

Mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights

Ref.: OL OTH 29/2023
(Please use this reference in your reply)

25 April 2023

Director-General of the ILO, Mr. Gilbert F. Hougbo,

I have the honour to address you in my capacity as Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, pursuant to Human Rights Council resolution 49/6.

In this connection, I would like to bring to your attention information I have received concerning the following comment on the Decision of the Governing Body of the International Labour Organization (hereafter, ILO) “Options for measures under article 33 of the ILO Constitution, as well as other measures, to secure compliance by the Government of Belarus with the recommendations of the Commission of Inquiry in respect of Conventions No. 87 and 98.¹” with regards to the draft resolution of the General Conference of the International Labour Organization (Meeting in Geneva at its 111th Session, June 2023) on measures to be applied under art. 33 of the ILO Constitution.

At the outset, I wish to recall and acknowledge the ILO’s mission and objective established already by the Treaty of Versailles “*to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues*” as the inalienable means to maintain international peace and security.

The draft resolution contains a recommendation to the governments, employers and workers “*1) to review ... the relations that they may have with the Government of Belarus and take appropriate measures to ensure that the Government of Belarus cannot take advantage of such relations to perpetuate or extend the violations of workers’ rights in respect of freedom of association, and to contribute as far as possible to the implementation of its recommendations; 2) ensure that the principle of non-refoulement is respected in line with international humanitarian law, given that trade union and human rights defenders are at risk of persecution in Belarus; 3) report back to the Director-General for transmission to the Governing Body*».

This recommendation, in my view may have a number of international law implications, including possible violations of economic, social and cultural rights of workers in Belarus, their families, as well as vulnerable groups who rely on social support programs. Additionally, the obligation of ILO’s constituents to report to the

¹ Governing Body, “Option for measures under article 33 of the ILO Constitution, as well as other measures, to secure compliance by the Government of Belarus with the recommendations of the Commission of Inquiry in respect of Conventions Nos 87 and 98”, 347th Session, Geneva, 13-23 March 2023, GB.347/INS/14(Rev.1), at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_867799.pdf

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Director General on measures taken under art. 33 (as per the Governing Body's recommendation), as well as under art. 19 of the ILO Constitution, appear to *de facto* establish a mechanism for supervision of obligations deriving from recommendations, in a similar way as the monitoring of compliance with the ILO's Conventions².

Under art. 19 of the ILO Constitution, ILO recommendations traditionally have a general character "*to meet the circumstances, which are not appropriate to the convention*", and this same article has a coordination and codification purpose as reflected in the ILO practice since 1919³.

To date, the only time when art. 33 of the ILO Constitution was used was the case of Myanmar of 2000.⁴ The status of the relevant document was and is still, however, not clear, as it was not included in the list of recommendations. Moreover, the ILO did not engage in economic or any other sanctions, even during the period of 1919-1946, when this possibility was explicitly provided for by the ILO Constitution. In this context, the ILO Director General in its report of 1994 emphasized that the ILO has "repeatedly discarded" the idea of imposing economic or political sanctions "since [its] earliest days", being perceived as ineffective and undermining cooperation.⁵

The decision by the Governing Body provides for a very broad interpretation of the list of measures which can/ shall be taken by the member-states, employers and workers as being "of an economic or other character" (para. 8). In the face of the expanding use of primary and secondary sanctions by states, this broad interpretation might be interpreted as providing for the authorization to impose unilateral sanctions towards Belarus, Belarusian companies and nationals, targeting multiple areas and sectors, including the economy in general, its specific sectors, as well as sports, art and academia. Such recommendation may be interpreted as constituting a tacit encouragement for excessive de-risking and over-compliance with such sanctions by non-state actors, including donors, businesses and the financial sector. And this, given the absence of any request for a narrow interpretation of country-related provisions, or obligation of any party to exercise a precautionary approach or to take into account possible humanitarian impact of measures aimed to implement the ILO recommendations in the Handbook of procedures relating to international labour Conventions and Recommendations 2019.⁶

Moreover, the Governing Body's reference to the economic and other measures reflect the position of 1919 Drafting committee, which in art. 28–29 provided for the possibility of the ILO Commission of Inquiry and the Permanent Court of International Justice to recommend "*measures of economic character against a defaulting state*" as well as the right of any state to take such unilateral economic measures against the above (art. 33)⁷. At that point delegates understood this notion

² Handbook of procedures relating to international labour Conventions and Recommendations. Centenary Edition 2019. -- International Labour Organization 2019. – 62 p. (paras. 59-66)

³ ILO Recommendations <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12010:0::NO::>

⁴ Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar (ILC 88), 2000
<https://www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#I>

⁵ International Labour Conference, 81st Session (1994), Report of the Director General, *Defending values, promoting change – Social justice in a global economy: An ILO agenda*, 58

⁶ See Handbook of procedures relating to international labour Conventions and Recommendations. Centenary Edition 2019. -- International Labour Organization 2019. – 62 p. (paras. 74-75)

⁷ International Labour Office. Official Bulletin, Vol.1 (Apr. 1919-Aug. 1920), pp.1-345. Geneva, ILO, 1923. <https://guide-supervision.ilo.org/wp-content/uploads/2021/06/EN-Report-CILL.pdf>

very broadly as “*all measures affecting the economic life of the country*” including the use of military force⁸. The use of the reference to economic and other measures by the Governing Body is inadmissible, especially in a view that any references of this kind have been removed from the ILO constitution in 1946⁹. I believe that the approach to interpret it as the possibility to broaden the list of measures which can be imposed by states, as referred to in the Guide for Constituents in the ILO Supervisory System¹⁰ would be against the purposes and principles of the ILO as well as principles of the interpretation of art. 31-33 of the Vienna Convention on the Law of International Treaties of 1969.

I would like to note that from the point of international law, reference to the possibility to impose unilateral economic sanctions has been removed from the text of the ILO Convention as it contradicted the UN Charter and the international law principles of the non-use of force, prohibition to intervene into the domestic affairs of states and sovereign equality of states. Under art. 103 of the Charter, obligations from it prevail over any other international obligations of member states. Moreover, the UN Charter explicitly endows the UN Security Council with the unique powers to decide on the use of military and non-military sanctions, without any possibility for other actors to engage in this activity.

I notice therefore that the recommendation to all stakeholders to take measures in the face of such broad interpretation could result in the expanding use of unilateral sanctions by states with reference to the ILO recommendations, violating basic human rights of workers, their families as well as vulnerable groups, including low income categories, people with disabilities, the elderly, who are dependent on social services and other support programs, including health care.¹¹ It would also contradict the main objectives of the Global Jobs Pact of 2009 – to guarantee employment and social protection as the main instruments to respond the job crisis¹², as well as guarantees of part III of the ILO Centenary Declaration for the future of work¹³, and might impede the achievement of the Sustainable Development Goal 8 – Promote inclusive and sustainable economic growth, employment and decent work for all.

I would also refer here to the numerous resolutions of the UN Human Rights Council (from 15/24 of 6.10.2010, paras. 1-3; to 45/5 of 6.10.2020, preamble; 49/6 of 31.03.2022, preamble, paras. 1-3; 52/13 of 27.03.2023) and the General Assembly (from 69/180 of 18.12.2014, paras. 5-6 to 75/181 of 16.12.2020, paras. 1-6, and 77/214 of 05.01.2023, paras. 1-6), which refer to the illegality of unilateral coercive measures as measures taken without authorization of the UN Security Council and not fitting the criteria of Retortions or Countermeasures under the Law of International

⁸ International Labour Office. Official Bulletin, Vol.1 (Apr. 1919-Aug. 1920), pp.1-345. Geneva, ILO, 1923. <https://guide-supervision.ilo.org/wp-content/uploads/2021/06/EN-Report-CILL.pdf> p. 125

⁹ The ILO to the Rescue? // https://www.piie.com/publications/chapters_preview/338/5iie3322.pdf (P. 93-109) p. 103

¹⁰ The ILO Supervisory System: A Guide for Constituents https://guide-supervision.ilo.org/wp-content/uploads/2021/11/The_ILO_supervisory_system_en.pdf p. 94

¹¹ Targets of unilateral coercive measures: notion, categories and vulnerable groups. Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights. A/76/174/Rev.1 <https://undocs.org/A/76/174/REV.1>

¹² Recovering from the crisis: A Global Jobs Pact (adopted by the International Labour Conference in 2009 and amended in 2022) https://www.ilo.org/ilc/ILCSessions/previous-sessions/98thSession/texts/WCMS_115076/lang-en/index.htm

¹³ ILO Centenary Declaration for the future of work, 2019, <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/centenary-declaration/lang-en/index.htm>

responsibility¹⁴.

I would also emphasize that the decision providing for the authorization to undertake measures which might be interpreted and/or take the form of unilateral coercive measures with reference to the ILO decision in the absence of authorization of the UN Security Council against the Government of Belarus, might render the ILO responsible alongside its member states for any breaches of the international legal norms as well as violations of human rights, in accordance with article 17 of the Draft articles on the responsibility of international organizations 2011¹⁵.

It shall also be mentioned that international humanitarian law referred to in the draft recommendation is not applicable to the situation in Belarus in accordance with Geneva conventions on protection of victims of international military conflicts of 1949; additional protocol to Geneva conventions relating to the protection of victims of International armed conflicts 1977; additional protocol relating to the protection of victims of non-international armed conflicts 1977; as well as art. 3 common for four Geneva conventions in accordance with the ICRC commentaries of 2016, 2020¹⁶.

I would recommend the International Labour Conference of the ILO to avoid any steps which could be interpreted as encouraging or authorizing the ILO member states to take measures not in accordance with the UN Charter, to amend the ILO Guide for Constituents in order to avoid the misleading broad interpretation not in accordance with the UN Charter and to ensure that they are acting in accordance with the ILO purposes, principles, with due account of the worker's rights and social protection objectives of the recent ILO declarations and plans.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all matters brought to my attention, I would be grateful for your observations on the following:

1. Please provide any additional information and any comment you may have on the above-mentioned analysis.
2. Please describe the measures undertaken to provide further guidance and clarity on the application of the ILO Governing Body's decision and recommendation to the International Labor Conference, and measures to prevent any violation of international law, as well as broad interpretation of the recommendation, including the authorization of the use of unilateral economic, trade, sport, art, academic sanctions, with adverse effects on the economic, labor and social rights of workers in Belarus.
3. Please provide information on the procedures to monitor and assess the scope, proportionality and length of the measures undertaken by ILO's constituents under art. 33, including legality assessment, as well as human rights and humanitarian impact assessment.

¹⁴ Unilateral coercive measures: notion, types and qualification. Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan A/HRC/48/59, 2021 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/175/86/PDF/G2117586.pdf?OpenElement>

¹⁵ Draft articles on the responsibility of international organizations 2011 https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf
Commentary on the first Geneva Convention. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. – Cambridge: ICRC, 2016. – paras. 384-392

4. Please provide information on the on the measures and procedures aimed to prevent over-compliance of the non-state actors including employers and trade unions which can affect economic, labour and social rights of workers in Belarus.

This communication, as a comment on pending or discussed resolutions, regulations or policies, and any response received will be made public via the communications reporting website after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council. I stay open for any further interaction and discussion on this matter.

Please accept, Mr. Gilbert F. Houngbo, the assurances of my highest consideration.

Alena Douhan
Special Rapporteur on the negative impact of unilateral coercive measures on the
enjoyment of human rights