *ILO Constitution* (n 1) Article. 7.
[7] *Ibid,* Article. 8.
[8] *Ibid,* Article. 10.
[9] *Ibid,* Article. 14.
[10] ILO, Compendium of Rules applicable to the Governing Body of the International Labour Office, 2021.
[11] *International Labour Conference* (n 5).
[12] *Interpretation of Peace Treaties* (Advisory Opinion) [1950] ICJ Report 65, page 71.

it."[13] In light of this, the ILO, guided by Article 37(1) of its Constitution and practical application, has established the binding nature of the Court's advisory opinion to it.[14]

11. This assertion has been consistently expressed by the ILO on numerous occasions.[15] The ILO has repeatedly treated all six advisory opinions issued by the Permanent Court of International Justice (PCIJ), at the request of ILO, as binding and promptly integrated them into practice.[16] The PCIJ's opinions were formally published in the ILO's Official Bulletin[17] and referenced in the Director-General's Report to the ILC to decide and implement the necessary measures to give full effect to the judicial pronouncement.[18]

12. Taking into account the provision under Article 37 of the ILO Constitution and the practical application, the Court's opinion on the legal question(s) would be binding for the ILO and its tripartite constituents,[19] which would consequently amount to the direct application of the opinion to the ILO and its constituents.

C. The Dispute between the Employers' and Workers' Group has been Longstanding

13. The disagreement between the groups of employers and workers regarding the interpretation of C-87 has endured for decades. The dispute originated in the 1950s when ILO Supervisory Bodies interpreted that the right to strike is a necessary corollary of the rights to organize and bargain collectively, which must be implemented by member States.[20] This led to a disagreement between the employers' and workers' groups regarding the interpretation of the C-87.

14. In the 121st session of the GB, the employer spokesperson of the Committee of Freedom of Association (CFA) stated that there was "no international instrument regulating the right to strike which would authorize bodies related to the ILO to pass judgment on the national regulations in force in any given country."[21]

15. In 1959, the Committee of Experts observed that the prohibition of strikes by workers was contrary to the norm under Article 8 paragraph 2 of the C-87.[22] This

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[13] *Western Sahara* (Advisory Opinion) [1975] ICJ Report 12, page 24 ('*Western Sahara*').
[14] GB ILO, 347th session, ILO Doc GB.347/PV(Rev.) (22 June 2023). See also ILO Doc GB.344/INS/5 P.8. Interpretation of the Convention of 1919 concerning Employment of Women during the Night.
[15] GB ILO, 256th session, ILO Doc GB.256/SC/2/2 (May 1993). See also GB ILO, 347th session, ILO Doc GB.347/INS/5 (27 February 2023), and GB ILO, 344th session, ILO Doc GB.344/INS/5 (17 February 2022).
[16] GB ILO, 344th session, ILO Doc GB.344/INS/5 (17 February 2022).
[17] *International Labour Office Bulletin*, vol. XVIII, No. 2, (1933), page 116.
[18] GB ILO, 64th session, (1933) and ILC ILO, 18th session, (1934).
[19] 'The Binding Legal Effect of ICJ Advisory Opinions', ILO Office (Web Page) <https://webapps.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_899567.pdf>.
[20] Lee Swepston, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' (2013) 29(2) *The International Journal of Comparative Labour Law and Industrial Relations,* page 199-200.
[21] GB ILO, 349th session, ILO Doc GB.349bis/INS/1 (14 September 2023), page 10 ('*ILO Doc GB.349bis/INS/1*').
[22] ILC ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 43rd session, Report III, 4th pt, (1959), paragraph 68.

'interpretation' by the Committee of Experts drew diverse responses from the ILO constituents at the 58th session of the ILC in 1973.[23] In general, the workers groups supported the interpretation by the Committee of Experts, while the employer groups were against such interpretation.

16. These opposing views between the group of workers and the group of employers continued as the ILO constituents responded to the notion described by the Committee of Experts that 'the right to strike is an intrinsic corollary of the right to organize protected by C-87.'[24] Reacting to such an assertion, the group of workers was in the affirmative, while the employers' group raised its objection against it.

17. The dispute intensified for decades, and in 2012 a major institutional crisis blew up when the Committee on the Application of Standards was prevented for the first time from exercising its supervisory function. The ILO supervisory bodies were paralyzed for about three years until at the March 2015 session of the GB, the workers' and employers' groups presented a joint statement concerning the strategies to resolve the existing deadlock in the supervisory system. The joint statement was then considered to be the revival of the supervisory function, despite the fact that the dispute on the right to strike continues to exist,[25] even when the 349th *bis* (special) session of the GB was held in 2023.[26]

18. Considering the longstanding dispute and the crisis that surfaced as a consequence of it, it is plausible that the dispute has the nature of an ideological conflict with a broader reach than just a legal question.[27] This matter entails broader topics within ILO, involving the supervisory system of the organization and the development of international labor standards.

19. Indonesia is of the view that, based on that account, the appropriate mechanism to settle this dispute is by conducting extensive negotiations and by re-balancing the relation between the constituents of ILO, rather than asking the Court to provide a 'judgment' over this dispute.

III. THE COURT SHALL EXERCISE ITS DISCRETION IN LIGHT OF THE COMPELLING REASONS

20. In considering the request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested.[28] The Court examines its jurisdiction to give an advisory opinion based on Article 65, paragraph 1, of the

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[23] *ILO Doc GB.349bis/INS/1*' (n 21) page 13.
[24] ILC ILO, *General Survey*, 81st session, Report III, Agenda Item 3, (1994).
[25] *ILO Doc GB.349bis/INS/*1 (n 21) page 31.
[26] *Ibid*, page 95.
[27] Claire La Hovary, 'The ILO's Employers' Group and the Right to Strike', (2016) 22(3) *Transfer: European Review of Labour and Research*, page 44.
[28] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Report 95, page 54 (*'Chagos'*).

Statute which provides that "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[29]

21. In line with the Court's jurisprudence,[30] Indonesia stresses that Article 65, paragraph 1, of the Statute, should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met. In its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius*, the Court established that the fact that it has jurisdiction does not mean that it is obliged to exercise it.[31] The Court went on to note that it will therefore give careful consideration as to whether there are compelling reasons for it to decline to respond to the request for an advisory opinion.

A. Rendering the Advisory Opinion is Tantamount to Resolving the Ongoing Dispute

22. Indonesia submits that the Court should exercise its discretion not to reply to the question provided before it as the question posed is the very subject matter of the dispute among ILO constituents and that answering to such question would be equivalent to deciding the ongoing dispute between the employers and the workers.

23. In the advisory case of *Eastern Carelia*, the PCIJ declined to give an opinion since the question was directly related to the main issue of dispute. The judges held:

> *"..Answering the question would be substantially equivalent to deciding dispute between the parties. The Court, being the Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."*[32]

24. Such jurisprudence has substantial relevance to the present case, which should be considered by this Court in its response to the GB's question. As elaborated in the abovementioned explanation, it is evident that the question put forward by the GB is the main point of dispute between the group of workers and the group of employers. Considering the binding character of the Court's opinion to the ILO and its constituents, therefore the Court should exercise its discretion against delivering its opinion to avoid deciding the ongoing dispute between the ILO constituents.

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[29] *Statute of the International Court of Justice* article 65(1).
[30] *Chagos* (n 28), page 63.
[31] *Ibid.*
[32] *Status of Eastern Carelia, (Advisory Opinion)* [1923] PCIJ, 29 ('*Eastern Carelia*').

B. The Absence of Consent of a Party to Refer the Dispute to the Court

25. The fundamental principle of consent is highly relevant to the Court in exercising its advisory jurisdiction, especially when the proceedings involve bilateral disputes between two parties. Indonesia understands that, in general, the lack of consent by an interested party to the dispute does not affect the jurisdiction of the Court, since the advisory opinion of the Court would not be given to the parties, but to the ILO which requested it. However, the Court has consistently recognized that an interested party's lack of consent engages consideration of judicial propriety and may constitute a compelling reason to exercise its discretion to refuse to answer a request.[33]

26. The Court elaborated its opinion in *Western Sahara,* where the judges held that the absence of consent of the interested party may render the giving of an advisory opinion incompatible with the Court's judicial character.[34] The Court acknowledged that lack of consent might constitute a ground for declining to give an opinion requested[35] and that it shall ensure respect for the fundamental principle of consent to jurisdiction.[36]

27. In line with such proposition, the presiding judges of the PCIJ in the *Eastern Carelia* applied such a principle where they held that the parties to the dispute must present their consent for the PCIJ to render its opinion on the matter.[37] The judges affirmed that the Court cannot pursue the proceeding as it needs the consent and cooperation of the interested parties.[38]

28. In the present case, the matter put forward to the Court is the dispute between two parties of the ILO constituents. It should be noted that the dispute persists, and the group of employers does not agree to the referral to the Court to solve the matter. The employers asserted that referral to external judicial bodies such as the Court in resolving the dispute among ILO constituents should not occur.[39]

29. Against this backdrop, Indonesia submits that the Court, consistent with its jurisprudence, should exercise its discretion not to render the advisory opinion requested.

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[33] Such position can be observed, for example, in *Chagos* when the Court explained, in para 85, that there would be a compelling reason for it to decline to give an advisory opinion when such a reply would have the effect of circumventing the principle of consent.

[34] *Western Sahara* (n 13), page 33.

[35] *Ibid*, page 32.

[36] *Ibid*, page 33.

[37] Dapo Akande, 'The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice' (1998) 9 *European Journal of International Law*, page 463.

[38] *Eastern Carelia* (n 32), page 29.

[39] Comment, 'Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution' (2023) *International Organisation of Employers,* page 15.

C. Rendering Advisory Opinion would be Contrary to the Tripartite Dispute Resolution Framework

30. Indonesia believes that the ongoing dispute between the employers and the workers should be dealt primarily within the existing ILO mechanism. The social dialogue of the tripartite dispute resolution framework within ILO should be optimized in finding the solution. The Court's advisory opinion, in this regard, may undermine the longstanding practice of tripartism inherent in the ILO.

31. Dialogue was presented as the ideal means of resolving disputes within ILO, and it was even suggested that *"resorting to external mechanisms would place the future of tripartite dialogue at risk."*[40] It is important to preserve the social dialogue within the ILO, especially in the ILC where all member states are present. The tripartite process within the ILC serves as the essential mechanism to adopt the international labor standards, including the standard of protection of the right to strike, which is currently debated between the ILO's constituents.

32. Indonesia noted that the ILC, despite being the organ assembling all member states of ILO, has not been given a chance to resolve the dispute.[41] The efforts to resolve the dispute through social dialogue in the ILC have not been properly carried out, as the GB decided on its 349th *ter* (special) session that there will not be a standard-setting item on the right to strike on the agenda of the 112th session of the ILC (2024).[42]

33. In line with the above, Indonesia is of the view that the tripartite dispute resolution within the framework of ILO should be given the opportunity to work exhaustively to find the solution to the dispute.

IV. CONCLUSION

34. Indonesia submits that there exist compelling reasons for the Court to exercise its discretion to decline to render the advisory opinion requested. Furthermore, Indonesia is of the opinion that the dispute between the employers and the workers on the protection of the right to strike within the C-87 be settled by conducting negotiations exhaustively to seek tripartite consensus in line with the core spirit and the unique characteristic of the ILO.

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[40] GB ILO, 322th session ILO Doc GB.322/PV (2014), paragraph 94.
[41] *Ibid,* paragraph 58.
[42] GB ILO, 349th *ter* session, ILO Doc GB.349ter/INS/1/Decision (2023).

Jakarta, 15 May 2024

Respectfully Submitted,

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Director General for

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Ministry of Foreign Affairs of the Republic of Indonesia