San Jose, Costa Rica
May 14, 2024

International Court of Justice
Peace Palace
2517 KJ The Hague
The Netherlands

Your excellencies,

Given the fundamental importance of the prompt resolution of the discrepancy on the interpretation of Convention 87 and the right to strike, Costa Rica submits some valuable considerations regarding the issue to be resolved, to your Authority.

I. On the Right to Strike in Costa Rican Legislation and International Agreements

In Costa Rica, the right to strike is defined in Article 61 of the Political Constitution, in addition to Article 371, related and concordant, of the Labour Code. It is therefore clear that the right to strike is established as a fundamental labour right.

For its part, the United Nations Covenant on Economic, Social and Cultural Rights[1] expressly grants the right to strike l, while admitting the possibility of establishing restrictions in the case of members of the police and State administration.

Likewise, the Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights, "Protocol of San Salvador"[2] contemplates the right to strike.[3]

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[1] Approved by Law No. 4229 of 11 December 1969.
See **Article 8.-1**. The States Parties to the present Covenant undertake to ensure:
a) (...)
d) The right to strike, exercised in accordance with the laws specific to each country.
2. This Article shall not prevent the exercise of such rights by members of the armed forces, the police or the State administration from being subject to legal restrictions.
3. (...)".

[2] Approved by Law No. 7907 of 3 September 1999.
[3] However, the conventional norm provides that it is a matter of law to establish restrictions to the exercise of this right in the case of public services. It is worth noting that according to this international instrument, the limitations that the law may impose must be in accordance with the democratic order, i.e., the restrictions placed on the right to strike must be proportionate and aim to protect health, morals and public order, in addition to the rights of the majority of citizens.

As for the Conventions of the International Labour Organization (ILO), the 1998 ILO Declaration on Fundamental Principles and Rights at Work is intended to encourage efforts by ILO Members to promote the fundamental principles and rights enshrined in the ILO Constitution and the Declaration of Philadelphia, which the Declaration reiterates.

In the latter instrument, the right to freedom of association and trade union freedom was framed as essential to ensure sustained progress, regardless of the economic condition of countries, which must be protected simply by virtue of their membership in the Organization.

These instruments regulate, among other rights, the freedom of association and the effective recognition of the right to collective bargaining. They do not, however, expressly establish the definition or regulation of the right to strike.

Therefore, unlike the right to freedom of association and the right to collective bargaining, **there is no ILO Convention that is specific to the right to strike, as it is neither established nor interpreted literally from the existing fundamental conventions**.

II. On the Right to strike and Convention 87

Convention 87 is the international labour standard that compiles all the rights and guarantees that should be applied for the proper development of freedom of association.

Article 2 provides:

> "*Article 2. Workers and employers, without any distinction and without prior authorisation, have the right to form the organisations they deem convenient, in addition to the right to join these organisations, with the sole condition of observing the statutes of the same.*"

Convention 87 also develops the limitations that the regulation on the constitution and maintenance of a social organisation must have.

Within its principles, it reiterates that the formation and constitution of social organisations cannot be subject to conditions which, by nature, limit the application of the provisions of Articles 2, 3 and 4 of the Convention. As regards the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) is that which defines the scope and limits of interference between one and other workers' or employers' organisations, reinforcing the notion of autonomy and independence between them and the State itself, and the clear prohibition of discrimination in the exercise of trade union freedoms.

Now, as for the right to strike, the aforementioned Convention 87 does not establish any express mention of this right. Instead, this right has been defined and regulated by way of the Political Constitution of Costa Rica and national legislation.

Under current national legislation, the right to strike is a right derived, indirectly, from the right to freedom of association. Article 60 of the Political Constitution states: *"Both employers and workers may freely unionise, for the exclusive purpose of obtaining and preserving economic, social or professional benefits".*

It implies a decision by the workers -unionised or not- to choose to abandon their work in a concerted manner, in order to pressure their employer to cover certain conduct, either to force them to bargain collectively, or to claim non-compliance with labour obligations, in accordance with the provisions of each domestic legislation.

At the constitutional level, Article 60 recognises free unionisation " (...) *for the exclusive purpose of obtaining and preserving economic, social or professional benefits*" and Article 61 establishes "*the right of both employers and workers to strike, except in public services, in accordance with the determination of these by law and in accordance with the regulations established therein, which shall disallow any act of coercion or violence".*

Costa Rica recently reformed the Labour Code by way of Law 9808, in order to give a reasonable balance to the exercise of the right to strike, while recognising that it is a fundamental right available to both public and private workers.

On the occasion of the enactment of this law, entitled: Law to provide legal certainty on strikes and related procedures", the Constitutional Chamber of the Supreme Court of Justice ruled to address the constitutionality consultation. On that occasion, by Resolution No. 20596 - 2019 it highlighted, in what is of interest:

> *"IV.- Consultation regarding the merits.* ***Although there is no clear reference to the right to strike in the Constitution of the International Labour Organization (1919), nor in the Declaration of Philadelphia (1944), nor in Conventions 87 and 98 of the International Labour Organization (ILO)*** *(...) since before,* ***the Constitutions of the World could establish the fundamental right to strike and provide for its regulation****. The way in which the strike in Costa Rica was created has been recorded in multiple historiographic works that facilitate the location of the motives and dates of each of the events,* ***even before any international recognition of the strike*** *(...)".*

It is clear the interpretation that the Constitutional Chamber makes with respect to the applicability of the institute of the strike, and that **it is not created in a literal manner** in Conventions 87 and 98, nor in the ILO Constitution, since, rather, it has been the Countries of the World, by way of their respective constitutions, which have both established the fundamental right to strike and have regulated it. It is also clear that there are historical antecedents at the national level, outside of Agreement 87, that support its origins and scope at the national level. Namely:

> *(...) In the case of Costa Rica, the right to strike was constitutionalised in a crystalline manner in 1943,* ***even before the adoption of the United Nations***

> ***Charter and the Universal Declaration of Human Rights**. The Political Constitution of 1871, which was liberal in principle, still contained some precepts that committed the Costa Rican State to certain social benefits, such as the right to education. It is said that the Costa Rican liberal cut of that Constitution would not be entirely in accordance with its English precursors, but in many of its effects, in which poverty, disease and hunger were rampant among many of our fellow countrymen of that time. In response, the constitutional reform of social guarantees and the materialisation of many of the principles contained therein were introduced by way of the Labour Code of 1943.*
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> *This has the virtue of breaking into the Costa Rican context in a status quo, to remove labour relations from the field of civil and commercial law in order to humanise them. Thus, the human being's attribute of work and a dignified life is allowed to emerge to a greater extent.*
>
> *The then President of the Republic, Dr. Rafael Ángel Calderón Guardia, determined to change such pressing situations in which the State could not be on the sidelines, first achieved the key legislation on social security, by promoting the amendment to the Political Constitution of 1871, and later the approval of the Labour Code in 1943. When proposing the constitutional reform, he indicated in his message to the Constitutional Congress on 1 May 1942, that: "The law that creates the Costa Rican Social Security Fund and the obligatory nature of the insurance that protects the life of the worker constitutes the first link in a series of reforms that we consider essential to balance the fair relations between employers and employees. Taking an entirely Christian point of view, we believe that, in order to ensure the basis for the future peace of the Costa Rican people, it is necessary to include in the Constitution the principle that creates social insurance as an inalienable right of workers, administered by the Costa Rican Social Security Fund. That principle, together with that which creates the minimum wage, the maximum eight-hour workday, the right of unionisation for employers and workers, the protection of the elderly, mothers and children as a social duty of the State, and all those other measures that the Executive Power considers just to raise the spiritual, moral and physical level of the working classes, will be part of a project for a new chapter of the Constitution which will be called Social Guarantees".*

It is therefore evident that in the countries in the Latin American region, the right to strike is incorporated in the constitutional block, which enshrines its importance in collective labour law. The importance of the fact that each State, in the exercise of its sovereignty, has contemplated and regulated the right to strike through its domestic laws and constitutions is thus emphasised.

Costa Rica therefore recognises in its Political Constitution that the right to strike is an essential element of the system of protection of the right to freedom of association, and there

is nothing left to do but to give content to said right, with clarity as to its scope and limits through laws, since, as highlighted by the Constitutional Chamber itself, there is a reservation of law regarding the regulation of the right to strike.

It is important to note that both the judicial labour courts, as well as the Constitutional Chamber and the Second Chamber of the Supreme Court of Justice, support their resolutions on the guarantee of freedom of association and the protection of the right to organise in the International Conventions of the International Labour Organization (ILO) duly approved by the Legislative Assembly and applicable in our country in accordance with Article 7 of the Political Constitution.

Especially with regard to union action, the Constitutional Chamber has highlighted that it is evident that **ILO Convention 87[4] intends to define the basic rights that make up and constitute the content of freedom of association, clarifying that the exercise of these rights must be framed within the order of legality and national legislation**. Thus, it is clear that the purpose of Convention 87 is to define the basic rights of freedom of association. On the other hand, trade union action, including strike action, is framed in the Constitutions and national laws specific to each country.

This aspect is of fundamental importance, as it refers to the objective and purpose, in itself, of Convention 87, which, according to the Constitutional Chamber, is to define the basic rights that integrate and constitute the content of the freedom of association, but not to define or regulate the right to strike. Thus, following the rules of interpretation of international treaties, as defined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), it is evident that the right to strike is not only **not extracted from a literal interpretation of Convention 87**, but it is also not extracted from its objective and purpose.

Article 31 of the VCLT also requires that the treaty must be interpreted "in the light of its object and purpose". The Preamble to Convention 87 confirms that the object and purpose of the adoption of Convention 87 was to codify freedom of association in the broader context of promoting better conditions of work and peace. However, **there is no indication that the object and purpose could have been more specific and included a regulation on the right to strike**.

Additionally, the Constitutional Chamber has clarified the scope of Article 61 of the Political Constitution. In its judgment No. 1317-98 of 10:12 AM on 27 February 1998, which declared unconstitutional the restrictions to the right to strike contemplated in paragraphs a), b) and e) of numeral 376 of the Labour Code, it stated that the regulation of the right to strike is a matter reserved to the law:

> "In relation to the content of union action, **specifically with regard to the right to strike, Article 61 of the Political Constitution establishes that the regulation of the aforementioned right to collective action is a matter reserved by law**, where

[4] Approved by law number 2561 of 11 May 1960.

> any restriction of the aforementioned right must be by law and in no way may it favour acts of coercion or violence. It is also a result of the attribution conferred by means of the aforementioned constitutional numeral 61, that it is incumbent upon the legislator to define in which cases of public activity the exercise of the right to strike is restricted or excluded; a mandate that is satisfied through Article 375 (formerly 368) of the Labour Code, which must be adjusted to the criteria of reasonableness and proportionality in order to be congruent with the democratic principle on which the national legal system rests, embodied in Article 1 of the Political Constitution and which is the supreme value of the Constitutional State of Law".

In the same sentence, the Constitutional Court declined to declare the unconstitutionality of number 375 of the Labour Code, which expressly prohibits strikes in public services. However, it was clear in remarking that this norm must be interpreted in **conformity with the national Constitution**, in such a way that the prohibition does not constitute an absolute impediment, as this would be contrary to the fundamental norm.

Thus, it is evident that the Constitutional Chamber is clear in highlighting that the purpose of Convention 87 is to define the basic rights that comprise and constitute the content of freedom of association, clarifying that the exercise of these rights must be framed within the order of legality and national legislation. However, as the right to strike is not regulated in Convention 87, it has been defined and regulated in the national laws and constitutions of the countries; it is through these that the right to strike and other rights that are part of trade union action and the exercise of trade union freedoms are given definition and content. Consequently, the right to strike does not fall within the scope of Convention 87, but by the Constitution and the laws specific to each country.

III. Conclusions:

1. The right to strike is clearly established in Costa Rica by way of Article 61 of the Political Constitution.

2. The importance of the fact that Costa Rica, as in many countries in the region, has defined the right to strike in its Political Constitution is recognised.

3. The right to strike has been established in several international law instruments, such as the United Nations Covenant on Economic, Social and Cultural Rights and the Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador".

4. The ILO has considered the right to freedom of association and the right to organise as fundamental labour rights, given their relevance for the development of other labour rights. **However, it does not expressly refer to or cover the right to strike in its fundamental conventions and constitution.**

5. Unlike the right to freedom of association and the right to collective bargaining, **there is no ILO Convention that is specific to the right to strike**.

6. The Constitutional Chamber has highlighted that it is evident that **through Convention 87 of the ILO[5] what is intended is to define the basic rights that integrate and constitute the content of the freedom of association**, clarifying that the exercise of such rights must be framed within the order of legality and national legislation; an aspect that must be complemented by what is also pointed out by said court insofar as the definition of the right to strike is absent in Convention 87, notwithstanding "..."*Such absence does not imply a gap in the recognition of this obligation, to accept that, since before,* ***the Constitutions of the World could establish the fundamental right to strike and provide for its regulation"***. It is therefore clear that the right to strike is currently defined and regulated by the legal system specific to each country, or by other international instruments, as it does not emanate from Convention 87.

7. Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties ("VCLT") require that interpretations be made *"in accordance with the ordinary meaning to be given to the terms of the treaty in their context..."*. It can thus be said that the terms "strike" or "right to strike" are not mentioned at any point in C87. Nor is there any mention of any indication as to the scope and limits of the right to strike and who is competent to determine it. The right to strike cannot be seen as part of the ordinary meaning given to the literal terms of Convention 87, since this requires domestic law, whether at the constitutional or legal level, to give content to the rights that are recognised by the domestic legal system, as part of trade union action, both in its definition and in terms of its regulation. In other words, the right to strike does not emanate from Convention 87 itself, but from its precise definition and regulation established in the constitution and laws specific to each country.

8. We respectfully present this position in order to collaborate with the process of this important consultation, which will allow for a definitive international clarification of the interpretation of the right to strike. Likewise, we emphasize that the right to strike is recognized in Costa Rica, through its political constitution, national legislation and connection with international regulations.

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[5] Approved by law number 2561 of 11 May 1960.