REQUEST FOR ADVISORY OPINION

ON THE ADMISSIBILITY OF

RIGHT TO STRIKE

UNDER ILO CONVENTION NO. 87

WRITTEN STATEMENT

OF

THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH

SUBMITTED TO

THE INTERNATIONAL COURT OF JUSTICE (ICJ)

16 MAY 2024

Overview

1.0 On 10 November 2023, at its 349th bis (*special*) Session, the Governing Body of the International Labour Organization (ILO) adopted, in accordance with Article 37 (paragraph 1) of the Constitution of the ILO and Article IX (paragraph 2) of the Agreement between the Organization and the United Nations, adopted a Resolution by which it decided, pursuant to Article 65 of the Statute of the International Court of Justice ('Court'), to request the International Court of Justice to render an advisory opinion, 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)?"*

1.1 The following observations are submitted by the Government of the **People's Republic of Bangladesh**, in response to the Order of the Court, dated 16 November 2023, in keeping with the stipulation that written statements on the afore-mentioned question be submitted to the Court by 16 May 2024.

Submission

2.0 While there have been, over the years, several attempts in the ILO to adopt a Convention on the 'right to strike' or, to include a 'right to strike' in the Conventions on related topics, none of those, for lack of tripartite support, have materialized so far. In the absence of a Convention addressing the right to strike, the Committee of Experts on the Application of Convention and Recommendations (CEACR) has taken its own initiative and developed, by means of its observations on Convention 87, rules on the scope, limits and conditions of the right to strike. These opinions on the right to strike are meant and understood by CEACR as a comprehensive and integral set of rules that need to be complied with by State parties to Convention 87 as a whole. It is worthwhile to note that the question on which the Court's advisory opinion has been sought has its origin in the divergence of views around the validity of these CEACR opinions on the right to strike in Convention 87.

3.0 It is the clear understanding of this Government that Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 ('VCLT') provides the core rules of interpretation that are applicable to ILO Conventions, including Convention 87.

3.1 Article 31(1) of VCLT requires that opinions have to be made *"in accordance with the ordinary meaning to be given to the terms of the treaty in their context ...*" In this present case, it is pertinent to note that the terms "strike" or "right to strike" is nowhere mentioned in Convention 87. While the term "*activities … of workers' organizations*" in Art. 3 of Convention 87 could potentially also include strike action, the categorical absence in Convention 87 i.e. of any indication on the scope and limits of the right to strike and on who is competent to determine them, suggests that the right to strike cannot be viewed as part of the ordinary meaning accorded to the terms in the context of Convention 87. As ILO Conventions create obligations for ratifying States at the international level, it is essential that they use terms that are precise and unambiguous across the legal systems worldwide in order to comply with the principle of legal certainty. This means that Convention 87, if it includes or leads to rules on a right to strike, would have to provide clear terms that are universally understood.

3.2 Article 31(1) of VCLT also requires that the treaty has to be interpreted *"in the light of its object and purpose".* The Preamble of Convention 87 confirms that the object and purpose of the adoption of Convention 87 was to codify the freedom of association in the wider context of promotion of better working conditions and peace. However, there is no indication that the object and purpose could have been more specific than that or, had included a provision on the right to strike.

4.0 Furthermore, in light of Article 31(2) of VCLT, the CEACR observations on the right to strike could be part of Convention 87 if there had been an *"agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty"* or, *"an instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."*

4.1 There is no evidence whatsoever that either an agreement or an instrument on the right to strike for the purposes of Article 31(2) of VCLT was made in connection with the conclusion of Convention 87. On the other hand, the CEACR observations refer to very detailed aspects related to the exercise of the right to strike e.g. essential services, political and sympathy strikes, noticiation periods, compulsory arbitration, sanctions, among other issues. There could be significant repercussions for the ratifying as well as non-ratifying States if these observations or opinions were to be considered to be part of the scope of Convention 87 in the absence of an agreement or an instrument as stipulated in VCLT.

5.0 Additionally, the opinions on the right to strike could have become part of Convention 87 if there had been a *"subsequent agreement between the parties regarding the interpretation"* on the right to strike in Convention 87 pursuant to Art 31(3)(a) of VCLT. However, there is no evidence of any agreement amongst the State parties to Convention 87 subsequent to its entry into force which could be considered to be recognition of the CEACR opinions on the scope and limits of the right to strike by all State parties to the Convention. On the contrary, various State parties to Convention 87, at different occasions over the past decades, have acknowledged that the Convention does not expressly or impliedly include the right to strike. At no point in time, there has been an agreement (nor unanimity of views) amongst all parties to the Convention on the fact that it contains obligations regarding a right to strike, let alone on the opinions on a right to strike given by CEACR. In this connection, it would be critical to flag that the Government Group Statement of 23 February 2015 does in no way constitute a *"subsequent agreement between the parties regarding the interpretation of [Convention 87] or the application of its provisions",* pursuant to Art 31(3)(a) of VCLT.

6.0 There is also the possibility under Article 31 that opinions can become valid through *"subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"* pursuant to Article 31(3)(b) of VCLT. However, there has been no such practice amongst the State parties to the Convention that established their agreement on the CEACR opinions on the right to strike. The fact that a significant number of countries bound by the Convention, according to the comments made by CEACR over many years, have not aligned their law and practice with all the CEACR opinions on the right to strike is clear evidence for the absence of such a practice. The fact that a right to strike, in general, exists at national level in many countries does not mean that this right is derived from Convention 87 nor that there is agreement on the CEACR opinions on the right to strike in the Convention. It has been pointed out on numerous occasions that there exists great diversity among national laws and practices in the area of industrial action owing to the diverse characteristics of industrial relations and industrial dispute settlement systems available in Member States. Furthermore, the conclusions and recommendations of the Committee on Freedom of Association (CFA) do not constitute *"subsequent practice in the application of [Convention 87] which establishes the agreement of the parties regarding its interpretation"* pursuant to Article 31(3)(b) of VCLT.

7.0 Article 32 of VCLT provides for the possibility to have recourse to supplementary means of interpretation, including the preparatory work of the treaty *inter alia "… in order to confirm the*

meaning resulting from the application of Article 31." Here, the preparatory reports unambiguously prove that there was no intention to regulate the right to strike in the Convention but instead to address it in the context of a later standard-setting process on arbitration and conciliation. Consequently, the right to strike was not raised in the discussion of the Convention. Incidentally, the preparatory work ('*travaux preparatoires'*) of the Convention also underlines that it has never been conceived to be a detailed regulation on questions related to the freedom of association. Any detailed opinion(s), including those developed by CEACR on the right to strike, therefore, do not appear compatible with the nature and intention of Convention 87 as a "*concise statement of certain fundamental principles*".

8.0 In view of the points raised above, there appears to be no justification for CEACR, even if it were well-intentioned, to fill a perceived gap in the Convention, and to progressively develop self-determined rules on the scope and limits on the right to strike for compliance by the State parties. Any attempt to legitimize such purported progressive development of the right to strike by CEACR would constitute an impingement on State sovereignty.

Conclusion

9.0 The Government of Bangladesh is, therefore, of the view that the request for an advisory opinion regarding the admissibility of the 'right to strike' under ILO Converntion 87 should be answered in the negative. In other words, the 'right to strike' is not protected under ILO Convention 87 for the reasons elaborated above.

M Riaz Hamidullah
Ambassador of Bangladesh
To the Netherlands
16 May 2024