

INTERNATIONAL COURT OF JUSTICE

REQUEST FOR ADVISORY OPINION

RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

WRITTEN STATEMENT OF ITALY

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### INTRODUCTION

On 10 November 2023, the Governing Body of the International Labour Organization (ILO), at its 349th bis (special) session, adopted a resolution on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) with respect to the right to strike. In its resolution, the Governing Body of the ILO stated that it is “[c]onscious that there is serious and persistent disagreement” among the Organization’s tripartite constituents on the interpretation of the Convention, and decided, in accordance with Article 37, paragraph 1, of the ILO Constitution, “[t]o request the International Court of Justice to render urgently an advisory opinion under Article 65, paragraph 1, of the Statute of the Court, 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)?”*

The request for an advisory opinion was transmitted to the Court by the Director-General of the ILO by letter dated 13 November 2023.

In its Order of 16 November 2023, the International Court of Justice decided that “the International Labour Organization and the States parties to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) are considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion” and fixed 16 May 2024 as the time-limit within which written statements on the questions may be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute.

The following written statement is submitted by the Government of the Italian Republic, which ratified the Freedom of Association and Protection of the Right to Organise Convention (No. 87) by Law No. 367 of 23 March 1958, by virtue of that Order.

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1. The debate on the scope of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) in relation to the right to strike dates back to 1953, when conflicting interpretations began to emerge. On the one hand, it was argued that the scope of the Convention in question also extended to the right to strike, because of its close connection with the freedom of trade union association. On the other hand, it was argued that there was no specific international ILO instrument regulating the right to strike and authorising the competent ILO Committees to verify the application by States.

2. The Government of the Italian Republic would like to recall that the ILO supervisory bodies have recognised that there is a close link between the right to strike and the freedom of trade union association and that the former must therefore be considered protected by the Convention No. 87 in the same way as the freedom of trade union association is.

3. In particular, the Committee on Freedom of Association (CFA) considered the right to strike as an inherent corollary of the right to organise, stating therefore that the prohibition on calling a strike was incompatible with the Convention<sup>1</sup>.

4. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has adopted a similar approach, recognizing in 1994 the right to strike as a 'basic right' and a 'general principle'.

5. The above mentioned Committee of Experts, in its 2012 Annual Report to the International Labour Conference, stated that the absence of an explicit provision on the right to strike in Convention No. 87 was not decisive and that, although the preparatory work is an important additional interpretative source when examining the application of a particular Convention in a specific country, other interpretative factors must also be taken into account, in particular, in the present case, the practice established over the years<sup>2</sup>.

6. In this context, the Government of the Italian Republic deems it useful to refer to the Italian domestic legislative framework and highlight how it recognizes and protects both the freedom of trade union association and the right to strike, acknowledging the close link between these principles.

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<sup>1</sup> Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 754, 757.

<sup>2</sup> International Labour Conference, 101st Session 2012, General Survey, para. 118.

7. In the Italian legal system, the right to strike is explicitly recognised in Article 40 of the Constitution: *“The right to strike shall be exercised in compliance with the law”*. The explicit recognition of the right to strike is balanced by the definition of specific ways in which it can be exercised, regulated by ordinary law. Nevertheless, the Constitutional Court on several occasions affirmed the prescriptive nature of the provision of Article 40 of the Constitution, even in the initial absence of an ordinary law on the matter<sup>3</sup>.

8. In addition, Article 39 of the Constitution explicitly recognises the freedom of trade union association. Consistent with a well-established academic and jurisprudential stance, although the two rights are enshrined in two separate constitutional provisions, the right to strike and the freedom of trade union association, according to the Constitutional Court, *“must be considered as logically linked, since they are a single expression of the democratic system established by the Constitution”*. Therefore, article 39 must be interpreted not as a mere declaration of freedom of association, but as an integral expression of trade union freedom, in particular by virtue of its *ratio legis* and its essential link with Article 40<sup>4</sup>. In other words, *“the freedom of trade union association finds its necessary corollary in the freedom of trade union action, because should the latter be denied, even the former would be reduced to a principle lacking content and meaning”*<sup>5</sup>.

9. In addition, Article 28 of Law No. 300 of 20 May 1970 on “Rules for the Protection of the Freedom and Dignity of Workers, Trade Union Freedom and Trade Union Activity in the Workplace, and Rules on Employment” expressly provides for sanctions against employers who engage in conduct aimed at preventing or restricting the exercise of trade union freedom and the right to strike. The law provides that the local representatives of the national trade unions concerned may request the competent judicial authority to order employers to cease the unlawful conduct and remove its effects. Then, if the judge ascertains the violation, within the following two days, after summoning the parties and collecting information, he or she provides with an immediately enforceable decision. Thus, the Italian legislation explicitly protects the right of workers to strike, as well as the exercise of the freedom of trade union association,

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<sup>3</sup> Constitutional Court of the Italian Republic, 4 May 1960, no. 29; Constitutional Court, 28 December 1962, no. 123.

<sup>4</sup> Constitutional Court of the Italian Republic, 4 May 1960, no. 29.

<sup>5</sup> Constitutional Court of the Italian Republic, 15 December 1967, no. 141.

which it implicitly considers to be a corollary of the right to strike, by providing a mechanism for repressing any possible anti-union behaviour by employers.

10. The national legal system recognises the right to strike as an individual right of the worker, although it is regulated by ordinary legislation in order to balance it with other public interests. In view of the broad wording of Article 40 of the Constitution, the Court of Cassation has held that the right to strike, regardless of the manner in which it is exercised and the extent of the damage caused, has no limits other than those found in the rules protecting competing subjective positions, which have priority - such as the right to life or personal security - or, at least, which are on an equal footing, such as the right to economic initiative<sup>6</sup>.

11. The Constitutional Court also declared the illegitimacy of certain criminal offences originally provided under Articles 502 et seq. of the Italian Criminal Code, which incriminated various forms of striking in relation to the objective pursued. However, it has recognized the criminal relevance of strikes having the purpose of subverting the democratic order<sup>7</sup>.

12. According to the national system, the right to strike is enjoyed not only by subordinate workers, but also, following an extensive interpretation endorsed by jurisprudence, by para-subordinate workers<sup>8</sup>, as well as small entrepreneurs who do not employ subordinate workers<sup>9</sup>.

13. The possibility of extending the constitutional protection of Article 40 of the Constitution to self-employed workers has been debated. Abstention from work for self-employed workers has not been qualified as a strike in the technical sense. However, it is considered an expression of the general freedom of association enshrined in Article 18 of the Constitution<sup>10</sup>.

14. With regards to the general framework described so far, it is also useful to recall that the Italian legislation regulates the exercise of the right to strike also in relation to essential public services. In order to balance the right to strike with other constitutional rights, Law No. 146 of 12 June 1990 provides for a number of measures aimed at guaranteeing essential services to

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<sup>6</sup> Court of Cassation of the Italian Republic, 30 January 1980, no. 711.

<sup>7</sup> Constitutional Court of the Italian Republic, 4 May 1960, no. 29; Constitutional Court of the Italian Republic, 28 December 1962, no. 123 ; Constitutional Court of the Italian Republic, 27 December 1974, no. 290; Constitutional Court of the Italian Republic, 2 February 1983, no. 165.

<sup>8</sup> Court of Cassation of the Italian Republic, 29 June 1978, no. 3278

<sup>9</sup> Constitutional Court of the Italian Republic, 17 July 1975, no. 222; Constitutional Court of the Italian Republic, 24 March 1986, no. 53.

<sup>10</sup> Constitutional Court of the Italian Republic, 27 May 1996, no. 171.

citizens, even in the event of a strike, including issuing an administrative order providing for the strike to be postponed or limited in time or manner.

15. It is worth highlighting how a similar approach has also been adopted at European level. In particular, the European Court of Human Rights included the right to strike among the possible interpretations of the right to freedom of trade union association, protected by Article 11 of the European Convention on Human Rights (ECHR), and in relation to which the strike is considered an 'inseparable corollary'<sup>11</sup>. This position, which has been consolidated over time, makes it possible to consider that the right to strike falls within the scope of the aforementioned Article 11 of the ECHR, on which the freedom of trade union association is based. The right to trade union association, indeed, has to be understood as a specific aspect of the more general freedom of association that concerns all subjects, both employers' and workers' organisations. Therefore, according to the European Court of Human Rights, the right to strike is certainly protected by Article 11 of the ECHR, as it represents an essential instrument for employers' and workers' associations to protect their own interests and those of their members<sup>12</sup>.

16. Without prejudice to the scope of the European Union's competences on this specific issue, it is useful to recall that the right to strike is expressly provided for in Article 28 of the Charter of Fundamental Rights of the European Union, in close connection with the exercise of the freedom of trade union association and, in particular, in relation to the right to collective bargaining, thus further confirming the close connection between these rights. Article 28 of the European Charter expressly states: "*Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action*".

17. Finally, Article 6 of the European Social Charter, as revised in 1996, enshrines the right to collective bargaining and recognises the right to strike as one of the collective actions that workers and employers may take in the event of a conflict of interests, further confirming the close link between these principles.

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<sup>11</sup> European Court of Human Rights, *Eneyi Yapi-Yol Sen v. Turkey*, application no. 68959/01, 21 April 2009, para. 24.

<sup>12</sup> See most recently European Court of Human Rights, Grand Chamber, *Humpert and others v. Germany*, 14 December 2023, applications no. 59433/18, 59477/18, 59481/18 and 59494/18/07, para. 98 e 104, 105.

18. To conclude, the Government of the Italian Republic considers that the aforementioned elements highlight the close link between the freedom of trade union association and the right to strike. These principles are deeply interconnected and it can be argued that such link should be recognized also in the context of the Convention No. 87. Therefore, the Government of the Italian Republic considers that there is no obstacle to recognising that the right to strike is closely linked to the principle of freedom of trade union association and therefore it is also protected, albeit indirectly, by the ILO Convention No 87/1948.