

INTERNATIONAL COURT OF JUSTICE

RIGHT TO STRIKE UNDER ILO CONVENTION No. 87

REQUEST FOR ADVISORY OPINION

**WRITTEN STATEMENT OF
THE REPUBLIC OF COLOMBIA**

16 May 2024

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GENERAL INTRODUCTION

The Republic of Colombia (**‘Colombia’**) submits this Written Statement in accordance with the Court’s Order of 16 November 2023 within the time-limit fixed therein, and following the letter of notice of the request transmitted by the Registrar on 14 November 2023, so as to furnish information on the question submitted to the Court by the Governing Body of the International Labour Organization (ILO), under cover of a letter from the Director-General of the ILO dated 13 November 2023 and to assist the Court.

In a resolution adopted by the Governing Body of the ILO on 10 November 2023, at its 349th bis (special) Session, under Article 37, paragraph 1, of the Constitution of the ILO and Article IX, paragraph 2, of the Agreement between that Organization and the United Nations, it decided, pursuant to Article 65 of the Statute of the Court, and under Article 103 of the Rules of 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)?”

The Written Statement is divided into five chapters. Chapter 1 serves as an introduction, highlighting the issues raised in the ILO Governing Body’s Request for Advisory Opinion, advocating the importance of an opinion in answer to this request to be furnished by the Court, as well as stating Colombia’s view on the jurisdiction of the Court to render the Advisory Opinion requested of it. Chapter 2 provides a factual background on the disagreement among ILO’s tripartite constituency with regard to whether the right to strike is protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (‘ILO Convention No. 87’). Chapter 3 delves into the subject matter being discussed, addressing among other, the interpretation of ILO Convention No. 87, recalling that freedom of association is a foundational principle of ILO and reviewing why the right to strike must be understood as a corollary to that fundamental right, and how it has been recognized by States, and understood as such in general international law and in the universal and regional human rights systems.

Chapter 4 illustrates Colombia's constitutional recognition and protection of the right to strike. Lastly, Chapter 5 offers concluding remarks.

RIGHT TO STRIKE UNDER ILO CONVENTION No. 87
REQUEST FOR ADVISORY OPINION

WRITTEN STATEMENT OF THE REPUBLIC OF COLOMBIA

CHAPTER 1

INTRODUCTION

1.1. The present Request for an Advisory Opinion rests on the longstanding disagreement among ILO's tripartite constituency concerning whether the right to strike is protected under ILO Convention No. 87. The very decision to submit the question now before the Court was the result of protracted discussions at ILO over the last three decades.

1.2. Colombia's legal position on the question has long been clear. For the Government of Colombia, the right to strike is intrinsic to the rights of freedom of association and collective bargaining. Moreover, given that the right to negotiate and unionize cannot be separated from the exercise of the strike, rights also stemming from the right to free association, as such, it is understood to be protected under ILO Convention No. 87.

1.3. The right to strike in Colombia enjoys constitutional protection, as it is guaranteed in Article 56 of our Political Constitution. Nevertheless, its regulation has not been exhaustively defined by the legislator, and thus, various aspects of strike management have been guided by recommendations from ILO supervisory bodies, by specific reference to Convention 87. It is in this framework that governments, such as Colombia's, would greatly benefit from legal certainty regarding all obligations emanating from ILO Convention No. 87.

1.4. The exercise of the strike as a mechanism for vindicating workers' rights is strongly linked to the history of the trade union movement since its origins in Europe and it can be said that the strike is an inherent part of the actions that have historically been undertaken by workers and workers' organizations to express their dissatisfaction

with working conditions and to convey their legitimate interests and expectations to employers.

1.5. Even though strikes may be disruptive to greater or lesser extents, in democratic societies, legislation and courts recognise and defend their link to the exercise of other rights and, indeed, as a means of asserting those rights, regulated in the legislation of each country. The strike is a last resort, but it is an empowering right when no other options remain.

1.6. Accordingly, Colombia believes that if the Court should decide to answer the question put before it, the resultant Advisory Opinion would be of the utmost importance to guide the ILO, governments, employers and workers alike. That is why Colombia supported the workers' group request and formally requested that the long-standing dispute regarding the interpretation of ILO Convention No. 87, in relation to the right to strike, be urgently referred to the International Court of Justice for resolution, in accordance with Article 37, paragraph 1, of the ILO Constitution.¹

1.7. Colombia underscores the far-reaching implications of the Court's opinion, which is poised to provide essential guidance on what it contends is a fundamental right of workers that should be respected by employers and guaranteed by States.

A. The Issues Raised by the Request

1.8. For over seventy years, the Committee of Experts on the Application of Conventions and Recommendations, composed of independent legal experts responsible for examining the application of ILO Conventions and Recommendations by ILO member States, has considered the right to strike as a corollary to the right to freedom of association, recognized and protected by the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

1.9. Around 1989, the Employers' Group began to question the interpretation of Convention No. 87 by the Committee of Experts and challenged the authority of the committee to interpret conventions. The dispute gradually intensified and, in 2012, led to

¹ ILO Governing Body Dossier to the ICJ ('Dossier'), Introductory Note, para. 2.

a major institutional crisis as the Conference Committee on the Application of Standards was not allowed to exercise its examining functions for the first time. There is a widespread feeling that the persistent disagreement on such important aspects of the normative mandate of the ILO negatively affects the credibility of the supervisory system and the reputation of the ILO as a normative organization.

1.10. In accordance with applicable provisions, a legal issue within the scope of the ILO's activities, such as the interpretation of an international labour convention, can be referred by the International Labour Conference or the Governing Body, expressly authorized by the Conference for this purpose, to the International Court of Justice for an advisory opinion.

1.11. The dispute between the ILO Employers' and Workers' groups, which began over thirty years ago, is related to the interpretation of Articles 3 and 10 of Convention No. 87.

1.12. The Workers' Group agrees that the rules of interpretation established in the Vienna Convention represent customary international law and, therefore, apply to Convention No. 87. Consequently, the Workers' Group contends that the terms of Convention No. 87 guaranteeing the right to organise must be interpreted in the context of the relevant provisions of the Preamble of the ILO Constitution and of the Declaration of Philadelphia, taking into account any subsequent practice that establishes general agreement on their interpretation, such as the consistent case law of the bodies responsible for overseeing the application of the Convention. Additionally, the Workers' Group argues that it is not necessary to have recourse to the preparatory works since the conditions of the Vienna Convention are not met; that is, the interpretation suggested in accordance with Article 31 does not lead to an ambiguous or obscure meaning that is manifestly absurd or unreasonable.

B. The Court has Jurisdiction to give the Advisory Opinion

1.13. The first task put before the Court in the present proceedings is to consider whether it has jurisdiction to render a response to the question requested by the ILO Governing Body and whether, after ascertaining that it can answer the question, there is any reason to decline to exercise its jurisdiction.

1.14. In accordance with Article 65, paragraph 1, of the Statute of the Court,

“The 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.”

1.15. Under this provision, two requirements must be met for the Court to have jurisdiction to give an advisory opinion: (i) it is necessary that the body requesting the opinion be “authorized by” or in accordance with the UN Charter to make such a request. (ii) The question put before the Court must be of a legal nature.

1.16. Furthermore, in accordance with Article 96, paragraph 2, of the UN Charter, a third requirement is added in the case of other organs of the United Nations and specialized agencies requesting advisory opinions, i.e., (iii) that the legal question arises within the scope of their activities.

“Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

1.17. As to the first requirement, the ILO became the first specialized agency of the then newly formed United Nations system in 1946. Pursuant to Article IX, paragraph 2 of the Agreement between the United Nations and ILO, it is authorized to ask the Court for an Advisory Opinion:

“Article IX

Relations with the International Court of Justice

(...)

2. The General Assembly authorizes the International Labour Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies.”²

² Agreement Between the United Nations and the International Labour Organization, No. 9 184 UNTS 1946-1947, Article IX.

1.18. The specific circumstances in which the ILO may avail itself of the Court's advisory jurisdiction are specified in the Constitution of the ILO, 9 October 1946, Article 37 of which provides as follows:

“Article 37

Interpretation of the Constitution and the conventions

1. Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Member in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

2. Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference.”³

1.19. Article IX, paragraph 3 of the Agreement between the United Nations and ILO, stipulates that the request for an advisory opinion “may be addressed to the Court by the Conference, or by the Governing Body acting in pursuance of an authorization by the Conference.”⁴

1.20. Consequently, the International Labour Conference while preserving its capacity to request advisory opinions of the ICJ, deemed “desirable” at its 32nd Session (1949) to grant through a resolution, a *standing authorization* to the Governing Body to do the same.⁵

³ ILO Constitution, Article 37. The original text of the Constitution, established in 1919, has been modified by the amendment of 1922 which entered into force on 4 June 1934; and five subsequent instruments of amendment: in 1945, 1946, 1953, 1962, 1972 and 1997, which entered into force, respectively, in September 1946, April 1948, May 1954, May 1963, November 1974; and October 2015.

⁴ Agreement Between the United Nations and the International Labour Organization, No. 9 184 UNTS 1946-1947, Article IX, para. 3.

⁵ ILC, 32nd Session, 1949, Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions.

1.21. On the basis of these provisions and in order to resolve the disagreements between the Employers' group and the Workers' group concerning the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in particular articles 3 and 10 thereof, the ILO Governing Body requested the International Court of Justice to issue an Advisory Opinion on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), as a matter of urgency.

1.22. Indeed, on 10 November 2023 at its 349th *bis* (special) Session, the Governing Body of the International Labour Organization (ILO) adopted by 33 votes in favour, 21 against and 2 abstentions,⁶ i.e., with the required majority, a resolution whereby, in accordance with Article 37, paragraph 1, of the Constitution of the ILO and Article IX, paragraph 2, of the Agreement between the United Nations and ILO, it decided to request the International Court of Justice to render an advisory opinion, pursuant to Article 65 of the Statute of the Court. As stated, the referral request came from the Workers' group and 36 governments.

1.23. The second requirement, i.e., that the question put before the Court be a legal one, is also complied with in the present case. In the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, the Court clarified that a question is a legal one when "the Court is asked to rule on the compatibility of the [request] with the relevant principles and rules of international law"⁷. In other words, questions "framed in terms of law and raising problems of international law"⁸, whereby the Court is asked to identify and apply principles and rules of international law, are "by their very nature susceptible of a reply based on law"⁹ and therefore qualify as questions of legal character.

1.24. Colombia considers that the question put to the Court by the Governing Body of the ILO is of a legal nature since the Court is asked to determine whether the right to strike of workers and their organizations is protected under ILO Convention No. 87. In order to provide an answer, the Court needs to conduct a thorough analysis of the legal perspectives presented by the International Labour Organization, the countries that

⁶ Dossier, Introductory Note, para. 9.

⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 234, para. 13.

⁸ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15.

⁹ *Ibid.*

have signed ILO Convention No.87, and the organizations that were invited by the Court to contribute to the issue by providing written submissions and information.¹⁰ The Court should apply the existing principles and rules that govern the interpretation of treaties, in a manner that is consistent with the development and international recognition of human rights, including the rights of workers.

1.25. Like other legal questions put before the Court, this question, and the request itself, may have political aspects, some of them of a controversial character, in particular, for States that have either failed to recognize the right to strike as such, have placed such limitations thereto as to make it impracticable, or have failed to put adequate legal protections in place to guarantee its exercise. Whatever the nature of the issues at stake, Colombia is of the view that these aspects should not discharge the Court of its task to determine this question. As the Court noted in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* advisory opinion:

“Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate.”¹¹

1.26. With regard to the third requirement, i.e., that the legal question on which the Court’s advisory opinion is sought question arises within the scope of ILO’s activities, it is clear that the question as to whether the right to strike is protected under ILO Convention No. 87 falls squarely within the scope of that Organization’s activities by the very subject-matter it concerns, namely the interpretation of a convention adopted at the Organization itself. The sheer volume of detailed records contained in the Dossier furnished to the Court by ILO highlights without ambiguity the subject-matter of the question.

1.27. Moreover, this is clearly a question the determination of which is acutely relevant to the Organization’s very functioning, as the disagreement between its tripartite constituency has persisted for decades now, and risks undermining the respective

¹¹ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 87, para. 33.

authorities and body of work on the matter of the relevant ILO organs. The Court held in the *Western Sahara* advisory opinion, that its function is

“[t]o give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object of purpose.”¹²

1.28. The Court's advisory opinion on the right to strike under ILO Convention No. 87 will not only provide guidance for ILO's tripartite constituency but also ensure the preservation of functional dynamics within the organization's organs and committees to effectively discharge their respective mandates.

1.29. Therefore, in the opinion of Colombia, the Court has jurisdiction and should not refrain from responding to the question submitted to it by the Governing Body of ILO.

¹² *Western Sahara, Advisory Opinion of 16 Oct. 1975, I.C.J. Reports 1975*, p. 25, para. 32.

CHAPTER 2 - FACTUAL BACKGROUND

DISAGREEMENT AMONG ILO'S TRIPARTITE CONSTITUENCY CONCERNING WHETHER THE RIGHT TO STRIKE IS PROTECTED UNDER CONVENTION No. 87

2.1. Although the recognition and understanding of the right to strike as a core element of the principle of freedom of association has been discussed on various occasions at the International Labour Conference (ILC)¹³ as well as in the Governing Body and the International Labour Office, the right to strike is not *directly* governed by International Labour standards embodied in ILO Conventions and Recommendations. Notwithstanding, Colombia submits, the absence of *explicit* ILO standards has not led the Organization to disregard the right to strike or abstain from providing a protective framework within which it may be exercised based on Convention No. 87.

2.2. There is, indeed, a coherent corpus of rules on the right to strike as an essential component of the principle of freedom of association developed over many decades by the interpretative work of the tripartite Committee of Freedom of Association (CFA) and the independent Committee of Experts for the Application of Conventions and Recommendations (CEACR) as ILO means of supervision for the application of Conventions and Recommendations.

A. The Committee on Freedom of Association (CFA)

2.3. Despite the absence of an explicit provision in Convention No. 87, the Committee on Freedom of Association (CFA) was the first supervisory body that recognized, in 1952, the right to strike as a trade union right when examining Case No. 28. The CFA stated that:

“[t]he right to strike and that of organising union meetings are essential elements of trade union rights, and measures taken by the authorities to

¹³ The ILC has made clear in various resolutions adopted since the 1950s that it considers the right to strike as an essential element of freedom of association.

ensure the observance of the law should not, therefore, result in preventing unions from organising meetings during labour disputes”¹⁴

2.4. The CFA has elaborated a very concrete and detailed body of decisions on the right to strike to ensure that legislation and practices reviewed in relation to the scope and the conditions of exercising that right comply with the principles of freedom of association and collective bargaining. This CFA case law, in the broadest sense of the term, has been well publicized in the *Compilation of Decisions of the Committee on Freedom of Association*¹⁵ and the *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*.¹⁶

2.5. As it will be further developed in Chapter 3, along with the consistent body of decisions in over 70 years related to ILO Convention No. 87, the CFA has affirmed, e.g., that “[t]he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87” and that “[t]he prohibition on the calling of strikes by federations and confederations is not compatible with Convention No. 87”.¹⁷ The CFA has also taken the view that “[p]rotests are protected by the principles of freedom of association only when such activities are organized by trade union organizations or can be considered as legitimate trade union activities as covered by Article 3 of Convention No. 87”.¹⁸ Furthermore, the Committee has stated that “[w]hile [it] has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, it has regarded it as such only in so far as it is utilized as a means of defending their economic interests”.¹⁹

¹⁴ Committee of Freedom of Association [CFA], (United Kingdom), July 1, 1951, Case No. 28 (UK–Jamaica), Rep. No. 2 (1952), para. 68. The CFA held that “the right to strike and that of organizing union meetings are essential elements of trade union rights.”

¹⁵ *Compilation of Decisions of the Committee on Freedom of Association* (‘*Compilation of Decisions*’), (6th ed., ILO 2018).

¹⁶ *Cf. Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, (5th rev. ed., 2006), paras. 520-676.

¹⁷ *Compilation of Decisions of the Committee on Freedom of Association* (6th ed., ILO 2018), paras. 754, 757.

¹⁸ *Compilation of Decisions*, paras. 204, 210.

¹⁹ *Compilation of Decisions*, para. 204.

B. The Committee of Experts for the Application of Conventions and Recommendations (CEACR)

2.6. Over the years, “the Committee of Experts has sought to deliver a rigorous, consistent and impartial assessment of compliance with ratified Conventions”²⁰. Accordingly, as illustrated in the following paragraphs, the CEACR has constantly issued clear guidance to governments regarding Convention No. 87, including those aspects related to the right to strike.

2.7. In complying with its mandate, the CEACR has reflected the relevant pronouncements of the Committee on Freedom of Association, while recognizing the right to strike as a core element of the right of freedom of association under Article 3 of Convention No. 87²¹. Already in 1959, seven years after case No. 28 of the CFA, the CEACR observed, that:

[T]he prohibition of strikes by workers other than public officials acting in the name of the public powers ... may run counter to Article 8, paragraph 2, of [Convention No. 87], according to which “the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for” in the Convention, and especially the freedom of action of trade union organizations in defense of their occupational interests.

2.8. Construing again in 1973 on the views of the CFA, the CEACR stated that “the conditions which have to be fulfilled, under the law, in order to render a strike lawful, should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organisations”.²²

2.9. In 1983, the CEACR stated further that “the right to strike is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests”.²³ It reiterated the position it had expressed in 1973 with respect to the right to strike and Articles 3 and 10 of the

²⁰ ILO, Monitoring compliance with international labour standards: The key role of the ILO CEACR ILO p. 21

²¹ ILC, 43rd Session, 1959, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part IV), pp. 101–29, para. 68.

²² ILC, 58th Session, 1973, General Survey, para. 108.

²³ ILC, 69th Session, 1983, Freedom of Association and Collective Bargaining: General Survey, Report III (Part 4 B), paras. 200–201.

Convention, and stressed that “[a] general ban on strikes ... is ... not compatible with the principles of freedom of association”.²⁴

2.10. In 1994, the CEACR described the right to strike as a “basic right” and as a “general principle”.²⁵ It noted that “[a]lthough the right to strike is not explicitly stated in the ILO Constitution or in the Declaration of Philadelphia, nor specifically recognized in Conventions Nos. 87 and 98, it seemed to have been taken for granted in the report prepared for the first discussion of Convention No. 87” but that, “during discussions at the Conference in 1947 and 1948, no amendment expressly establishing or denying the right to strike was adopted or even submitted”.²⁶ According to the Committee of Experts, “[i]n the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject”.²⁷

2.11. The CEACR explained also that the position it had expressed since 1959 was “based on the recognized right of workers’ and employers’ organizations to organize their activities and to formulate their programmes for the purposes of furthering and defending the interests of their members (Articles 3, 8 and 10 of Convention No. 87)”.²⁸ In particular, from a combined reading of Articles 3 and 10 of the Convention, the Committee concluded that strike action is included within the concepts of “activities” and “programmes” of organizations pursuant to Article 3.²⁹ As such, the Committee “confirm[ed] its basic position that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87”.³⁰

2.12. In 2012, the CEACR noted that, “[i]n the absence of an express provision in Convention No. 87”, both it and the Committee on Freedom of Association had, for

²⁴ ILC, 69th Session, 1983, General Survey, para. 205. The Committee of Experts continued also to develop its views on conditions for the prohibition or limitation of the right to strike. paras. 204–226.

²⁵ ILC, 81st Session, 1994, Freedom of Association and Collective Bargaining: General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949, Report III (Part 4B), paras. 137, 159.

²⁶ ILC, 81st Session, 1994, General Survey, para. 142.

²⁷ ILC, 81st Session, 1994, General Survey, para. 145.

²⁸ ILC, 81st Session, 1994, General Survey, para. 147.

²⁹ ILC, 81st Session, 1994, General Survey, paras. 148–149.

³⁰ ILC, 81st Session, 1994, General Survey, para. 151.

decades, progressively developed “a number of principles relating to the right to strike” on the basis of Articles 3 and 10 of that Convention.³¹

2.13. In response to the views expressed by the Employers’ group in the Committee on the Application of Standards at the 99th Session (2010) of the Conference, the Committee asserted that “the absence of a concrete provision [on the right to strike in Convention No. 87] is not dispositive” and that while “the preparatory work is an important supplementary interpretative source when reviewing the application of a particular Convention in a given country, it may yield to the other interpretative factors, in particular, in this specific case, to the subsequent practice over a period of 52 years (see Articles 31 and 32 of the Vienna Convention on the Law of Treaties)”.³²

2.14. Accordingly, the Committee “reaffirm[ed] that the right to strike derives from [Convention No. 87]”³³ and went on to specify “a series of elements concerning the peaceful exercise of the right to strike, its objectives and the conditions for its legitimate exercise”. In the same General Survey, the Committee reiterated that its position on the right to strike “lies within the broader framework of the recognition of this right at the international level”, citing provisions of the International Covenant on Economic, Social and Cultural Rights; the Charter of the Organization of American States; the Charter of Fundamental Rights of the European Union; the Inter-American Charter of Social Guarantees; the European Social Charter; the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights; and the Arab Charter on Human Rights.³⁴

2.15. In addition, it noted that other international labour standards – such as the Abolition of Forced Labour Convention, 1957 (No. 105), and the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92) – and resolutions adopted in different contexts at the ILO also made express reference to the right to strike.³⁵

2.16. Colombia shares the CEACR’s assessment contained in its 2013 report to the effect that in undertaking its mandate it must, of necessity, interpret the Conventions

³¹ ILC, 101st Session, 2012, Report III (Part 1B), para. 117.

³² ILC, 101st Session, 2012, General Survey, para. 118.

³³ ILC, 101st Session, 2012, General Survey, para. 119.

³⁴ ILC, 101st Session, 2012, General Survey, para. 120.

³⁵ ILC, 101st Session, 2012, General Survey, para. 121.

and Recommendations taking into account “three elements of particular relevance: (i) its status as an impartial, objective and independent body, with members appointed by the tripartite Governing Body in their personal capacity precisely because of that impartial and independent status; (ii) while its terms of reference did not authorize it to give monitoring compliance with international labour standards definitive interpretations of conventions, in order to carry out its mandate of evaluating and assessing the application and implementation of Conventions, it had to consider and express its views on the legal scope and meaning of the provisions of these Conventions; and (iii) that, from at least the 1950s, it had expressed its views on the meaning of ILO instruments in terms that inevitably reflected an interpretative vocabulary”.³⁶

2.17. In fulfilling this task, it is the responsibility of the CEACR and the CFA to make the principle of freedom of association, guaranteed by the ILO Conventions and Recommendations on freedom of speech, specific and concrete.³⁷

2.18. Thus, over the past six decades, the CEACR has made numerous country-specific comments on the right to strike in the context of regular supervision and the examination of reports submitted under Article 22 of the Constitution. Indeed, as part of its monitoring of the application of Convention No. 87 in 2022-2023, the CEACR addressed 75 observations to Member States concerning the exercise of the right to strike.³⁸ It is to be noted that out of the five geographical regions represented at ILO, the Latin American region regrettably accounts for 50% of the complaints lodged with the CFA. According to the Committee’s reports, out of a total of 3,437 complaints submitted to the Committee between 1951 and 2022, 1,729 have been against Member States belonging to the Latin American region³⁹.

2.19. Colombia would like to bring to the Court's attention that the Committee on Freedom of Association's mandate has never been challenged by any member. Furthermore, as previously mentioned, the Committee provides a platform for the

³⁶ ILO, CEACR General Report, Report III (Part A), International Labour Conference, 108th Session, 2019, paras. 26–35.

³⁷ The protection of the right to strike in the ILO: some introductory remarks por Achim Seifert, p. 2.

³⁸ ILC, 110th Session, 2022, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part A), pp. 97–318, and ILC, 111st Session, 2023, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part A), pp. 101–342.

³⁹ ILO, Presentation of the Annual Report for the period 2022 of the Committee on Freedom of Association. Governing Council 347th Session, Geneva, 13-23 March 2023, p. 7.

tripartite review of complaints related to the right to strike, which is safeguarded by the principles outlined in Convention No. 87.

2.20. As a consequence of this longstanding tradition and within the framework of the ILO Constitution⁴⁰, both the CFA and the CEACR have developed a significant body of decisions on the interpretation of conventions the thoroughness and consistency of which have solidified their authoritative character. The gravitas of this consistent interpretative work is also buttressed by the wide recognition of the qualifications of the twenty members of the CEACR possess and the high regard in which their expertise is held.⁴¹ The rules for the composition and appointment of these experts are intended to ensure their objectivity and their independence.⁴²

2.21. It has been convincingly argued that this is one of the reasons why the ILO had never hitherto resorted to Article 37(1) of its Constitution for the interpretation of a convention which provides for “the institution of a tribunal for the prompt settlement of any question or problem” and, in the absence of implementation of these provisions, the procedure for interpretation entrusted to the Court in order to receive a binding response to the question of whether Convention No. 87 guarantees a right to strike.⁴³

2.22. For a long time, the CEACR and the CFA were considered by ILO constituents and stakeholders as possessing the necessary independence and objectivity to provide an authoritative interpretation of conventions.

2.23. Considering the aforementioned, it is crucial for all governments of the Member States, especially for the Latin American region and Colombia, to ensure legal

⁴⁰ In its 2013 report, the Committee further recalled that it directed its non-binding opinions and conclusions to governments, social partners, and the CAS pursuant to its well-established role in the ILO supervisory structure. While aware that its guidance was taken seriously in certain specific settings, both by domestic courts and international tribunals, the Committee considered that this reflected respect for its independent and impartial nature and for the persuasive value of its non-binding analyses and conclusions. The Committee recalled that those analyses or conclusions could only become authoritative in any “binding” sense if the international tribunal, or instrument, or the domestic court independently established them as such.

⁴¹ Tonia Novitz. *Tripartism as Sustainable Governance* Tonia Novitz at ILO 100 Law for Social Justice. International Labour Office Geneva 2019.

⁴² They are appointed by the Conference from a list drawn up by the Director-General. They must be personalities with recognized legal competences: in practice judges or academics.

⁴³ In 1992, the Worker member of Finland in the CAS stated that “until recently the established interpretations made by the Committee of Experts have been considered binding by member States until the International Court makes a final decision” (ILC, Record of Proceedings, 1992, p. 27/5, para. 13).

certainty. This means having well-defined interpretations of international labour standards.

CHAPTER 3

THE INTERPRETATION OF ILO CONVENTION No. 87

A. **The right to strike as an indispensable and essential corollary to the right of freedom of association – unionizing**

(1) STATUS UNDER THE ILO REGULATIONS

(i) General overview

3.1. Different viewpoints on the matter at hand have been identified among relevant bodies and entities both within the ILO, as well as in their interpretation and application by domestic courts in different jurisdictions.

3.2. As explained in the previous chapter, there is an established case-law from the ILO regarding the right to strike, which has been shaped by the deliberations of two key supervisory committees: i) the independent Committee of Experts (CEACR), and ii) the tripartite Committee on Freedom of Association (CFA).

3.3. In this sense, the ILO has constantly considered that there is a direct and necessary link between the right to strike and the right to freedom of association (FOA).

3.4. Various instruments are relevant in terms of the acknowledgment of the right to strike in the framework of the ILO. Principally, Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize plays a crucial role in enabling the exercise of this right. Article 3(1) of the Convention provides that “organizations of workers and employers have the right to adopt their own statutes and rules, complete freedom to choose their representatives, to organize their administration and activities and to shape their programs”⁴⁴. It has long been understood, primarily resulting from the consistent efforts of two of ILO’s supervisory bodies the CFA and the CEACR – that the provision concerning workers’ organizations (unions), entails their right, among other prerogatives, to undertake activities such as strikes and other forms of pressure, including demonstrations and blockades.

⁴⁴ Convention No. 87 of the ILO, Article 3,1.

3.5. Additionally, Convention No. 98 of the International Labour Organization (ILO) indirectly addresses the right to strike. It emphasizes that “workers should use adequate protection (strike as a method of protection) against all acts of discrimination in employment, which could be detrimental to union freedom”⁴⁵. This is particularly relevant if a worker faces dismissal due to their union membership or participation in union activities outside of working hours.⁴⁶

3.6. Moreover, strike action is explicitly referenced in ILO Recommendation No. 92 on voluntary conciliation and arbitration. It suggests that if all parties involved in a voluntary agreement include a conciliation procedure, they should be encouraged to abstain from strikes and lockouts during this process.⁴⁷ The term “lockout” refers to the right of employers to temporarily close their businesses as a response to worker strikes, aiming to compel them to accept the employers’ conditions. By implication, it is thus acknowledging that unions have the right to strike, and it is only with a view to facilitating the success of a conciliation procedure voluntarily agreed to by them, that the recommendation to abstain from conducting a strike during such process is made.

3.7. In addition to the thorough examination of the right to strike conducted by supervisory bodies, the right to engage in industrial action has also been addressed by the International Labour Organization Conference, which is the representative body authorized to define the content of ILO policies and standards. On at least two occasions, the ILO Conference, in a resolution adopted in 1957 (“Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation”), and in a similar resolution in 1970 (“Resolution concerning Trade Union Rights and Their Relation to Civil Liberties”), called upon its members to support and endorse laws safeguarding the rights of trade unions, specifically including the right to strike. While these resolutions do not represent a comprehensive treatment of the right to strike, which would have provided greater clarity on the matter, they do reinforce the notion that this right has been acknowledged by ILO constituents over the years, demonstrating a forceful consensus.

⁴⁵ See Article 1, paragraph 1 of the Convention No. 98 of the ILO, 1949.

⁴⁶ Article 1, paragraph 2.

⁴⁷ Article 1, paragraph 4 of the ILO Recommendation No. 92.

3.8. Despite assertions made by employers in recent years, both the ILO supervisory bodies and the ILO Conference have operated for many years under the understanding that Convention No. 87 and the principles of Freedom of Association encompass a fundamental right to strike. The Committee of Experts has not acted independently; rather, it has fulfilled its intended role as defined by the ILO constituents.

(ii) The right to strike under Convention No. 87

3.9. The history, development, context and content of the 1948 ILO Convention No. 87, which recognizes the right to freedom of association, is of great significance. This right has been widely recognized by all member parties to the Organization.

3.10. As background, it is important to recall that the 1944 Declaration of Philadelphia (the purpose of which was to elucidate the aims and objectives of the ILO), in its Article I, literal b), clearly stated that one of the fundamental principles of the International Labour Organization is to recognize freedom of expression and association as essential rights for the constant progress of nations.

3.11. Likewise, within the framework of the International Labour Conference held in 1947, its participants unanimously agreed to develop a broad axiological framework aimed at consolidating an instrument based on the development of the right to freedom of association, as evidenced in Annex 15f of the Fifth Session of the United Nations Economic and Social Council - an organ that, moreover, promoted discussion this very topic within the ILO in 1947.⁴⁸

3.12. It is worth noting that in Annex X of the thirtieth session of the International Labour Conference of 1947⁴⁹, participants declared it “desirable” to adopt international regulations aimed at the protection of the right of freedom of association and collective bargaining, determining the scope of the right to trade union freedom, as well as the consolidating mechanisms conducive to reaching collective agreements.

⁴⁸ Economic and Social Council, 5th Session, 1947, Official Records, Annex 15f, Trade union rights (freedom of association), Decisions adopted unanimously by the International Labour Conference in July 1947.

⁴⁹ ILC, 30th Session, 1947, Record of Proceedings, Appendix X, Freedom of Association and Industrial Relations, pp. 561–578.

3.13. Similarly, in the same session, both workers' delegates and representatives of several participating States – including Colombia – advocated for the right of freedom of association to be subject to an international regulatory framework, which would be accomplished shortly thereafter through the adoption of ILO Convention No. 87 in 1948.

3.14. Thus, the corresponding resolution adopted within the framework of the 1947 Conference⁵⁰ came to reaffirm without a shadow of a doubt the intention, expressed by the international community, for the discussion and regulation of the freedom of association to be addressed through international law.

3.15. Soon after ILC's 30th session in 1947, ILO Convention No. 87 was drafted. Its core guidelines, among other prerogatives, included in the convention, were as follows: the recognition of the rights of trade unions in light of the right of freedom of association; the autonomy of union members to draft their own rules and procedures; restriction to these organizations' dissolution by administrative decisions; the possibility for organizations to be part of confederations as well as international trade unions.

3.16. The relevant provisions are set out as follows. First, Article 2 of ILO Convention No. 87 provides that:

“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

3.17. Article 3 also recognizes that:

“Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.”

3.18. For its part, Article 10 establishes that:

“In this Convention the term *organisation* means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.”

⁵⁰ *Ibid.*, ILC, 30th Session, 1947, Appendix X.

3.19. Furthermore, Article 11 clearly states that:

“Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.”

3.20. From the cited articles of ILO Convention No. 87, the following inferences can be drawn: on the one hand, the right of freedom of association - materialized in the formation of organizations, to be understood broadly and generally according to the convention - is recognized and accepted by the International Labour Organization. Thus, it is enshrined in a conventional norm of international law binding on all signatory parties. On the other hand, it is understood that the purpose of such organizations is, particularly in the case of workers' organizations as concerns the subject-matter of these proceedings, to ensure the defense of the interests of workers. Consequently, freedom of association is not limited to the formation of organizations but to guaranteeing the exercise of the activities that they may carry out in defense of the interests of their members.

3.21. This latter conclusion should be read in harmony with the interpretation of the Convention undertaken by the various supervisory bodies within the ILO, as recounted in Chapter 2 above.

3.22. As previously recalled, the ILO is the only organization of the UN system that has a tripartite character, which means that decisions are taken with the participation of workers, employers and governments. By agreeing to become part of the ILO, States commit themselves to fulfilling their mandate and implementing its standards not only through national legislation, but also through the practice of their institutions. While the ILO's supervisory bodies do not have the status of judicial bodies, their recommendations are of great value to all parties and carry a moral enforceability. This entails that, when ratifying a convention, each State must ensure that its domestic legislation is in accordance with the provisions of the respective convention. In many cases, as a result of the recommendations made by ILO's supervisory bodies, States adjust their legislation to be in conformity with the standards of the convention.

3.23. In 1957, during the fortieth session of the International Labour Conference, the report of the CEACR on the application of the ILO Convention No. 87 was reviewed, and it was expressly stated that the intention of said instrument was to guarantee workers

and employers, without any distinction, the freedom to determine all activities aimed at exercising their right of freedom of association⁵¹. In fact, the group of experts assessed that the effective materialization of this right imposed the obligation upon the States, on the basis of Article 11 of the aforementioned Convention 87, to adopt all necessary measures to guarantee the prerogative enshrined therein.

3.24. That said, there is no doubt that although the right to strike is not explicitly mentioned in ILO Convention No. 87, the analysis of that instrument's effective implementation - carried out by the CEACR whose mandate is provided for in the ILO Constitution - contains an assessment of the freedom that governments grant and guarantee to trade unions to engage in strikes. These questions, as assessed by the CEACR in relation to many member States have, moreover, been received, accepted, and integrated by a large number of States without objection.

3.25. As an example of the above, the CEACR, when evaluating the Colombian case, considered views that it had already incorporated in its 1985 report in relation to the implementation of ILO Convention No. 87 in the German Democratic Republic within the framework of the 71st Session of the International Labour Conference. On that occasion, the Committee had considered that,

“The Committee takes note of the Government's point of view, in particular of the statement that no provision of the Convention expressly mentions the right to strike, but is bound to point out that it has stressed in paragraphs 199 to 206 of the General Survey that under Article 3 of the Convention workers' organizations should have a number of means of furthering and defending their economic and social interests and that the right to strike is an essential one of these means”⁵².

3.26. As early as 1974, during the 59th session of the International Labour Conference, the CEACR had warned the government of Guatemala that limiting the right to strike could constitute a serious restriction on the freedom of association and that its restriction would only be acceptable in relation to the provision of essential services that could be put at risk.

⁵¹ Cf. International Labour Conference, 40th Session, 1957, Report III (Part IV), p. 737, para. 8.

⁵² Cf. ILO, Report III (Part. 4A), 1985, 71st International Labour Conference, p. 337.

3.27. A similar conclusion was adopted in the report presented at the 67th session in 1981 when the case of the Dominican Republic was analysed. It was decided that in situations involving essential public services, the right to strike may be limited if necessary. This interpretation framework allows for a stringent restriction of this prerogative, only in cases where it is considered a legitimate need.

3.28. The analysis report presented at the same 1981 session was even more insightful when it established that the absolute prohibition imposed by the State of Liberia on the right to protest could signify a limitation “not compatible” with the principle - and right - to freedom of association. The same warning was issued in the case of the Philippines presented during the 67th session.

3.29. As far back as 1985, during the 71st session, the CEACR pointed out that not only was the freedom of association undermined by abolishing the right to strike, but also when overly strict conditions were imposed for its exercise. In studying the Polish case, the Committee established the following:

“The Committee takes note of these statements but is bound to point out that the imposition of conditions for the calling of strikes that are too severe may seriously jeopardise the possibility open to workers of organising such movements and that the prohibition of strikes should be confined to essential services in the strict sense of the term, that is to say those whose interruption would endanger the life, personal safety or health of the whole or part of the population. It also points out, as it has already done in its General Survey of 1983, that trade union organisations should have the possibility of resorting to protest strikes, including those called to criticise the economic and social policy of governments. In the opinion of the Committee, the above-mentioned provisions thus constitute obstacles to the right of trade unions to organise their activities (Article 3) with a view to furthering and defending the interests of their members (Article 10)”⁵³.

3.30. An identical position was expressed during the study of the case of Uruguay in the same session of 1985, where it was cautioned that one of the ways for freedom of association to be affected was to establish obstacles and limits to the exercise of strike action.

⁵³ ILO, Report III (Part. 4A), 1985, 71st International Labour Conference, p.479.

3.31. Even in cases where States have legally recognized the right to strike but have limited it so as not to affect essential services, the CEACR has indicated that not every service is inherently essential. For example, during the 79th session of 1992, the Committee warned that the restrictions imposed by the government of Norway on the exercise of strike action by organizations in the oil sector were considered excessive:

“While noting the Government's statement in its report that the interference by the authorities in the right to strike in order to restrict or prohibit it is compatible with the Convention in the event that the strike is liable to cause considerable economic losses with a harmful effect on society or third parties and that the oil industry should, in this respect, be considered to be an essential service, the Committee recalls that the principle whereby the right to strike may be limited or prohibited in essential services would become meaningless if the legislation defined essential services too broadly. The Committee has already indicated that the prohibition upon the right to strike should be confined to services whose interruption would endanger the life, personal safety or health of the whole or part of the population, or in a situation of acute national crisis. Moreover, the Committee has considered it compatible with the Convention to maintain a minimum service, provided that it is restricted to operations that are strictly necessary to avoid endangering the life, personal safety or health of the whole or part of the population and provided that workers' organisations are, if they wish, able to participate in defining the minimum service along with the employers and public authorities”⁵⁴.

3.32. The CEACR took a similar position during the same session when evaluating the restrictions imposed by Pakistan on organizations in the oil industry. Without disregarding that certain essential services may be subject to limitations in guaranteeing the right to strike, it reiterated what had already been noted in the case of Norway. That is, considerations for imposing restrictions on such prerogatives would be conditioned on the risk to fundamental rights such as life, health, or public order.

3.33. The position of the CEACR serves as an example of the current state of affairs and the authoritative interpretation of the freedom of association, with a particular focus on the right to strike, which is often mentioned in all of its official documents. This is evident in its 1996 report within the framework of the 83rd International Labour Conference when analyzing the situation in Chad, where it explicitly indicated that “the

⁵⁴ ILO, Report III (Part. 4A), 1992, 79th International Labour Conference, p. 491.

right to strike is an intrinsic corollary of the right of organization, which is protected by Convention” No. 87⁵⁵.

3.34. These exact terms were used by the CEACR in 2010 during the 99th International Labour Conference when evaluating Australia’s implementation of the Convention. The same occurred in 2011 during the 100th session of the Conference in the context of the case of the United Kingdom; and in the 102nd session of 2013 when the case of Russia was presented. Similarly, during the 67th session (Egypt), the 173rd of 1985 (Denmark), the 174th of the same year (Ethiopia), the 175th of 1992 (Kuwait), the 176th of the same year (Syria), the 177th of 1996 (Jamaica), and the 178th of 2021 (Belarus). In all these cases, without exception, the body authorized to determine compliance of ILO Convention No. 87 asserted the recognition of strike action as an intrinsic and irrevocable element of the right to freedom of association.

3.35. It is worth noting that the CEACR, a body established within the ILO, has a clear position on the right to strike. As a corollary of the principle of freedom of association, the CEACR emphasizes that the right to strike is an essential aspect of workers' rights, as outlined in Convention No. 87. This position holds authoritative functions of interpretation to ensure that the Convention is properly implemented. Indeed, the references mentioned above are not an exhaustive list of all cases analysed. In all the case studies where addressing the specific issue of strike action was called for, States have been urged to ensure it and to enforce its free exercise in line with current international provisions.

3.36. This position has remained unaltered even in the latest reports from the sessions of 2020, 2021, 2022, and 2023 regarding cases from, *inter alia*, Benin, Fiji, Burkina Faso, Armenia, Japan, Malta, Chile, Seychelles Islands, Turkey, Madagascar, Bahamas, Ecuador, Guinea, and the United Kingdom. From these, it can be inferred that, in line with the interpretation of the scope of Article 3 of Convention No. 87 by ILO’s Committee of Experts, the right to strike is indispensable and inseparable from the right of freedom of association. This conclusion remains so regardless of the domestic legal regime vis-à-vis which it has been interpreted.

⁵⁵ ILO, Report III (Part. 4A), 1996, 83rd International Labour Conference, p. 351.

(2) RELEVANT SUBSEQUENT PRACTICE

3.37. According to article 31(3)(b) of the Vienna Convention on the Law of Treaties, when interpreting a treaty, it shall be taken into account, together with the context “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. According to this provision, such subsequent practice is to be given due consideration when establishing the actual dimension of a legal disposition.

3.38. The position of the International Law Commission, moreover, is consistent with the jurisprudence of the International Court of Justice, in the sense of considering that “additional agreements” or “subsequent practices” may occur, which serve to interpret treaties. Although the Court has considered that all parties must agree⁵⁶, it is clear that the interpretation of a treaty should not only consider the objective and teleological elements but may also refer to subsequent practices among the signatory parties of a treaty.

3.39. In this framework, it is worth recalling that there is an established position by ILO organs regarding the right to strike, namely i) the CEACR, and ii) the tripartite CFA. Specifically, ILO organs have historically supported that there is a direct link between the right to strike and the right to freedom of association (FOA).

3.40. The interpretation advanced by both organs is predicated upon the notion that member States of the ILO are obligated to uphold and safeguard the autonomy of workers’ and employers’ organizations that, in turn, are tasked with advocating for and advancing the interests of their members.

3.41. The CFA has acknowledged this right since its inception, asserting that the right to strike is an inherent component of the principle of Freedom of Association derived from the ILO’s Declaration of Philadelphia and Convention No. 87. It has gone as far as to stress that, “it is reasonable to conclude that its members believed that a right to strike

⁵⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, paras. 63-68; see also, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, para. 234.

was implicit in the Convention's guarantee of freedom of association".⁵⁷ This perspective is affirmed by the CEACR, which has addressed the right to strike in analogous terms, noting the strikingly similar approaches adopted by both bodies in evaluating the status of the right to strike within the framework of ILO standards.⁵⁸

3.42. The authoritative interpretation conferred upon both Committees justifies the incorporation of the opinions expressed by these ILO supervisory bodies by national legislators and courts in the course of the implementation of ILO law in domestic jurisdictions. Additionally, the enduring and uncontested interpretation of the principle of freedom of association by the CFA and CEACR, coupled with its acknowledgment by Member States, may be considered as subsequent practice in the application of the ILO Constitution, pursuant to Article 31(3)(b) of the VCLT.

3.43. The consistent supervisory practice likely reflects an ensuing intention, as demonstrated by the acknowledgment of the right to strike by other ILO bodies, such as the Resolutions of the ILC in 1957 and 1970, and the ongoing practice of the Conference Committee on the Application of Standards (CAS) in scrutinizing cases of infringements of the right to strike, as instances of violations of the principle of freedom of association. As the consistent practice of the ILO organs has not been challenged by Member States, there is a strong presumption in favor of recognizing that, in fact, the right to strike is understood as a corollary of the right of freedom of association and thus implicit in the provisions in question.

3.44. To the contrary, a literal interpretation of Article 3 of Convention No. 87 would limit the scope of the right of freedom association, disregarding the development that this prerogative has undergone not only in light of other treaties, but also of the interpretation that the ILO has advanced in light of its provisions through the CEACR and the CFA. Their interpretation sheds light not only on the purpose and aim of the right in question, but it is also reflective of the evolution of international law in the matter and of its acceptance by the States parties to the Convention.

⁵⁷ *Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th ed., 2006).

⁵⁸ International Labour Conference, 99th Session, "Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) General Report and observations concerning particular countries" (2010).

3.45. However, acknowledging the right to strike as a foundational principle of ILO law does not necessarily elucidate the full content and scope of this right. A significant number of regulations concerning the right to strike developed by the CFA and endorsed by the CEACR in its Reports do not reflect a consistent practice but have only sporadically been sanctioned (such as go-slows, wildcat strikes, or working to rule as legitimate forms of industrial action). Consequently, considerable legal uncertainty persists regarding the precise content and limitations of the right to strike under ILO law.

B. Recognition of the right to strike Under General International Law

3.46. As previewed earlier, in referring to general rules of interpretation, the Vienna Convention on the Law of Treaties ('VCLT') provides that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 31, paragraph 3 of the VCLT provides that, together with the context, it must be taken into account "(c) any relevant form of international law applicable in the relations between the parties."

3.47. Therefore in what follows, this section addresses the status of the right to strike as customary international law based on the existence of widespread State practice seen as a reflection of an *opinio juris* coherent with the subsequent practice developed by ILO supervisory committees—the independent Committee of Experts (CEACR), and the tripartite Committee on Freedom of Association (CFA) in the application of Convention No.87 insofar it deals with the right to strike as an integral element of freedom of association among workers. Within this framework it will also analyze the coincidence in the recognition of the right to strike in key international instruments, namely universal and regional human rights treaties, reaffirmed by the organs responsible for monitoring its implementation.

(1) THE RIGHT TO STRIKE AS AN INTERNATIONAL CUSTOM

3.48. The mere absence of explicit mention in the literal text of Article 3, or throughout the text of ILO Convention No. 87, does not, in any event, exclude the recognition of the right to strike. This is so, not only because this right can be interpreted in light of the object and purpose of the treaty - which aims to guarantee the wellbeing of members of workers' organizations as well as the protection of the organizations' activities in pursuance of their aims, but also because the Convention is to be read in

accordance with the international law. And it is precisely within this framework that, both conventionally and through custom, the right to strike has been recognized.

3.49. As well settled by the Court's jurisprudence, "the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States"⁵⁹.

3.50. State practice in the matter of strike rights can be proven through various means: its explicit recognition through legal or constitutional provisions; domestic courts jurisprudence on the matter; bilateral treaties (e.g., free trade agreements, for instance) and also multilateral instruments in relation to this right. Moreover, the Court has further clarified:

"The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."⁶⁰

3.51. For its part, an *opinio juris* in terms of the acceptance by States of the rule's binding character can be manifested in different ways: official pronouncements, diplomatic correspondence, press releases, opinions of official legal advisors, executive decisions, public policies, positions adopted in multilateral and conventional fora, among others.⁶¹

3.52. In the present proceedings, as a preamble to the arguments that follow, it is worth highlighting that the annexes to the notes in the Dossier submitted by the ILO Governing Body to the Court amply show the large number of States that, whether through constitutional, legal⁶², or by their jurisprudence, have recognized the right to

⁵⁹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, I.C.J. Reports 1985, pp. 29-30, para. 27.

⁶⁰ *Military and Paramilitary Activities (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 98.

⁶¹ Cf. Crawford James, Brownlie's Principles of Public International Law, 9th edition, Oxford University Press (2019), pp.18-19.

⁶² To cite but a few examples: Italy's 1947 Constitution, Article 40: "The right to strike shall be exercised within the limits set out by the laws governing it"; France's 1946 Constitution, Preamble, para. 7: "The right to strike shall be exercised in accordance with the laws governing it"; Spain's 1978 Constitution,

strike an indispensable part of the right of freedom of association. Likewise, its acceptance can be evidenced by the accession to universal and regional treaties and conventions that explicitly recognize the strike as a right. It is also crucial to note the development of domestic legal systems regarding the strike, which shows that, even with variations in its interpretation and implementation, most legal systems around the world acknowledge the strike as a legitimate and valid action when it comes to trade union activities.

3.53. Several international treaties and conventions explicitly recognize the right to strike. The International Covenant on Economic, Social and Cultural Rights, the European Social Charter, and the Additional Protocol to the American Convention on Human Rights, are evidence that this right is widely understood by States as a corollary of the freedom of association.

3.54. The foregoing is evidence that the right to strike, as a customary norm, has been crystallized in various universal and regional human rights treaties. Although custom does not necessarily have to be explicitly contained in a treaty, as often recalled by the Court, its explicit recognition in a binding instrument under international law is indicative of its existence and acceptance. International regional tribunals have also recognized such right as shown in the examples provided in the following section.

Article 28, para. 2: “*The right to strike of workers is recognized for the defense of their interests...*”. Article 82.1. All wage earners have the right to declare themselves on strike [Côte d'Ivoire, Labor Code, 1995] Article L.620. paragraph 2. All workers have the right to declare themselves on strike within the conditions and according to the procedure provided for in the first section of this chapter. They cannot be dismissed due to the strike, except in cases of serious misconduct. [Niger, Labor Code, 1996] Article 3. (a) Employees have the right to strike in order to protect their economic and professional interests. (b) The right to strike as a last resort can be used in case an agreement and conciliation of the labor dispute has not been reached during the negotiations prior to the strike. [Latvia, Law on Strikes, 1998] Trade Unions shall have the right to assemble and organize, in accordance with the provisions of the law, in meetings, demonstrations, and other gatherings. In order to defend the rights of their members in accordance with procedures authorized by law, trade unions shall have the right to call strikes... [Lithuania, Law on Trade Unions, 1991] Article 79. In accordance with this Law, employees may strike for the purpose of obtaining their economic and social rights at work. [Macedonia, Labor Relations Law, 1973 (amended by Labor Relations Law (No. 1050), 1997)] Article 46. Strike or lockout procedure. (1) Pursuant to subparagraphs (2) and (3), when an unresolved conflict arises under Article 45, either party may take action in the form of a strike or lockout at any time. (2) A party may not resort to strike or lockout if: (a) the procedures of Article 44 [conciliation procedures] have not been complied with; or (b) the conflict has been referred for resolution under Article 45 (1) or Article 45 (2) (a) [submission to the Labor Relations Court of conflicts of rights and conflicts in case of essential services] (3) [prior notice is required 7 days before, to the other party and to the Secretary of Labor.] [Malawi, Labor Relations Law, 1996].

3.55. For the purpose of confirming the recognition of the right to strike as a customary norm in accordance with the provisions of Convention No. 87, at the outset, it is important to recall the reiterated position of the interpretative bodies of the ILO with regard to freedom of association and the right to strike as its corollary.

3.56. Even as early as 1927, the International Labour Office highlighted the intimate relationship between the right to trade union freedom and other activities inherent to it, such as the right to strike.⁶³

3.57. As referred to in Chapter 2 above, in a compendium published in 2016⁶⁴, the ILO compiled the conclusions of the Committee on Freedom of Association during its 65 years of existence by reviewing more than 3200 cases. The compendium, which sought to record the main principles of the right of freedom of association, is indicative of the broad consensus that exists with regard to the mentioned right, its scope, including the right to strike, and above all, its international recognition.

3.58. Regarding the nature of the right of freedom of association, as a fundamental prerogative and right, the compendium – reiterating what the CFA had concluded in report 376, case 2988 (at p.138), states that:

“Freedom of association constitutes one of the fundamental guarantees for peace and social justice. Based on the Declaration on Social Justice of 2008, the Member States of the ILO commit to respect, promote, and materialize the principles and fundamental rights at work, paying special attention to trade union freedom (...).”

3.59. Furthermore, it reiterates the importance of interpreting the right of freedom of association in harmony with the Universal Declaration of Human Rights: “The Committee has deemed it appropriate to reaffirm the importance of the principles set forth in the Universal Declaration of Human Rights, as their violation can compromise the free exercise of trade union rights.” It thus reaffirms the inseparable relationship between freedom of association and the exercise and guarantee of human rights, reinforcing the

⁶³ ILO, Freedom of Association: Report and Draft Questionnaire (Geneva: ILO, 1927), ILC, 10th Session at 75, 138 and 143.

⁶⁴ *Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, (6th ed., 2018).

idea that freedom of association is a complex right manifested through a series of fundamental prerogatives and is not limited to the mere power to form organizations.

3.60. Worth noting is the reference made in the CFA report 351 of the Committee on Freedom of Association on case 2569 (para. 645), where it recalls that:

“On numerous occasions, the Committee has emphasized the importance of the principle stated in 1970 by the International Labour Conference in its resolution on trade union rights and their relationship with civil liberties, which recognizes that the rights conferred on workers' and employers' organizations are based on respect for the civil liberties listed, in particular, in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, and that the concept of trade union rights lacks any meaning when such civil liberties do not exist.”

3.61. The relationship between freedom of association and fundamental human rights is, therefore, twofold. On the one hand, the former serves as an instrument for promoting the recognition and guarantee of the latter. On the other hand, in turn, it draws on them because it is through them that trade union activity is materialized.

3.62. One of those internationally recognized fundamental rights closely related to freedom of association is precisely the right of freedom of expression. A prerogative which, in turn, is therefore inextricably related to the right to strike inasmuch as the latter is in and of itself a collective form of expression of an idea or position of the organization, legitimately so when intended to prevent or address a violation of the rights of its members or improve their working conditions.

3.63. Referring to case 2723 (para. 839) of report 362, the CFA understood that “The freedoms of assembly, opinion, and expression are necessary conditions for the exercise of trade union freedom.” Furthermore, in its report 368 regarding case 2912 (para. 227), said Committee concluded that “The right to strike and the right to organize trade union meetings are essential elements of trade union rights, in that measures taken by the authorities to enforce legality should not have the effect of preventing unions from organizing meetings in the event of labour disputes.”

3.64. Precisely, the right to peaceful demonstration, a concrete form of freedom of expression and an essential element of the right of freedom of association, has been reiterated in multiple reports of the Committee on Freedom of Association phrased in

terms such as “workers must be able to enjoy the right to peaceful demonstration to defend their professional interests”, or “workers may be entitled to enjoy the right of peaceful manifestation in order to defend their professional interests”⁶⁵.

3.65. If the right to freedom of association were limited solely to the capacity to promote the creation of organizations, not only would its scope be unreasonably curtailed, but its very purpose, which is none other than to preserve the possibility that through means available to such organizations, including inter alia strike action, they are able to effectively influence employers’ decisions in favor of the interests of their members, chief among them, the guarantee and realization of their labour rights.

3.66. In this regard it is also relevant to note the considered views in several reports of the International Labour Conference resulting from the reports of the ILO’s CEACR, which, as explained above, is an authoritative voice for the proper interpretation of the instrument under analysis.

3.67. In 1992, in the course of its supervision on the implementation of ILO standards and recommendations in Colombia’s case, the CEACR articulated the reasoning for considering that the right to strike is inherent to trade unions’ right of freedom of association under Article 3 of Convention No. 87, ratified by Colombia in 1976, in the following terms:

“The Committee emphasizes that although it is clear that the provisions of the Convention do not specifically mention the right to strike, Article 3 of the Convention provides that workers’ organizations shall have the right to organize their activities and formulate their programmes in full freedom. The Committee considers that this right includes recourse to strikes, which are one of the essential means through which workers and their organizations may promote and defend ‘their economic and social

⁶⁵ Cf. Compilation of 2006, paragraph 133; 340th report, Case No. 1865, paragraph 764; 342nd report, Case No. 2323, paragraph 691; 350th report, Case No. 2554, paragraph 505, Case No. 2508, paragraph 1104; 351st report, Case No. 2616, paragraph 1011; 354th report, Case No. 2508, paragraph 921; 355th report, Case No. 2680, paragraph 883; 360th report, Case No. 2765, paragraph 289; 363rd report, Case No. 2753, paragraph 483; 365th report, Case No. 2902, paragraph 1121; 367th report, Case No. 2680, paragraph 66, Case No. 2743, paragraph 160; 368th report, Case No. 2765, paragraph 200; 372nd report, Case No. 3025, paragraph 152, Case No. 3024, paragraph 427; 375th report, Case No. 3070, paragraph 113, Case No. 3059, paragraph 661, Case No. 3082, paragraph 692; 377th report, Case No. 3100, paragraph 377; and 378th report, Case No. 3171, paragraph 489 and Cases No. 3110 and 3123, paragraph 625.

interests'. As an essential means in this respect, it should not be the object of excessive restrictions"⁶⁶.

3.68. In addition to the recommendations by ILO bodies, similar positions have been expressed by ILO member States. Thus, statements by government representatives in the Government Group of the Governing Body of the ILO are noteworthy. For instance, in session 323 of 2015, several members of the Governing Body, either individually or collectively, insisted on the need to declare the right to strike as a corollary of the principle of trade union freedom. To illustrate the point, their most relevant statements are quoted below:

“The Government Group recognizes that the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO. The Government Group specifically recognizes that without protecting a right to strike, Freedom of Association, in particular the right to organize activities for the purpose of promoting and protecting workers’ interests, cannot be fully realized.”⁶⁷

(...)

“Speaking on behalf of the Government group, a Government representative of Italy said that the group recognized that the right to strike was linked to freedom of association which was one of the ILO fundamental principles and rights at work. The group also recognized that, without protecting a right to strike, freedom of association, and in particular the right to organize activities for the purpose of promoting and protecting workers’ interests, could not be fully realized. However, albeit part of the fundamental principles and rights at work of the ILO, the right to strike was not an absolute right: its scope and conditions were regulated at national level. The background document described the multifaceted regulations that States had adopted to frame that right. Governments were ready to consider discussing, in the forms and framework that would be considered suitable, the exercise of the right to strike. The complex body of 65 years of recommendations and observations on Convention No. 87 by the various components of the ILO supervisory system constituted a valuable resource for such discussions.

(...)

Speaking on behalf of the group of Latin American and Caribbean countries (GRULAC), a Government representative of the Bolivarian Republic of

⁶⁶ Cf. ILO, Report III (Part. 4A), 1992, 79th International Labour Conference, p. 341.

⁶⁷ ILO Governing Body, session 323 of 2015.

Venezuela noted that the abundant information regarding the modalities and practice of strike action contained in studies on the Latin American region had not been included among the sources cited in the background document. He recalled that the Meeting was part of a broader package that included the question of the necessity or not for a request to the International Court of Justice (ICJ) to render an urgent advisory opinion, and the working methods of the CAS. The group understood that the right to strike existed in international law: it was an essential component of freedom of association and the right to organize. Countries in the region attached considerable importance to the International Covenant on Economic, Social and Cultural Rights and the Additional Protocol of the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, known as the “Protocol of San Salvador”, both of which were legally binding documents that made specific reference to the right to strike. The right of a trade union to freely organize its activities and to formulate its programme of action, set out in Article 3 of Convention No. 87, would be limited if the trade union did not have the right to strike, to be exercised in conformity with the laws of the country. While freedom of association was neither exclusive to Convention No. 87, nor to the ILO, the Preamble to the ILO Constitution and the Declaration of Philadelphia both enshrined the concept of freedom of association, as did the ILO.

Declaration on Fundamental Principles and Rights at Work. In the legal systems of the region, the right to strike was an inherent right directly linked to freedom of association. The issue that had arisen at the 101st Session of the International Labour Conference in 2012 had been rooted in the interpretation of the right to strike by the CEACR, rather than in the existence of the right to strike per se. The question to be considered by the Meeting was therefore how that right should be protected in the frame of competence of each body in the ILO supervisory system. Convention No. 87 could not be considered in isolation; in particular, due account should be taken of the provisions of article 19(8) of the ILO Constitution, whereby the adoption or ratification of any Convention could not be deemed to affect any law or agreement that ensured more favourable conditions to the workers concerned than those provided for in the Convention.

(...)

Speaking on behalf of the Africa group, a Government representative of Zimbabwe observed that over the years, the right to strike had become associated with Convention No. 87 owing to the position taken by the CEACR. He welcomed the statement agreed by the Workers’ and Employers’ groups and expressed his group’s willingness to engage with other groups in finding a lasting solution to the problem.

(...)

Speaking on behalf of the European Union (EU) and its Member States, a Government representative of Latvia said that all 28 Member States of the EU had ratified Convention No. 87 and were bound by the Charter of Fundamental Rights of the European Union, which recognized the right to collective bargaining and strike action. The European Court of Justice stated that the right to collective action, including the right to strike, was a fundamental right, but the exercise of that right could be subject to restrictions. The dispute that began in 2012 regarding the interpretation of Convention No. 87 could be resolved by referring the matter to the ICJ or by appointing a tribunal, in accordance with article 37 of the Constitution of the International Labour Organisation. The EU and its Member States were ready to accept such referral to the ICJ as part of a six-point package, though hoped it might be avoided. The question before the present Meeting concerned Convention No. 87 in relation to the right to strike. Since its entry into force, Convention No. 87 had been supervised by the CEACR, the CAS and the CFA, without persistent objections from governments, but only some disagreement on specific findings. Article 19 of the ILO Constitution contained a minimum standard provision whereby ratified Conventions should not be deemed to affect any law, award, custom or agreement which ensured more favourable conditions for the workers concerned than those provided for in ILO Conventions. The United Nations International Covenant on Economic, Social and Cultural Rights, 1966, in its Article 8(d), protected the right to strike. Some 140 countries had ratified both the Covenant and Convention No. 87. The right to strike was thus a corollary of freedom of association, even though it was not mentioned explicitly in Convention No. 87. However it was not an absolute right, but could be governed by national law and practice. The Tripartite Meeting could be useful in achieving a better understanding of the right to strike in order to ensure a positive outcome at the 323rd Session of the Governing Body.

(...)

Speaking on behalf of the Asia and Pacific group (ASPAG), a Government representative of China believed that the dispute regarding the interpretation of Convention No. 87 in relation to the right to strike could be resolved through tripartite consultation. ASPAG welcomed the joint statement by the Employers' and Workers' groups. Strike action was a last resort once all other means had been exhausted. The right to strike was not however an absolute right. It was recognized in the national law of 150 countries and was regulated according to national laws.

(...)

Speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), a Government representative of Norway supported the EU statement. The right to strike could be derived from Convention No. 87. However, the ILO and its supervisory bodies did not exist in isolation from the rest of the world. An international instrument had to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation. The International Covenant on Economic, Social and Cultural Rights obliged its parties to respect the right to strike in accordance with national law. Some 141 of the 153 countries party to Convention No. 87 had ratified the Covenant. A general ban on strike action would considerably restrict trade unions from defending the interests of their members. In many countries employers could take action through lockouts. Based on a reading of previous statements up to 2012, the Nordic countries noted that almost all member States had recognized a right to strike. Similarly, the Employers seemed to have recognized that there was a general right to strike that could be derived from Convention No. 87, and their objections appeared to be related to the restrictions on this right. The CEACR's interpretation of Convention No. 87 was in accordance with Article 31 of the Vienna Convention. Strike action was a means whereby workers could apply pressure in defence of their interests; the meaning of the word "programmes" therefore naturally included such action. As the CEACR was permitted to interpret a general right to strike under Convention No. 87, so it should also be entitled to place restrictions on this right. The longer the time before a State actively objected to the CEACR's jurisprudence, the greater the weight of its interpretations. It appeared that most governments accepted the CEACR's recommendations and adopted measures accordingly. Several international treaties regulated the right to strike. It would be paradoxical if the International Labour Organization did not recognize the right to strike within its own Conventions. The CEACR should continue to evaluate its interpretation and application of instruments against a background of society and legislation in evolution. If an agreement regarding Convention No. 87 and the right to strike could not be reached during the Meeting, referral to the ICJ would be necessary.

(...)

A Government representative of the United States regretted that the CEACR's function had been called into question as it was an essential part of the ILO and had been supported by every United States Administration over the past 60 years. It was vital to address this issue in a way that would strengthen the ILO supervisory system. In the decades since the adoption of Convention No. 87, the CEACR and the CFA had provided observations and recommendations with regard to the right to strike. Convention No. 87 was meant to protect freedom of association rights of workers and

employers, and the right to organize activities and formulate programmes. Working within their mandates through the examination of specific cases they had observed that freedom of association and particularly the right of workers to organize their activities for the purpose of promoting and protecting their interests could not be fully realized without protecting the right to strike. The same logic had prevailed in the United States, where the National Labor Relations Act protected workers' rights, and the Supreme Court of the United States had deemed strikes to be a protected activity. The CFA had confirmed and applied the relationship between the right to strike and the right to freedom of association in almost 3,000 cases without dissent. The United States concurred that the right to strike was protected under Convention No. 87, even though the right was not explicitly mentioned in the Convention. It lent its full support to the dedicated work of the CEACR and the CFA, which for more than 60 years had provided non-binding observations and recommendations addressing the protection, scope and parameters of the right to strike. The United States also welcomed the opportunity to discuss how countries could promote this right and hoped that interference with ILO supervisory organs would not continue.

(...)

A Government representative of Germany welcomed the social partners' joint statement, considering it an important first step towards ensuring the effectiveness of the supervisory system. He also highlighted the importance of the consensus reached in the Government group and would be interested to hear the social partners' views on the Governments' statement that "the right to strike is linked to freedom of association" and that "without protecting the right to strike, freedom of association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized". In view of the tripartite structure of the ILO, government contributions to the discussions at the Governing Body in March 2015 were of great importance. Such contributions would help promote the social partners' temporary agreement to bring a durable solution with regard to Convention No. 87."⁶⁸

In sum, the right to strike, corollary to the right of freedom of association, is a norm of customary international law, as demonstrated by its express recognition in other treaties and conventions (both universal and regional), the domestic laws of the majority of States Parties to Convention No. 87, international and domestic jurisprudence, the reiterated position of authoritative bodies of the ILO, and expressions in support of this

⁶⁸ ILO Governing Body, GB.323/INS/5/Appendix I, II y III.

interpretation from delegates of different states within the organization's Governing Body.

(2) THE RIGHT TO STRIKE IN THE HUMAN RIGHTS SYSTEMS

3.69. The right to strike plays a crucial role in labour rights within the human rights legal framework. Throughout history, it has been essential to workers' efforts to advocate for fair treatment, better working conditions, and social justice.⁶⁹ For its part, the right to employment is intrinsically tied to leading a dignified life, thereby influencing the enjoyment of various other human rights.⁷⁰ Linked closely with freedom of association, the right to strike is universally recognized as essential for protecting the economic and social interests of workers worldwide, enabling them to attain dignified conditions in their employment.⁷¹

3.70. The legal landscape concerning the right to strike exhibits variability across jurisdictions and human rights instruments. Although international standards offer a foundational framework for its safeguarding, the practical application and understanding of this right are contingent upon the particular legal system considered. However, under the different Human Rights regimes, the right to strike has been recognized as a legitimate tool to balance labour relations and allow workers to exert pressure for fair and dignified working conditions. Its recognition in international law underscores the need to protect workers' autonomy and promote equality of conditions in the workplace, thus contributing to the realization of fundamental principles of human rights.⁷²

3.71. In this sense, rights that are necessary for the adequate implementation of the right to work have also been protected under the different human rights systems.⁷³ Accordingly, interpretative bodies of the various human rights systems have established

⁶⁹ Bogg, A. *The Right to Strike: A Comparative Perspective*, 2013. *Industrial Law Journal*, 42(3), p. 261-292.

⁷⁰ ILO, *What is the right to work?*, 2020.

⁷¹ ILO. *Right to Strike*.

⁷² International Commission of Jurists (ICJ), *Principles on the Effective Protection and Promotion of the Right to Strike*, 2017.

⁷³ Antonio Riva Palacio Lavín, *El Pacto Internacional de Derechos Económicos, Sociales y Culturales*. Available at: <https://www.corteidh.or.cr/tablas/r29906.pdf>

that trade union rights, freedom of association and the right to strike are crucial means of introducing, maintaining, and defending just and favourable conditions of work.⁷⁴

(i) Universal Human Rights System

3.72. The right to freedom of association is also recognized in other international instruments, which reinforces the idea that it has not only arisen from the negotiations within the framework of the ILO. It is also reflected in general public international law, where it has even been raised to the status of a fundamental human right.

3.73. At the United Nations General Assembly, through the exercise of the strictest interpretation of the Universal Declaration of Human Rights, the right to freedom of association was defined as a fundamental human right. Its Article 20 states: “Everyone has the right to freedom of peaceful assembly and association.”⁷⁵

3.74. At the universal level, article 21 of the International Covenant on Civil and Political Rights (ICCPR) protects peaceful assemblies wherever they take place. In this regard, the Human Rights Committee has established that such assemblies may take many forms, including demonstrations, protests, assemblies, processions, rallies, sit-ins, candlelight vigils and flashmobs.⁷⁶ The recognition of the right to peaceful assembly imposes on States Parties the corresponding obligation to respect and guarantee its exercise without discrimination. This requires States to allow such assemblies to take place without unwarranted interference and to facilitate the exercise of the right and protect the participants.⁷⁷

3.75. Although the Committee does not refer directly to the right to strike, it interprets the concept of peaceful assembly as one that encompasses the concept of protest or demonstration. This has been used as a synonym for strike, or at least as a broad concept within which this right falls. While not explicitly articulated, this approach acknowledges the fundamental similarity between strikes and other forms of assembly in

⁷⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)

⁷⁵ Universal Declaration of Human Rights.

⁷⁶ Human Rights Committee, General comment no. 37 (2020) on the right of peaceful assembly (article 21).

⁷⁷ Human Rights Committee, General comment no. 37 (2020) on the right of peaceful assembly (article 21).

their shared objective of collective expression and action. By viewing protests and strikes through a unified lens, the Committee underscores the indivisibility and interdependence of rights essential to democratic societies.⁷⁸

3.76. Article 22 of the ICCPR guarantees every individual the right to freedom of association for peaceful purposes, including the formation and joining of trade unions to protect their interests. Although this provision does not explicitly mention the right to strike, it is commonly understood that the exercise of trade union freedom inherently encompasses the right to strike as a legitimate form of collective action.⁷⁹

3.77. However, States also have the power to impose restrictions on the exercise of the rights referred to in Article 21 and 22. Such restrictions must be carefully balanced with the principles of legality, necessity, proportionality, and non-arbitrariness.⁸⁰

3.78. One of the primary justifications for restricting the rights of peaceful assembly and freedom of association is to safeguard the legitimate interests of the state. These interests encompass concerns such as national security, public order, public health, and public morality. States may impose restrictions on the rights to peaceful assembly and freedom of association when necessary to protect the rights and freedoms of other individuals under its jurisdiction. This includes preventing acts of violence, incitement to hatred or discrimination that may arise during assemblies or associational activities.⁸¹

3.79. Although States may impose limitations on the above grounds, such restrictions must always be necessary and proportionate to the objectives pursued.⁸² In addition, any restrictions imposed on the exercise of the rights referred to in Article 21 must be established by law. This requirement ensures that the limitations are clearly

⁷⁸ Human Rights Committee, General comment No. 37 (2020) on the right of peaceful assembly (article 21).

⁷⁹ United Nations General Assembly. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2019. Available at: <https://undocs.org/en/A/74/349>

⁸⁰ Human Rights Committee, General comment No. 37 (2020) on the right of peaceful assembly (article 21).

⁸¹ Human Rights Committee, General comment No. 37 (2020) on the right of peaceful assembly (article 21).

⁸² Library of Congress, “Article 8: Right to strike” in “International Covenant on Economic, Social and Cultural Rights (ICESCR): Overview and Legal Framework”, 2020.

defined, predictable and accessible to individuals. Furthermore, these restrictions must be necessary in a democratic society, serve a legitimate aim and not be applied arbitrarily.

3.80. At the same level, the International Covenant on Economic, Social and Cultural Rights (ICESCR), in its article 8, establishes the obligation of States to ensure the right to strike, exercised in accordance with the laws of each country. This Instrument explicitly recognizes the right to strike as an essential component of labor rights and workers' protection. Article 8 of the ICESCR enshrines the right of workers to participate in strikes for the protection of their economic and social interests, acknowledging the significance of collective action in advancing labor rights and negotiating fair working conditions.⁸³

3.81. However, interpretations of this article also emphasize the need to balance this right with the protection of public interests and the rights of others. Therefore, this right could be subject to certain restrictions in specific circumstances that must adhere to specific standards to be considered legitimate. First, such restrictions must be established by law, meaning they must be clearly defined and predictable for both individuals and authorities. Furthermore, restrictions must pursue legitimate objectives recognized internationally, such as safeguarding national security, public order, public health, or the rights and freedoms of others. For instance, a strike posing a severe and evident threat to public safety could justify state intervention to ensure the general welfare.

3.82. These restrictions must comply with the principle of proportionality. This entails that measures taken by the state to limit the right to strike cannot be more burdensome than necessary to achieve the legitimate objective pursued. In other words, restrictions must be suitable and proportionate to the severity of the situation being addressed. For instance, if a strike impacts a sector essential for public health, such as emergency medical services, imposed restrictions must be proportionate to the need to maintain the provision of these vital services.

3.83. In this sense, it is noted that in the universal system, the two aforementioned international instruments protect the right of workers to strike in a similar

⁸³ United Nations Office of the High Commissioner for Human Rights (OHCHR), *Human Rights and Decent Work: A Focus on the Implementation of the International Covenant on Economic, Social and Cultural Rights in the Workplace*, 2019.

manner. In this sense, the universal system has demonstrated its relevance for the protection of the right to work by recognizing the need to allow workers to associate in order to assert their interests and guarantee the rights derived from the possibility of having a decent job within the framework of human rights.⁸⁴

(ii) *European Human Rights System*

3.84. The European Convention on Human Rights (ECHR) does not explicitly mention the right to strike. However, case law has elucidated its implicit recognition as part of the broader right to freedom of association, safeguarded by Article 11 of the Convention. The European Court of Human Rights (ECtHR) has issued a series of decisions in which it has delimited the boundaries of this right and its interaction with other rights explicitly set out in the ECHR.

3.85. In the case of *Ogvenenko v. Russia*, the European Court of Human Rights recognized that, while no explicit provision allows the right to strike to be understood as the sole way to guarantee freedom of association, it is, undoubtedly, one of the clearest forms to exercise the latter. It also established, based on Article 11 of the European Charter of Human Rights, although countries have the authority to regulate the ways to guarantee the aforementioned prerogative, they cannot impose arbitrary restrictions:

“Article 11 of the Convention does not secure any particular treatment of trade unions or their members and leaves each State a free choice of the means to be used to secure a trade union’s freedom to protect the occupational interests of its members. The granting of a right to strike constitutes without any doubt one of the most important of such means”⁸⁵.

3.86. Another landmark case in this context is *National Union of Rail, Maritime and Transport Workers (RMT) v. United Kingdom*. In its judgment, the ECtHR elucidated the right to strike as protected under Article 11 of the ECHR, which guarantees freedom of association. The ECtHR recognized the right to strike as an integral component of trade union freedoms and emphasized that any interference with this right must be justified and

⁸⁴ United Nations, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/71/385, September 14, 2016.

⁸⁵ ECtHR, *Ogvenenko v. Russia* (2018), para. 54. See also, *National Union of Belgian Police*, paras. 38-39; *Swedish Engine Drivers’ Union, v. Sweden*, judgment of 6 February 1976, Series A no. 20, paras. 39-40; *Wilson, National Union of Journalists and Others*, paras. 42 and 45; and *Tüm Haber Sen and Çınar, v. Turkey*, No. 28602/95, ECHR 2006-II para. 28; and *Schmidt and Dahlström*, para. 36; *UNISON v. the United Kingdom*, No. 53574/99, ECHR 2002-I.

proportionate. The Court concluded that domestic legislation that imposes restrictions on the ability of trade unions to call strikes are incompatible with Article 11 of the ECHR, as it creates excessive limitations on the effective exercise of the right to strike, which is protected under human rights law.

3.87. In addition, the ECtHR has addressed relevant issues related to the right to strike, derived from Article 11 of the Convention, in cases such as *Demir and Baykara v. Turkey*. In that case, the Court ruled that the absolute prohibition of strikes in the public sector contravened the right to freedom of association and collective bargaining and that national laws do not have the power to prevent or restrict the protection of this internationally recognized right. The ECtHR in fact mentioned that:

“The Court has always considered that Article 11 of the Convention safeguards freedom to protect the occupational interests of trade-union members by the union’s collective action, the conduct and development of which the Contracting States must both permit and make possible”⁸⁶.

3.88. However, it is imperative to note that the ECtHR has underscored the non-absolute character of the right to strike. While acknowledging its significance, the Court has recognized that limitations may be imposed under specific circumstances, such as for reasons of public order, national security, and the protection of the rights and freedoms of others. Nevertheless, any such restrictions must adhere to the principles of proportionality and necessity.

3.89. Accordingly, the ECtHR has articulated that limitations on the right to strike must be proportionate to the legitimate objectives pursued by the restrictive measures. The restrictive measures should not exceed what is necessary to achieve the intended purpose, and they must be deemed necessary in a democratic society. This necessitates a compelling and sufficient justification for restricting the right to strike, consonant with democratic values and fundamental human rights principles.

3.90. For its part, the European Social Charter of 1996 not only recognizes the right to freedom of association, but also emphasizes the importance of recognizing the right to collective bargaining, wherefrom arises the commitment of the parties to respect

⁸⁶ ECtHR, *Demir and Baykara v. Turkey* (2008), paras. 109 and 140, See also, *National Union of Belgian Police*, para. 38; *Swedish Engine Drivers’ Union v. Sweden*, judgment of 6 February 1976, para. 39, Series A No. 20; *Tüm Haber Sen and Çınar v. Turkey*, No. 28602/95, ECHR 2006-II, para. 28.

the exercise of the strike as a fundamental element of this prerogative. Article 6 of this instrument provides as follows:

“With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

1. to promote joint consultation between workers and employers;
2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:
4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into”⁸⁷.

3.91. The ability of organizations to enter into collective agreements, which naturally arises from the prerogative of forming such organizations under the recognized right of trade union freedom, has even been subject to a more generous interpretation by the European Union. In its Charter of Fundamental Rights of the year 2000, it establishes the strike as an inherent right of trade unions. Article 28 of the said Charter reads literally:

“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.”⁸⁸.

3.92. The above mentioned must necessarily be read in conjunction with the provisions of Article 12 of the same Charter of Rights, which, in line with international law and the aforementioned instruments, establishes:

“Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic

⁸⁷ Cf. ESC, (1996), art. 6.

⁸⁸ Cf. EUCFR, (2000), art. 28.

matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests”⁸⁹.

3.93. On the other hand, the European Court of Human Rights, in the case of *Islamayilov v. Azerbaijan*⁹⁰, considered that regardless of the provisions contained in national law, it is essential to seek the harmonization of the international legal framework with domestic regulations in order to ensure and not affect the effective realization of the right to trade union association. In this regard, reference was made not only to the International Covenant on Economic, Social and Cultural Rights, but also to the provisions contained in ILO Convention No. 87, the interpretation of which is at issue in the present proceedings.

(iii) *Interamerican Human Rights System*

3.94. In the same manner, the American Convention on Human Rights (ACHR), establishes the existence of a right to strike while allowing states to impose restrictions under certain conditions. Although the Convention does not specifically mention the right to strike, the Inter-American Court of Human Rights (IACtHR) has interpreted the right to trade union freedom and association, enshrined in Article 16 of the Convention, as implicitly encompassing the right to strike.⁹¹ This legal framework reflects a delicate balance between safeguarding workers’ rights and maintaining social order and public welfare.

3.95. Furthermore, with the Additional Protocol (1978) on Economic, Social, and Cultural Rights of the aforementioned Convention (‘San Salvador Protocol’), the rights of trade union association were more broadly recognized, deeming it necessary to establish as well, the right to strike as a fundamental prerogative. Article 8 reads as follows:

“Article 8 – Trade Union Rights

The States Parties shall ensure:

- a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As

⁸⁹ *Ibid.*, Art. 12.

⁹⁰ ECtHR, *Islamayilov v. Azerbaijan*, Judgment of 17 January 2008, para. 48.

⁹¹ Inter-American Court of Human Rights (IACtHR), *Advisory Opinion OC-27, 5 May 2021*, p. 40. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_27_esp1.pdf

an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;

b. The right to strike.

2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.

3. No one may be compelled to belong to a trade union.”⁹²

3.96. Regarding the right to strike, the Interamerican Court of Human Rights (IACtHR) warns that States must respect and ensure that it can be effectively exercised by all workers, without discrimination. To this end, those measures necessary to prevent the conditions and prerequisites for the strike from constituting an obstacle to its effective realization must be adopted. Likewise, the State must ensure that workers can exercise their right to strike without being subject to penalties by the particular employer or the State itself.⁹³

3.97. Key milestones in the development of the right to strike in the Inter-American System include landmark cases adjudicated by the IACtHR. In cases such as *Baena Ricardo et al. v. Panama* and *López Álvarez et al. v. Honduras*, the Court affirmed the right to strike as protected under the ACHR, emphasizing its essential role in ensuring labor rights and democratic governance.

3.98. In those cases, the interpretation of the right to strike was informed by Article 16 of the ACHR, which addresses freedom of association. While those cases do not specifically mention the right to strike, the principles established under Article 16

⁹² Additional Protocol to the Inter-American Convention of Economic, Social and Cultural Rights (1988), art. 8. Available at: <https://www.oas.org/juridico/spanish/tratados/a-52.html>

⁹³ IACtHR, *Advisory Opinion OC-27, 5 May 2021*, p. 42

regarding freedom of association are relevant to discussions surrounding the right to strike within the framework of the ACHR.

3.99. The IACtHR emphasized the importance of States respecting and ensuring effective exercise of this right by all workers without discrimination, and underscored the necessity of adopting measures to prevent conditions and prerequisites for strikes from becoming obstacles to their effective realization. Furthermore, it highlighted the obligation of States to ensure that workers can exercise their right to strike without facing penalties from private employers or the State itself.

3.100. In turn, in the case of *Trabajadores del Estado (ATE) v. Argentina*, the IACHR affirmed that freedom of association and the right to collective bargaining, which implicitly includes the right to strike, are fundamental rights protected by the American Convention on Human Rights. The Court found that States violated these rights by failing to ensure an enabling environment for collective bargaining and by repressing unions and workers exercising their right to strike through national legislation that became incompatible with human rights obligations.

3.101. In this sense, as the Universal and European systems also have, the IACtHR has established that the exercise of the right to freedom of association, collective bargaining and strike may only be subject to the limitations and restrictions provided by law, as long as these are appropriate in a democratic society, necessary to safeguard public order, to protect public health or morals, as well as the rights and freedoms of others.⁹⁴

3.102. In recent years, the Inter-American System has continued to address issues related to the right to strike, including the intersection with other human rights beyond freedom of association, such as freedom of expression and assembly. Both the IACtHR and the Commission have interpreted these rights in favour of the existence of a right to strike as a vital component of labour rights and democratic governance.

3.103. The IACtHR, in Advisory Opinion OC/27 of 2021, concerning the “rights of freedom of association, collective bargaining and strike and their relation to other rights, with a gender perspective”⁹⁵ considered that:

⁹⁴ IACtHR, *Advisory Opinion OC-27, 5 May 2021*, p. 42.

⁹⁵ *Ibid.*

“(…) there is a reference with sufficient specificity to the rights to freedom of association, collective bargaining and strike to derive their existence and recognition in the OAS Charter. Accordingly, it concludes that they are rights protected by Article 26 of the Convention, the scope of which shall be determined in light of international jurisprudence. In this regard, the Court recalls that the obligations contained in Articles 1.1 and 2 of the American Convention constitute, ultimately, the basis for determining international responsibility to a State for violations of the rights recognized in the Convention (…).”⁹⁶.

3.104. Although in said opinion the Inter-American Court emphasized that its interpretation would be based on the regional instruments of the system to which it belongs, it also insisted that the norms contained therein have resulted from a reading in conjunction with the corpus of international law. In this sense, it acknowledged that the various conventions of the ILO and other instruments, opinions, and recommendations produced by the CFA and the CEACR on the Application of Conventions and Recommendations of said organization are valid sources of interpretation.⁹⁷.

3.105. Turning to the analysis of the scope of the right of freedom of association, the IACtHR reiterated that it should be understood as a human right instrumental to the “improvement of the living conditions” of workers. This has also been accepted within the legal frameworks of most members of the Organization of American States⁹⁸, which have included in their constitutions and laws the recognition of the right to free trade

⁹⁶ *Ibid.*, para. 48.

⁹⁷ *Ibid.*, para. 52.

⁹⁸ Constitution of the Argentine Nation, article 14 bis, and Trade Union Associations Law No. 23551, article 4; Political Constitution of the Plurinational State of Bolivia, article 51, and General Labor Law, article 99; Constitution of the Federative Republic of Brazil, article 8, Labor Code, article 511; Political Constitution of the Republic of Chile, article 19, Labor Code, article 212; Political Constitution of Colombia, article 39, and Substantive Labor Code, article 353; Political Constitution of the Republic of Costa Rica, article 60, and Labor Code, article 341; Constitution of the Republic of Ecuador, article 326.7, and Labor Code, article 440; Political Constitution of El Salvador, article 47, and Labor Code, article 204; Political Constitution of Guatemala, article 102 r; Constitution of the Republic of Honduras, article 128, and Labor Code, articles 470 to 474; Political Constitution of the United Mexican States, article 123 A XVI, and Federal Labor Law, article 357; Political Constitution of the Republic of Nicaragua, article 87, and Labor Code, articles 100 to 105; Political Constitution of Panama, article 68, and Labor Code, article 335; Constitution of the Republic of Paraguay, article 96, and Labor Code, articles 64 and 67; Political Constitution of Peru, article 28, and General Labor Law, article 329; Political Constitution of the Dominican Republic, article 62, and Dominican Republic Labor Code, article 318; Constitution of the Oriental Republic of Uruguay, article 57, and Law 17.940; Canadian Charter of Rights and Freedoms, article 2, and *Dunmore v. Ontario (Attorney General)*, para. 37.

union association, thus demonstrating the widespread existence and recognition of such provision.

3.106. The IACtHR went on to recall that in several of its judgments, including those referred to in para. 3.97 above⁹⁹, it has understood the right to trade union association as both an individual and collective right. On an individual level, it is considered that each person has the right to participate – or not – in a given organization. In its collective dimension, the power to create organizations and define their protocols and operating frameworks is protected without interference from public and administrative authorities.

3.107. It is also worth noting that the IACtHR touched upon the fact that the right to trade union association is not exhausted by the mere power to form trade unions. There is a fundamental instrumental relationship between these organizations and the exercise and guarantee of the rights pursued by collective action¹⁰⁰. In the IACtHR's words:

“(…) freedom of association in labour matters is not exhausted by the theoretical recognition of the right to form groups, but also includes, inseparably, the appropriate right to exercise that freedom.”¹⁰¹

3.108. Equally significant is the conclusion reached by the IACtHR, after reviewing its extensive jurisprudence, to the effect that “trade union freedom constitutes, in addition to a right enshrined in the domestic law of States, and in various international instruments on human rights, a general principle of international law.”¹⁰²

⁹⁹ Case of *Baena Ricardo et al. v. Panama*. Merits, Reparations, and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 153-159; Case of *Huilca Tecse v. Peru*. Merits, Reparations, and Costs. Judgment of March 3, 2005, Series C No. 121, paras. 69-77; Case of *Cantoral Huamani and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 10, 2007. Series C No. 167, paras. 144-146; *Ownership of Rights of Legal Persons in the Inter-American Human Rights System* (Interpretation and Scope of Article 1.2, in Relation to Articles 1.1, 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46, and 62.3 of the American Convention on Human Rights, as well as Article 8.1 A and B of the Protocol of San Salvador). Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 87; and Case of *Lagos del Campo v. Peru. Preliminary Objections*, Merits, Reparations, and Costs. Judgment of August 31, 2017. Series C No. 340, paras. 156-157.

¹⁰⁰ An identical position to that stated earlier in the Case of *Huilca Tecse v. Peru*, para. 70, and in the Case of *Lagos del Campo v. Peru*, para. 156.

¹⁰¹ IACtHR, *Advisory Opinion OC-27, 5 May 2021*, para. 71.

¹⁰² IACtHR, *Advisory Opinion OC-27, 5 May 2021*, para. 70.

3.109. More to the point, specifically dealing with the right to strike, the views contained in the relevant section of the IACtHR's Advisory Opinion 27 of 2021, are noteworthy:¹⁰³

“D. The Right to Strike

95. The right to strike is one of the fundamental human rights of workers, which they can exercise independently of their organizations. This is specified in Articles 45.c of the OAS Charter (right to strike ‘by workers’), 27 of the American International Charter of Social Guarantees (‘[w]orkers have the right to strike’) and indicated by the deliberate placement of its statement isolated from the rights of trade unions, in Articles 8.b of the San Salvador Protocol and 8.1.d of the ICESCR¹²⁶ (*supra*, paras. 47 and 48, and 56 to 60). Otherwise, the negative dimension of freedom of association in its individual aspect could be violated. It is also a right vested in trade unions in general.

96. *The Court notes that while the right to strike is not expressly recognized in ILO conventions, it is worth noting that Article 3 of Convention 87 recognizes the right of workers' organizations to 'organize their activities freely and formulate their program of action' (supra, para. 63). In this sense, the Committee on Freedom of Association has recognized the importance of the right to strike as an 'indissociable corollary of the right of association protected by Convention 87.' In both cases, the strike constitutes a legitimate means of defending economic, social, and professional interests. It is a resource that workers use as a means of pressure on the employer to correct an injustice or to seek solutions to economic and social policy issues and problems arising in companies that directly affect workers.*

97. Likewise, the Court notes that, in addition to being widely recognized in international law, the right to strike has also been recognized in the Constitutions and legislation of the OAS member states. In this sense, it can be considered as a general principle of international law.

98. For the Committee on Freedom of Association, a strike is generally understood to be 'the temporary interruption (or reduction) of work voluntarily carried out by one or more groups of workers in order to obtain claims or reject demands or express complaints or support the claims or complaints of other workers.' The Court agrees with this definition and considers that the right to strike is one of the fundamental rights of workers and their organizations, as it constitutes a legitimate means of defending their economic, social, and professional interests. It is a resource that

¹⁰³ *Ibid.*, paras. 95-98.

workers use as a means of pressure on the employer to correct an injustice or to seek solutions to economic and social policy issues and problems arising in companies that directly affect workers. In this sense, the European Court has described the strike as the 'most powerful' instrument for protecting labour rights” (emphasis added).

3.110. The same Inter-American Court of Human Rights, in the *La misma Corte IDH*, en its Judgment on the Case of the *Former Employees of the Judiciary v. Guatemala*¹⁰⁴, recalls the CFA’s recognition of the importance of the right to strike:

“107. The Court notes that although the right to strike is not expressly recognized in the ILO Conventions, it is significant that Article 3 of Convention 87 on Freedom of Association and Protection of the Right to Organize, to which Guatemala is a party, recognizes the right of workers’ organizations to ‘organize [...] their activities in full freedom and to formulate their program of action.’ In that regard, the Committee on Freedom of Association has recognized the importance of the right to strike as ‘an intrinsic corollary to the right to organize protected by Convention No. 87.’”

3.111. The jurisprudence of the IACtHR concerning the nature and scope of the right to trade union association (freedom of association) demonstrates how the right should be understood in a broad and substantial manner. Contrary to what could be termed an exclusively formal exercise, i.e., limited to the mere constitution of organizations, the IACtHR adopted a pro-persona interpretation accepting that, as it is a human and universal right, the right to trade union association must be understood to entail the guarantee of other fundamental rights.

3.112. Thus, it can be concluded that both the conventional framework and the jurisprudence of the main regional human rights courts and the domestic legislations of the vast majority of countries in the world recognize and accept the right to trade union association. It has even been elevated to the category of a universal and fundamental human right. Regardless of the nuances in its acknowledged scope – largely determined by the freedom that States have to regulate its exercise and the acceptable limits thereof – there is no doubt as to its inclusion in the international corpus juris.

¹⁰⁴ IACtHR, *Case of the Former Employees of the Judiciary v. Guatemala*, Judgment 17 November 2021, para. 107.

(iv) Challenges to the exercise of the right to strikes under human rights regimes

3.113. The right to strike, as enshrined in international human rights instruments, is a fundamental component of labour rights and essential for ensuring fair and dignified working conditions worldwide. However, despite its inherent importance, contemporary challenges impede its effective exercise, posing significant threats to workers' human rights.

3.114. Although the existence of the right to strike within the framework of human rights can be observed, there is still a lack of international consensus on the nature and scope of this right. The different jurisdictions and legal systems have had similar interpretations, but with some differences, which has meant that its protection is different in each case.

3.115. In addition, legal limitations imposed by some States, such as onerous prerequisites or prohibitions on certain types of strikes, raise serious concerns about the effectiveness and actual protection of the right to strike. These limitations may undermine its genuine exercise and constitute violations of international human rights standards.

3.116. The changing labor context, characterized by the proliferation of precarious forms of employment and new technologies, adds another layer of complexity to the protection of the right to strike. Workers in non-traditional employment situations may face significant obstacles to organizing and participating in strikes, which have not been regulated and interpreted in a human rights context, highlighting the need to adapt and strengthen the guarantees of this right in the modern work environment.

CHAPTER 4

COLOMBIA'S CONSTITUTIONAL PROTECTION OF THE RIGHT TO STRIKE

4.1. The State of Colombia, as a member of the international community¹⁰⁵ has ratified, inter alia, ILO Convention No. 87 and signed the 1998 ILO Declaration on Fundamental Principles and Rights at Work. As for human rights instruments, it also signed the Universal Declaration of Human Rights and ratified the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). At a regional level, it joined the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and the Protocol of San Salvador in the Area of Economic, Social and Cultural Rights. These are a show of its credibility and commitments vis-à-vis the international community.

4.2. In terms of the protection of the right to strike, Colombia possesses ample evidence reflected in its legal system (Constitution, law, rules), as well as in the rulings of its Constitutional Court, the Labor Chamber of the Supreme Court of Justice and the Council of State, which demonstrate that all authorities accept and recognize the right to strike as a right to be protected both domestically and internationally.

4.3. Indeed, nearly 90 years ago, Colombia's 1886 Constitution guaranteed the rights of association and strike in the 1936 Legislative Act (constitutional reform).¹⁰⁶ Similar provisions were included in the current Political Constitution of Colombia of 1991, when establishing the rights of association (article 39), negotiation (article 55) and strike except in essential public services, the regulation of which was left to the legislators (article 56).

4.4. Under both the previous and the current constitutions, laws have been passed that, in line with the superior legal text, guarantee the right to strike. Thus, the 1950 Substantive Labor Code set out an articulated regulation of collective rights to protect the rights and freedoms of trade unions in their components of association (articles

¹⁰⁵ Colombia is a founding member of ILO in 1919, the UN in 1945 and the OAS in 1948.

¹⁰⁶ Article 20 of Legislative Act of 1936: "It is permitted to form companies, associations and foundations that are not contrary to morals or to the legal order. Associations and foundations may obtain recognition as legal persons. // The right to strike is guaranteed, except in public services. The law shall regulate its exercise."

353 to 428), negotiation and strike (articles 429 to 480), among others. Subsequently, these regulations have been partially amended either due to legal changes¹⁰⁷ or through judicial rulings by the constitutional court when apprised and having determined their incompatibility with the Political Constitution. It is noteworthy however, that neither the former nor the latter have ever attempted to derogate the right to strike that has, as stated earlier, been a fixture of the Colombian legal system for nearly 90 years.

4.5. This legal system on strike has evolved over time, mainly since the adoption of the 1991 Political Constitution in a developing trend that is still being built upon and in which ILO's influence has been essential, not only through Conventions Nos. 87, 98, 151 and 154 ratified by Colombia, but, moreover, through the actions of the CEACR and the CFA, whose authoritative pronouncements with regard freedom of association have been decisive in Colombia's issuance of new norms and judicial rulings of domestic and international impact.

4.6. In terms of legislation, for instance, Law 1210 of 2008, Article 2 of which modified Article 451 of the Substantive Labor Code to assign to the judiciary the determination and decision on the declaration of a strike's illegality which had theretofore been attributed to labor administrative authorities.

4.7. It was on the Government's initiative that this legal change was adopted, and its origin was the pronouncements of the CEACR and the CFA, that in furtherance of ILO Convention No. 87 addressed various State Members on multiple occasions, including Colombia, to point out that declaring a strike or a collective work stoppage illegal should not lie with the government, but with a judicial authority or an independent authority.¹⁰⁸ In that same vein, on 24 August 2023, the Colombian Government submitted to Congress, a Labor Reform draft legislation intended to, inter alia, further advance a human rights agenda in line with the need to adapt domestic laws to international and national standards in terms of the right to work, the right of association, trade union freedoms, collective negotiation and the right to strike, based precisely on the recommendations that ILO's supervisory bodies have formulated to Colombia and that needs to be implemented to ensure full compliance of our commitments as a State.

¹⁰⁷ The most significant changes were embodied in Law 50 of 1990, without prejudice to subsequent legislative developments.

¹⁰⁸ See *Compilation of Decisions of the Committee on Freedom of Association* (6th ed., ILO 2018), paras. 907 to 913.

4.8. With regard to the text of Colombia's Labor Reform in its Report on the Application of Conventions and Recommendations – Freedom of association, collective bargaining and industrial relations issued at the 112th ILC, the CEACR stated:

“The Committee also recalls that in previous comments it noted that both the Constitutional Court, in relation to the oil sector, and the Supreme Court, with regard to the various services defined as essential in the legislation, have called for a revision of the legislation to better limit the restrictions imposed on the exercise of the right to strike. The Committee notes with **interest** that the proposed legislative reform submitted to the Congress envisages the amendment of sections 417 and 430 of the Substantive Labour Code with a view to ensuring conformity of the legislation with the Convention. **The Committee expects that the reform, once adopted, will take fully into account the longstanding comments that it has been making on this subject.**”¹⁰⁹

4.9. This shows that in Colombia, both the government as well as congress, abide by the pronouncements of ILO's supervisory bodies in relation to the right to strike as covered under ILO Convention No. 87 as a fundamental right in accordance with the tripartite 1998 ILO Declaration on Fundamental Principles and Rights at Work adopted without reservations.

4.10. For its part, national courts' jurisprudence accepts and understands that, in addition to articles 39, 55 and 56 of the Constitution, ILO Conventions Nos. 87, 98 and 154 insofar as they enshrine labor related human rights, are part of the constitutional bloc along with the Universal Declaration on Human Rights, the ICCPR and the ICESCR, the American Convention on Human Rights and the Protocol of San Salvador.¹¹⁰

4.11. In this context and having regard to the fact that most of the legal provisions in part II of the Labor Code date back to the mid-20th century and they therefore precede the 1991 Political Constitution, Colombia's constitutional, labor and administrative jurisprudence has recognized, in light of the new social realities and international views based on the authoritative doctrine of the CEACR and the CFA as

¹⁰⁹ Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) – General Report and observations concerning particular countries (Geneva: ILO, 2024), pp. 201-202.

¹¹⁰ *Cf. inter alia*, Constitutional Court of Colombia, Judgments C-574-1992, T-409-1992, T-426-1992, T-568-1999, T-1319-2001, T-235A-2002, C-04-2003 and C-038-2004. All available (in Spanish) at: www.corteconstitucional.gov.co.

well as other United Nation's and OAS monitoring bodies, that the right to strike is a corollary to Trade Union Freedom as enshrined in ILO Convention No. 87 and is, simultaneously, an autonomous right embodied in other international instruments as shown below, with reference to some significant judicial rulings on matters of trade union freedom and the right to strike.

A. Legal nature of the right to strike: a fundamental human right

4.12. As stated, national jurisprudence in Colombia has evolved in line with new social realities and on the basis of the international instruments that protect the right to strike. Perhaps the field where more difficulties have arisen is that of essential services, the regulation of which is incumbent on Congress according to the Constitution (art. 56) and is still pending. Therefore, judicial rulings on the matter are prolific.

4.13. For its part, the Constitutional Court in judgment C-796 of 2014 in relation to one of the public services in which strike is prohibited under article 430 of the Substantive Labor Code, following extensive references to ILO Convention No. 87, pronouncements from CEACR and CFA, to provisions in the ICESCR¹¹¹, to paragraph b) of Article 8.1 of the Protocol of San Salvador¹¹², as well as to several rulings of the same court, reiterated that the right to strike is in line with the ends of the social State based on the rule of law, that it is a guarantee associated to trade unions' right of association and to the right of collective bargaining protected under Article 55 of the Constitution and ILO Conventions Nos. 87, 98 and 154, all of which, the Court held, appertained to the constitutional bloc by virtue of Article 93 of the Constitution.

4.14. For the purposes of this written statement, it is worth recalling that the Constitutional Court held in that 2014 Judgment that, with regard to restrictions to the right to strike in essential services it is necessary to resort to ILO doctrine, as follows:

“20. On the specific topic of legitimate restrictions to the right to strike, both organs [CEACR and CFA] agree that this right is of a general character

¹¹¹ IECRSR Article 8 provides that: “1. The States Parties to the present Covenant undertake to ensure: (...) d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.”

¹¹² Article 8 of the Protocol of San Salvador on Trade Union Rights provides that: “1. The States Parties shall ensure: (...) b. The right to strike.” The article further provides that this right “(...) may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.”

and only allows for exceptions in the case of public officials ‘that exercise functions of authority on behalf of the State’ and in the event of the provision of essential services in the strict meaning of the term, that is, those services ‘the interruption of which may endanger the life, personal safety or health, of all or part of the population’¹¹³.

Thus, the CEACR has stated that the qualification of activities as essential public services is to be very restrictive, while accepting that a requirement that certain minimum services be maintained during the strike may be placed in matters not defined as such¹¹⁴:

‘The principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population’ (...).”

4.15. The Constitutional Court thereafter referred, in the 2014 Judgment in question, to the Committee on Freedom of Association, according to which:

The establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance”.¹¹⁵

4.16. The Constitutional Court then went on to quote many statements from ILO’s two supervisory and control organs in order to define, in the same terms as the CEACR and in harmony with Article 56 of the 1991 Constitution, the notion of essential

¹¹³ See *Freedom of Association, Digest of Decisions and Principles of the Committee on Freedom of Association of the Governing Body of the ILO* (5th ed., 2006) para. 541. And *Freedom of Association and Collective Bargaining*, Report of the Committee of Experts on the Application of Conventions and Recommendations, report III, part 4B, 1994, para. 156 and ff.

¹¹⁴ See *Freedom of Association and Collective Bargaining*, Report of the Committee of Experts on the Application of Conventions and Recommendations, report III, part 4B, 1994, para. 159.

¹¹⁵ See *Freedom of Association: Digest of Decisions and Principles of the Committee on Freedom of Association of the Governing Body of ILO* (5th ed., ILO 2006) para. 606.

services and went on to conclude that the right to strike is a fundamental right linked to the right of freedom of association:

“In sum, the right to strike is a fundamental right recognized in the Constitution and in the constitutional bloc, closely linked to the rights of freedom of association and collective bargaining. In accordance with Article 56 [of the Constitution] its exercise may only be prohibited in the sphere of essential public services defined by the Legislator. The latter, in order to define which rights fall under that category must take into account the following material criteria established in constitutional jurisprudence in light of the aims pursued by Article 56 of the Constitution: essential services are those the interruption of which generates an immediate risk to the life, safety or health of the population. For public order or general interest reasons the Legislator may impose additional limitations, as long as they do not disregard the essential core of the right and they are subject to constitutional principles, in particular, that of proportionality.”

4.17. In addition to the 2014 judgment discussed, the recent ruling of the Constitutional Court should be recalled whereby it called on “Congress to regulate, (...) on the basis of Article 56 of the Constitution, the exercise of the right to strike in the essential public service of justice administration. Until the regulation is issued, the exercise of this right shall be subject to ensuring the provision of minimum justice services, and without an indefinite interruption being allowed to”.¹¹⁶

4.18. In the same vein, the Labor Chamber of the Supreme Court has held, since its landmark Judgment CSJ SL1680-2020, in several other judgments¹¹⁷, that the right to strike is a fundamental right on the basis of ILO Convention No. 87, the ICPCR and ICESCR, the Protocol of San Salvador and the statements by the monitoring and control bodies of those instruments.

4.19. In the Supreme Court of Justice of Colombia’s words:

“1.1. The fundamental right to strike

¹¹⁶ Constitutional Court of Colombia, Judgment C-134 of May 3, 2023.

¹¹⁷ The jurisprudential reasoning reinforcing the freedom of association in all of its components, including the right to strike, as a fundamental human right, has been strengthened in multiple Supreme Court judgments, inter alia: CSJ SL415-2021, CSJ SL720-2021, CSJ SL1947-2021, CSJ SL1919-2021, CSJ SL4048-2022, CSJ SL5567-2022 y CSJ SL728-2024.

The Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO) have held that the strike is a fundamental right of workers that enables them to vindicate and defend their interests. The CFA's case law has established the basic principle according to which 'the right to strike is one of the fundamental rights of workers and their organizations' to which they may resort in defense of their economic and social interests. In parallel, the CEACR has stated that 'the strike is an essential means of action available to workers and their organizations to defend their interests', therefore, it 'constitutes a fundamental right' inextricably linked to the right to organize protected under Convention No. 87.

Although the right to strike is not explicitly enshrined in Convention No. 87, the ILO's supervisory bodies have held, for over half a century, as a given, that this right derives from article 3 of the aforesaid convention that enshrines the right of workers and their organizations to 'formulate their programmes' and from Article 10 'according to which the organizations have the purpose of 'promoting and defending the interests of workers'.

In the general studies on freedom of association and the protection of the right to unionize, 1994, and on the fundamental conventions, 2012, conducted by the CEACR, this organ has insisted that the right to strike is an intrinsic corollary to the freedom of association without which the latter would be nothing but a rhetorical recourse, a statement devoid of content. This, insofar as 'workers, in order to be able to promote and defend their interest, need to have means of action at their disposal that allow them to exert pressure for attaining their claims'.

It should be recalled that the Colombian State as a member of the International Labour Organization, should guide its actions having due regard for ratified conventions and the authentic interpretation thereof made by ILO's supervisory bodies (CFA and CEACR).

Now, the right to strike is not only referred to within the framework of the International Labour Organization, but also in other international human rights instruments of higher rank. Indeed, article 8.1.d) of the International Covenant on Economic, Social and Cultural Rights provides that States parties to the Covenant agree to ensure, inter alia, 'the right to strike, [...] exercised in conformity with the laws of the particular country', clarifying in paragraph 3 that '[n]othing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a

manner as would prejudice, the guarantees provided for in that Convention.’

At a regional level, Article 8.1.b) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) guarantees the right to strike, and in paragraph 2 provides that the exercise of this right ‘may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others.’

At the national level, Article 56 of the Political Constitution guarantees the right to strike in a broad manner, ‘except in essential public services defined by the legislator’.¹¹⁸

4.20. In a later case, and consistent with its earlier jurisprudence, the Labor Chamber of Colombia’s Supreme Court in Judgment CSJ SL2256-2023, in addition to reiterating judgments C-796 of 2014 and CSJ SL 1680 of 2020, on the basis of Article 56 of the Constitution, as well as Articles 3 and 10 of ILO Convention No. 87 and Articles 8.1 of the ICESCR and 8.1 of the Protocol of San Salvador, all of which, it insisted, are part of the constitutional bloc, held that:

“(…) our normative system of labor relations expressly recognizes that workers have the fundamental right to resort to strike, as a disruptive and vindicating exercise aimed at pursuing the defense of their rights and pressuring their counterpart for the establishment of better working conditions.”

4.21. Thereafter, the Supreme Court resorted to international *corpus juris* and in relation to the ILO’s normative system, it held:

“(…) that it has been acknowledged that the right to strike derives from Article 3.1 of Convention No. 87, according to which workers’ organizations have the right to, inter alia, ‘[...] organise their administration and activities and to formulate their programmes.’ In this regard the Committee on Freedom of Association – CFA – has recognized that ‘[t]he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87’ and constitutes ‘[...] one of the essential means through

¹¹⁸ Supreme Court of Justice of Colombia, Judgment CSJ SL1680-2020, 24 June 2020.

which workers and their organizations may promote and defend their economic and social interests'¹¹⁹.”

4.22. The Supreme Court also stated that, despite the fact that strike is of enormous importance and that there is an “express recognition as an essential corollary to the freedom of association”, “valid limitations and even prohibitions [are admissible] on the right to strike when, for example, there are acute national crisis situations, it concerns workers that exercise functions of authority on behalf of the State, or in the case of essential services for the community”, and to that effect, cited paragraphs 820 to 830 of the fifth edition (2006) of the *Digest of Decisions and Principles* of ILO’s Committee on Freedom of Association.

4.23. Even more recently, in Judgment CSJ SL728 of 2024, the Supreme Court again reiterated Judgment CSJ SL 1680 of 2020 to affirm, in the light of ILO Convention No. 87 and the CEACR and CFA’s pronouncements cited in extenso, as well as the doctrine of the universal and American regional human rights organs, that the right to strike is a fundamental human right. To this effect, the Supreme Court held that:

“By its recognition as a right, the strike is part of a ‘system’ within the international legal order and, as an international labor norm, it is also incorporated to the national legal order, according to Article 93, because the strike is considered as a fundamental right.

(...)

That is the sense in which the notion of the strike is to be understood as of the 1991 Constitution, also inspired on international law, the source of which emanates from the application of ILO Conventions, and expressly in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador).

In this regard, the ILO has considered that the strike is an essential means of action available to workers and their organizations to defend their interests, constituting a fundamental right.

(...) ILO have specified a series of elements related to the peaceful exercise of the right to strike, its objectives and the conditions for its legitimate exercise and, despite the absence of a specific provision on strike on Convention No. 87 on freedom of association and the protection of the right to organize, its application has been built upon Article 3 of the aforesaid

¹¹⁹ *Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of ILO* (6th ed., 2018), paras. 753 and 754.

convention, where the right of workers' organizations to establish their activities formulate their programs without restrictions is enshrined, and on Article 10 where it is provided that the objective of these organizations is to 'promote and defend the rights of workers'.

(...)

For its part the Committee on Freedom of Association has always considered that the right to strike is an intrinsic corollary to the right to organize protected under Convention No. 87.

(...)

Accordingly, and notwithstanding the authorized restriction the general prohibition of strike is incompatible with the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), even though control organs accept the prohibition of wildcat strikes. Moreover, the committee has considered that the right to strike of federations and confederations Should be recognized, since they are often the ones to convene them.”

4.24. After referring to the ICPCR and the ICESCR, the Protocol of San Salvador, and other pronouncements from ILO's CEACR and the CFA, the Supreme Court stated that:

“The inclusion of the right to strike in the international legal regime is evident; and it is recognized purely as a social right of fundamental freedom that is linked to the right to unionize and collective bargaining, given that it indicates the connection it has with the other labor rights of a collective nature.

International doctrine has considered the right to strike as *extrema ratio*, given that it is a mechanism of pressure on the employer with the purpose of obtaining vindications, rejecting demands, expressing grievances, or supporting those of other workers, and that it is manifested in several principles that have been stated in the decisions of the committee on freedom of association of the ILO (...).”

4.25. Following lengthy dissertation on the distinct regimes that enshrine the right to strike, the Supreme Court observed that this right is widely recognized on the international corpus juris and that, in that sense, it may be considered as a general principle of international law, and went on to state that:

“this body of principles has a legal significance, because the restrictions that domestic legislation may provide for may undermine the fundamental collective rights of workers and, in general, the expectation of improvement

of the working conditions in society. Therefore, the invaluable contribution of the normative control organs of ILO – [the CEACR and CFA] – to the concrete development of the right to strike and its application in domestic law is noteworthy.”

4.26. For its part, the Council of State at the highest administrative court, in line with the constitutional and labor jurisprudence, also admits the fundamental character of the right to strike. Specifically, in a case where a worker was dismissed for participating in a work stoppage at the State’s oil company where, according to the law, the strike is prohibited, after referring to ILO’s CFA’s case 2355, of the Freedom of Association Committee, the Council held that:

“(…) without prejudice to the restriction that by virtue of article 56 of the constitution and articles 430 y 450 of the [substantive Labor Code] is imposed on strikes on the place of essential public services, in the case under study the restriction of the exercise of that right was uncalled for given that the oil sector does not constitute an essential public service in a strict sense, given that it's interruption does not endanger the life, safety, or health of the individual.”¹²⁰

4.27. To conclude, it is clear in terms of Colombia national jurisprudence, that the right to strike is a fundamental human right inseparable from the right of freedom of association enshrined in ILO Convention No. 87; a solid and coherent legal reasoning built upon and developing on the basis of the doctrine of the CEACR, the CFA and the organs of monitoring and control in the universal and the American regional human rights systems.

¹²⁰ Council of State of Colombia, Case No.: 11001-03-25-000-2012-00230-00 (0884-2012), Judgment of 6 June 2019.

B. Other significant constructions of Colombia's national jurisprudence in relation to the right to strike

(1) THE STRIKE IS THAT RIGHT LINKED TO DEMOCRACY

4.28. In its Judgment CSJ SL1680-2020, the Colombian Supreme Court held that “the strike is a right indisputably linked to democracy, to pluralism and to the social State based on the rule of law, the exercise of which allows for the just participation of workers in the economic growth of nations and the realization of social justice and equity”.

(2) TITULARITY OF THE RIGHT TO STRIKE

4.29. In its Judgment CSJ SL720-2021, the Supreme Court of justice of Colombia again referred to the fact that strike is a human right attributed individually to workers, although its exercise is to be collective. In this regard, it explained that the strike may be exercised through a trade union (in representation of workers) or by a group of non-unionized workers, because in our legal system there is no “organic notion of strike, by virtue of which the only ones enabled to declare it are trade unions and, therefore, the so-called non-unionized or spontaneous strikes, that is, those that are not declared, directed or controlled by a trade union, are legitimate.”

(3) THE STRIKE CAN PURSUE ANY AIM OF INTEREST TO THE WORKERS

4.30. In its Judgment CSJ SL1680-2020, consistent with the pronouncements of ILO’s supervisory bodies, the Supreme Court stated that the objective of the strike can surpass the scope of collective bargaining and pursue different aims as long as they are in the workers' interest. This means that socio-political, solidarity, contractual strikes, for the breach of obligations by the employer and in general those that purport to *‘encompass various aims, as long as they are in the workers' interest, are legitimate’*. Therefore, the Court was of the view that *‘in this matter, the principle that the strike is the legitimate means for the defense of any occupational, social or economic interest of workers remains valid’*.

(4) STIKES OTHER THAN CONTRACTUAL STRIKES ARE NOT SUBJECT TO ANY

PROCEDURE

4.31. In its Judgment CSJ SL1680-2020, Colombia's Supreme Court of justice corrected its previous jurisprudence to state that strikes other than those initiated to pressure the signing of a collective agreement, such as sociopolitical, attributable to the employer, or solidarity strikes, are not subject to any procedure.

(5) CRITERIA FOR DETERMINING WHEN A SERVICE IS ESSENTIAL AND WHETHER STRIKE IS PROHIBITED

4.32. The Labor Chamber of the Supreme Court reiterated that in order to determine when a public service is essential, and thereby, to assess whether a prohibition for the exercise of strike exists, two criteria need to be taken into account: a formal one, according to which the legislator, in an exclusive and restrictive manner, must identify a public service as essential; and a material one, by virtue of which certain parameters and conditions must also be met to deduce whether an essential service or one that is vital to the community is at issue in a specific case. Consequently, ‘the definition of essential character of a service follows the validation of whether the legislator has so provided, expressly, and that, in truth, and in the concrete social context, its interruption endangers the life, the health, or the safety of persons’.¹²¹

4.33. Subsequently in its Judgment CSJ SL1680-2020, The Supreme Court clarified that in addition to those formal and material criteria it is necessary to distinguish between activity and service. Thus, on the basis of the definition given by ILO’s CEACR, the court explained that an activity is a broader concept than that of service, so that within an activity various services of different natures may be found.

4.34. The Supreme Court went on to state that *‘only the services that, within a given activity, are potentially necessary for its correct functioning could be considered essential’* or, in other words, *‘only the limitation to a strike that affects essential services is possible, not the one carried out by workers assigned to marginal services that, within the same activity are not indispensable for the preservation of the fundamental right, the protection of which is sought’* and that, in consequence, *‘when assessing whether a strike concerned an essential service, what needs to be verified, is whether the stoppage affected*

¹²¹ Supreme Court of Justice of Colombia, Judgment CSJ SL20094-2017, 29 November 2017

a service among those whose interruption directly, evidently and immediately endangered the health, life and safety of all or part of the population’.

(6) WORKERS HAVE THE RIGHT TO INTERRUPT THEIR WORK IN THE CASE OF IMMINENT RISKS AND TO COLLECTIVELY DEMAND SAFE WORKING CONDITIONS

4.35. The employer’s obligation to adopt all adequate means to ensure the safety and health of workers correlates to the latter’s right to work in an environment that reasonably guarantees their health, safety and well-being. Consequently, if the employer breaches those obligations, it gives the workers the right to demand a conduct in line with those duties and to refrain from providing the service until their safety is guaranteed. This was recalled in Colombia’s national jurisprudence in the Supreme Court’s Judgment CSJ SL 1450-2018 as follows:

“Indeed, the employer’s power of direction, organization on control of the productive activity, that enables the employer to issue instructions and orders to workers, and to these the duty to comply with them, does not grant the employer an absolute power over their existential rights. Therefore, the life, health and integrity are supreme and irreplaceable assets that escape the subordinating scope of the employer who, under the pretext of his organizing power cannot impinge on them. Thus, resistance to obeying an order of the employer that, justifiably and foreseeably, may affect the safety and health of his workers is legitimate, as is the right to collectively protest to demand appropriate and safe working environments.

Therefore, the court considers that’s such a determination, resulting from an immediate, natural, and instinctive reaction to a foreseeable danger, is not subject to special procedures or additional requirements, beyond giving notice to the employer and being based on reasonable grounds.”

(7) WORKERS AND THEIR ORGANIZATIONS CANNOT BE HARMED FOR ORGANIZING OR TAKING PART IN STRIKES

4.36. Based on the doctrine of ILO’s CEACR and CFA, Colombia’s labor jurisprudence has established that workers and their organizations should not suffer any type of harm or punishment for having organized or taken part in a strike, even if it was declared illegal. To that effect, in Judgment CSJ SL1947-2021, the Supreme Court of Justice of Colombia stated that:

“[...] the fundamental right to strike is affected not only when it is directly prohibited, but also when the consequences of the execution of the strike

are so disproportionate for the workers (dismissal, criminal penalties) and their organizations (cancellation of their legal personhood, reparations for losses) that, in practice, exercising it is a risk in itself.”

For that reason, it considered that paragraph 2 of Article 450 of the Substantive Labor Code is to be interpreted in the understanding that the sole fact of having organized or taken part in an illegal strike is not sufficient cause for dismissal. Consequently:

“[...] an examination of the conduct of the worker is necessary in order to determine whether during [the strike] the worker incurred in untoward acts, overstepping or deviations unprotected by law, such as criminal acts, physical violence, sabotage, destruction of files and documents, divulging confidential information, prohibited actions that endanger the life or safety of persons.”

4.37. The normative and jurisprudential references outlined leave no doubt that for the Colombian State, the implicit recognition of the right to strike in ILO Convention No. 87 is certain and unequivocal.

CHAPTER 5

CONCLUDING REMARKS

5.1. Colombia submits that the right to strike of workers and their organizations is protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

5.2. It is important to consider the historical context in which the key notions of unionization and strikes were developed, as they are essential to interpreting Articles 3 and 10 of ILO Convention No. 87 in relation to workers. On this basis, when Convention No. 87 states that workers' organizations have the right to organise their administration and activities and formulate their programmes, it must be understood that the strike, as a traditional form of demonstration and as a mechanism of pressure of last resort of workers' organizations, is implicitly recognized among those activities aimed at implementing the plan of action of those workers' organizations.

5.3. As explained in previous chapters, Colombia considers that the right to strike is intrinsic to the right to freedom of association, association and collective bargaining. The strike constitutes an enabling right or instrumental right that is exercised to create the necessary conditions for the exercise of the other rights to which it is linked. Thus, the right to strike cannot be disconnected from the rights to bargain and organize and, in general, from freedom of association. This has been affirmed by the Committee on Freedom of Association when it states that "the right to strike is an inseparable corollary of the right to organize protected by Convention No. 87."¹²²

5.4. In accordance with what has been set out in this written statement, the Colombian State shares the view of the Workers' Group that the right to strike is protected by the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). This assertion is supported by its domestic constitutional and legal regulations and by the prolific national jurisprudence that has so deployed it, to the point

¹²² *Compilation of Decisions of the Committee on Freedom of Association* (6th ed., ILO 2018), paras. 754

of elevating it to the category of a fundamental human right that is part of the constitutional bloc.

5.5. This view is also supported by international custom, as evidence of a general practice accepted as law. Indeed, Convention No. 87 has been almost universally accepted to the extent that out of 187 ILO member States, 158 have ratified it and, in any case, by virtue of the 1998 ILC Declaration, the principle of freedom of association with all its components applies in all states regardless of whether or not Convention No. 87 has been ratified.

5.6. On the other hand, the consistency and coherence of the system of supervision and control exercised by the CEACR and the CFA for more than 7 decades before many ILO Member States regarding the strike as an indissoluble element of the Freedom of Association enshrined in Convention 87, is further evidence of a generally accepted practice.

5.7. In fact, the CEACR in its General Surveys from 1959 to 2023¹²³ has supported the existence of the right to strike based on the principle of freedom of association as an inherent content of Convention No. 87; recently, as part of the monitoring of the implementation of the same Convention, in the 2022-2023 Report, it addressed 75 observations to Member States on the exercise of the right to strike.

¹²³ International Labour Conference, 43rd Session, 1959, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part IV), 135-136, para. 68; 58th Session, 1973, *Freedom of Association and Collective Bargaining: General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4B), para. 107; 69th Session, 1983, *Freedom of Association and Collective Bargaining: General Survey of Reports on the Freedom of Association and Protection of the Right to Organise Convention (No. 87), 1948, and the Right to Organise and Collective Bargaining Convention (No. 98), 1949*, Report III (Part 4 B), paras. 200-201, 204-226; 81st Session, 1994, *Freedom of Association and Collective Bargaining: General Survey of Reports on the Freedom of Association and Protection of the Right to Organise Convention (No. 87), 1948, and the Right to Organise and Collective Bargaining Convention (No. 98), 1949*, Report III (Part 4B), paras. 137, 159; 101st Session, 2012, Report III (Part 1B), para. 117; 101st Session, 2012, *General Survey*, paras. 118, 119, 120-121, 122-161.

5.8. Similarly, since 1952, the CFA has affirmed the existence of the right to strike in the cases submitted to it, as evidenced by the compilations of its decisions for the years 1972, 1976, 1985, 1996, 2006 and 2018. Throughout this period, the tripartite participation of governments, employers and workers has supported the pronouncements on the cases brought before the Committee.

5.9. Moreover, subsequent agreements and practices concerning the interpretation and application of Convention No. 87 support the existence of the right to strike. Subsequent instruments, adopted on a tripartite basis, have affirmed the right to strike in certain provisions. Thus, for example, article 7 of the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), provides that “Nothing in this Recommendation shall be construed in any way to prejudice the right to strike”; *The same* was true of Article 1 of the Abolition of Forced Labour Convention, 1957 (No. 105), which cannot be imposed “as a punishment for having participated in strikes”.

5.10. In addition, the Colombian State, as a member of the UN, shares the doctrine of its Human Rights Committee according to which the strike is an inherent component of the right of trade union association, while accepting and committing itself internationally to guarantee the rights to freedom of association and strike enshrined in article 8.1 (a) and (b) of the International Covenant on Economic, Social and Cultural Rights. The ICESCR’s Supervisory Committee (CESCR) has pointed out that the right to strike is a protected right under the Covenant and ILO Convention No. 87¹²⁴.

5.11. In addition, Colombia, as a founding member of the Organization of American States OAS, has signed various instruments of the Inter-American Human Rights System that also recognize strikes as a corollary of the right of trade union association provided for in ILO Convention No. 87 and as an autonomous right enshrined in the Protocol of San Salvador (art. 8.1).

¹²⁴ CESCR, Concluding Observations, Germany (2011); concluding observations, Germany (2011), and concluding observations, Estonia (2019).

5.12. Within the OAS, the Inter-American Court of Human Rights, responsible for applying and interpreting the American Convention on Human Rights, by virtue of which it exercises advisory and contentious functions, has recognized the right to strike in the exercise of both functions. In Advisory Opinion OC-27/21 of 5 May 2021, the Inter-American Court of Human Rights recognizes the right to strike as a protected right in various human rights instruments and considers it a “general principle of international law”, an affirmation fully in consonance with Article 38, paragraph 1 (c) of the Statute of the International Court of Justice.

5.13. In carrying out its contentious function, in a recent judgment of 17 November 2021, issued in the case of *Former Workers of the Judiciary v. Guatemala*, the Inter-American Court of Human Rights for the first time analyzed the violation of the right to strike and, in essence, reiterated the arguments raised in Advisory Opinion OC-27/21, of 5 May 2021.

5.14. Consequently, on the basis of its domestic legal system, Colombian jurisprudence, international labour standards, those that comprise the universal and regional human rights systems, as well as the authoritative doctrine of the control and monitoring bodies of the international organizations of which the Colombian State is a member, the Colombian government understands and accepts that the right to strike implicit in ILO Convention No. 87 has a multidimensional projection insofar as it is a fundamental right within the framework of the ILO, a human right in international human rights law, as well as a customary norm and a general principle of Public International Law.

5.15. In conclusion, the Republic of Colombia, respectfully submits these considerations within the framework of a consultative procedure, in the hope that the Court will provide valuable guidance to the ILO constituency in addressing the correct interpretation and application of Convention 87 labour standards and, at the same time, contribute to the clarification and development of the international legal order for the protection of workers' rights.

Bogota, 16 May 2024

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