INTERNATIONAL COURT OF JUSTICE

REQUEST FOR AN ADVISORY OPINION

RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

(General List No. 191)

WRITTEN STATEMENT

BY THE KINGDOM OF NORWAY

The Hague

16 May 2024

I. Introduction

1. In its Order of 16 November 2023, the International Court of Justice (hereinafter "**the Court**") invited States parties to the Convention Concerning Freedom of Association and Protection of the Right to Organise (No. 87) of 9 July 1948, 68 UNTS 17, (hereinafter "**the Convention**") to submit written statements concerning the request by the Governing Body of the International Labour Organization (hereinafter "**ILO**") that the Court issue an advisory opinion concerning the interpretation of the Convention. In its decision dated 10 November 2023 the Governing Body of the ILO requested the Court to urgently 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)?"*

2. The Kingdom of Norway supported the decision of the Governing Body of the ILO on 10 November 2023 to refer this question to the Court. Recognising the importance of promoting the effectiveness of international human rights and international labour standards, Norway has been concerned by the apparent institutional impasse within the ILO relating to this particular issue. It has, therefore, since 2014 consistently supported proposals to refer the question to the ICJ, in accordance with Article 37, paragraph 1, of the ILO Constitution (hereinafter "**the Constitution**").

3. Norway is satisfied that the Court has jurisdiction to issue an advisory opinion on the question put to it by the Governing Body of the ILO. Pursuant to Article 65 of the Statute of the Court, the latter has jurisdiction to offer 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. The General Assembly of the United Nations, acting on its competence under Article 96, paragraph 2, of the Charter of the United Nations, has authorized the ILO to request advisory opinions from the Court on "*legal questions arising within the scope of its activities other than questions concerning the mutual relationship between the organization and the United Nations or other specialised agencies*", Cf. Article IX, paragraph 2, of the 1946 Agreement between the United Nations

and the International Labour Organization (hereinafter "**the UN-ILO Agreement**"). It follows from Article IX, paragraph 3, of the UN-ILO Agreement that such a request may be addressed to the Court by the Governing Body of the ILO where this organ is acting in performance of an authorisation by the Conference of the ILO. The decision of the Governing Body of the ILO to request an advisory opinion from the Court was taken in performance of such authorisation as given by the Resolution concerning the procedure for requests to the International Court of Justice for Advisory Opinions adopted by the International Labour Conference on 27 June 1949. The Governing Body of the ILO is thus clearly competent to request an advisory opinion from the Court on the question at issue. The question posed is, moreover, indeed a legal question directly related to the core of, let alone the scope of, activities regulated by the Convention, which the Court will be capable of answering by reference to applicable international law. The jurisdiction of the Court to offer an advisory opinion is therefore established.

4. Norway is also satisfied that an opinion by the Court on the question posed to it will be of a decisive nature since it follows from Article 37, paragraph 1, of the Constitution that "[a]*ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice*". The question posed to the Court by the Governing Body of the ILO is a legal question relating to the interpretation of the Convention, and the latter was concluded by Members of the ILO in pursuance of the provisions of its Constitution. The term "*decision*" as used in the explicit wording of the relevant provision in Article 37, paragraph 1, of the Constitution signifies that the effect of the Court's opinion will have binding effect for the organisation and its members. Norway trusts that the Court's examination of the question posed will contribute to resolving the impasse relating to the question of whether the Convention provides a right to strike for workers and their organisations, and thus provide a positive contribution to the ILO and its Members.

5. In a nutshell, it is the opinion of Norway that the Convention does provide for a right to strike of workers and their organisations. This position is without prejudice to the question of the precise scope and limits to that right. Such right is not unfettered. Questions of the

precise scope and limits of such a right are matters that fall outside the question posed to the Court by the Governing Body of the ILO.

6. This statement will briefly explain the position of the Kingdom of Norway with regard to the substantive question put forward to the Court. Part II will briefly review the background to the request, whilst Part III will consider substantive issues that the Kingdom of Norway believes are relevant to the case. Part IV concludes the observations by the Kingdom of Norway at the present stage of the proceedings.

II. Background to the request

7. Since 1926, the ILO Committee of Experts on the Application of Conventions and Recommendations (hereinafter "**the CEACR**") has been a key part of the ILO supervisory system. This body consists of independent experts responsible for monitoring the application of ratified ILO Conventions by Member States. For more than half a century, the CEACR has held the view that a right for workers and their organisations to strike is indeed protected by the Convention.

8. In 1959, the CEACR held that the Convention does not limit the right of states to prohibit strikes for public employees exercising public authority, including armed and police forces. When doing so, it clearly presupposed the existence of a more general right to strike - its findings would otherwise not make much sense. At the very least, the CEACR signified that exceptions to a right to strike would, in any case, make it necessary to establish adequate guarantees that would fully safeguard their interests:

> *"(...) Finally, in certain countries organisations do not have the right to use the strike weapon; in three countries, this prohibition applies only to certain workers; in three other countries it would seem to apply to all workers. However this may be,* ***there is a possibility that this prohibition may run counter to Article 8, paragraph 2, of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (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 organisations in defence of their occupational interests; ***it is therefore necessary that, in every case in which certain workers are prohibited from striking, adequate guarantees should be accorded to such workers in order fully to safeguard their interests. This principle has been emphasised on numerous occasions by the Governing Body of the I.L.O. on the recommendation of its " Committee on Freedom of Association "***[1]

9. It emerges notably from such statement that the CEACR already in 1959 assumed that there exists a clear, substantive connexity or nexus between the freedom of association and the right to strike, as the latter constitutes not only an accepted, but an adequate means of safeguarding key interests protected by the Convention. In addition, it clearly appears that any prohibition of the right to strike would at the very least require alternative remedial guarantees that would, so to speak, "compensate" for such prohibition – and would thus have to be carefully considered and circumscribed. In 1959, the CEACR did not provide specific guidance on such exceptions or limits, and therefore on the precise scope of a right to strike. In later statements, the CEACR has gone further in engaging with the question of limits to the presupposed protection of strike action under the Convention. It is noted in this regard that the CEACR has further developed its reasoning on the right to strike in General Surveys in 1973, 1983, 1994 and 2012 and that it has stated that a general prohibition against strike action would run contrary to the Convention.

10. For reason of simplicity, reference is made only to the following brief, initial observation contained in the 2012 report:

> "*Regarding the particular issue of the right to strike, the Committee recalls that the right to strike was reflected in the 1994 General Survey on Freedom of Association and Collective Bargaining and has been dealt with in this*

[1] International Labour Conference, 43rd Session, 1959, Report III (Part I), Information and Reports on the Application of Conventions and Recommendations, Summary of Reports on Ratified Conventions (Articles 22 and 35 of the Constitution), page 114-115, para 68 (our emphasis). Accessed 13 May 2024.

year's General Survey on the fundamental Conventions, which clearly reflects the views of the social partners."[2]

11. The interpretations expressed by the CEACR with regard to the question of a right to strike has not been consistently endorsed by all Members of the ILO or parties to the Convention. Indeed, the issue has generated prolonged disagreement within the organisation, which forms the background to the decision of the Governing Body of the ILO on 10 November 2023 to request a decision by the Court in line with Article 37, paragraph 1, of the Constitution. In 2012, disagreement over the issue of whether the Convention protects the right to strike of workers and their organisations reached a stage where it gave rise to a major institutional crisis, where the Conference Committee on the Application of Standards (hereinafter "**CAS**") - for the first time in the history of the ILO – was prevented from exercising its supervisory functions. During the discussions in CAS at that stage, the representative of Norway added that Norway considers that the Convention protects a right to strike for workers and their organisations.[3] At the special session of the Governing Body of the ILO where the decision to refer the question to the Court was taken (33 in favour, 21 against, 2 abstentions), the representative of Norway stated that Norway was ready to support the referral to the ICJ at the Governing Body in November 2014, and that Norway is of the opinion that the right to strike can be derived from convention 87.[4]

III. Observations concerning questions posed to the Court

12. The Kingdom of Norway considers that the Convention entails a right to strike by workers and their organisations, as the general and adequate means of ensuring the safeguard of key interests protected by the Convention. This is the basis on which Norway implements its obligations under the Convention.

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[2] International Labour Conference, 101st Session, 2012, ILC.101/III 1A, Report of the Committee of Experts on the Application of Conventions and Recommendations, page 8, para 11. Accessed 13 May 2024.
[3] International Labour Conference, 101st Session, 2012, 19(Rev.) Part I, Report of the Committee on the Application of Standards, page 24, para. 90. Accessed 13 May 2024.
[4] Minutes of the 349th bis (Special) Session of the Governing Body of the International Labour Office, 10 November 2023, GB.349bis/PV, page 11, para 34. Accessed 13 May 2024.

13. In line with the general principles of treaty interpretation, as reflected in Article 31 (1) of the Vienna Convention on the Law of Treaties, the terms of the Convention shall 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.[5] This is a textual approach to interpretation, the gravitation point of which is the terms of the treaty and the overall aim of identifying the shared intention of the parties, of which the text constitutes the clearest indication.

14. The relevant provisions for the issue at hand are found in Articles 3 and 10 of the Convention. Article 3, paragraph 1, of the Convention provides that "[w]*orkers' 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*". Article 3, paragraph 2, of the Convention stipulates that "[t]*he public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof*". Article 10 provides that "*the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers*".

15. Norway submits that the right of workers and their organisations under Article 3, paragraphs 1 and 2, of the Convention 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 without interference from public authorities, is not merely a protection of a procedural nature, i.e. a standard protecting the mere ability to *form* an organisation of some kind without any bearing on the actual nature of the substantive activities of that organisation. The rights provided for under Article 3 include, in the opinion of Norway, a right for those entities concerned to undertake certain forms of activities which are closely linked to the object and purpose of the organisation and the act of entering into an organised relationship as amongst workers. This appears to be reflected in the terms of Article 3, which specifically refers to "*activities*" of the organisation as an element covered by the freedom of association protected by the provision. The term

[5] Norway is not a party to the Vienna Convention on the Law of Treaties, but maintains the position that the general rules of treaty interpretation expressed in articles 31-33 of that convention provides an accurate restatement of customary international law applicable to all states.

"*activities*" denote the actions undertaken by the relevant organisation. While this clearly cannot reasonably include any activity simply because authored by a workers' organisation (many of which are not unique to those organisations), it should be understood to include those actions which are generally regarded to be a natural part of trade union activities for the furthering and defending of the interests of workers, and that have done so historically.

16. Significantly, Article 8, paragraph 2, of the Convention sets out that "*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 organisations in defence of their occupational interests. This provision confirms the substantive nature of rights to be protected, and a prohibition to impair the guarantees provided for in the Convention. One may therefore ask more precisely what the core legal interests to be protected are.

17. An answer is provided in Article 10, and the interpretation draws strength also from it on an independent basis. Article 10 provides an important part of the textual context of Article 3 and stipulates that the term "*organisation*" for the purposes of the Convention shall be taken to mean any organisation of workers or employers "*for furthering and defending the interests of workers or of employers*". This formulation indicates that the Convention presumes that the steps regularly taken by those organisations for the furtherance and defence of workers' interests form a core of activities of the organisations referred to in Article 3. Those specific activities could thus be considered to enjoy protection as part of the overall freedom to organise guaranteed by the Convention.

18. Negotiations backed up by the possibility of strike action, and the threat thereof, are a natural part of the activities and programmes of trade union organisations. If this analysis was accurate already when the Convention was adopted in 1948, it has certainly been consistently confirmed and further strengthened in the many decades since, as will be seen inter alia by subsequent assessments of the supervisory system of the ILO, as exemplified by the CEACR assessments referred to above. Strike action is among the means of action by which workers and their organisations in the ultimate case may stimulate action on the part of the employer towards the improvement of the terms and conditions of workers. There is an underlying economic logic to such action. The dramatic step by workers of

putting down their work, places a cost on the employer that provides a clear incentive for the employer to enter into negotiations with workers to avoid this situation, by agreeing on relevant and reasonable improvements to the terms and conditions for work. The knowledge that a strike represents a means available to workers and their organisations thus introduces the basis for a balance of power, a parity, between workers and employers, creating an incentive for the employers to negotiate with workers in good faith and avoid the possible escalation of a strike.

19. This link between strike action and the activities of workers' organisations, and its historical pedigree, suggests that a provision providing workers' organisations a right to organise "*their [...] activities*" and to formulate "*their programmes*", would include a right to plan and organise strike action as part of those activities.

20. Reference may in this regard also be made to the increasing tendency in the practice of States and in public international law to consider strike action as a normal part of the activities of workers' organisations. It is noted that the right to engage in strike action is recognized in the national laws of many States, and in several instruments of public international law. Although a right to engage in strike action has not yet been specifically recognized as an essential element of trade union freedom under the European Convention on Human Rights, there has been a development in the case-law of the European Court of Human Rights to the effect that strike action is protected by Article 11 of that Convention, see for example *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (2014) para. 84. As with ILO Convention 87, the right to strike is not expressly mentioned in Article 11 of the European Convention on Human Rights.

21. Against this backdrop, Norway submits that the planning for or organisation of a strike is part of the "*activities*" in which workers' organisations shall have a right to engage pursuant to Article 3, paragraph 1, of the Convention. Such action, or the plausible threat thereof, also constitutes, in the opinion of Norway, one of the means generally applied by workers' organisations for the furtherance and defence of the interest of workers, pursuant to Article 10 of the Convention. Moreover, Article 8, paragraph 2 of the Convention confirms the substantive nature of the rights to be protected, whilst also establishing a prohibition against States impairing guarantees provided for in the Convention.

22. As has been noted in Part II of this written statement, this is also the position consistently communicated by the CEACR since its first statement on the issue in 1959. Norway maintains that statements and recommendations issued by the latter are not legally binding and, consequently, neither governments nor the Court are required to model their interpretation of the Convention on that of the CEACR. At the same time, the practice of the ILO and its expert bodies may qualify as helpful means that may assist in the determination of the applicable rules to be drawn from this ILO Convention, as provided for under Article 38, paragraph 1, litra d, of the Statute.

23. Even though the organisation of strike action by workers and workers' organisations enjoys protection under Article 3 of the Convention, cf. Articles 10 and 8 of the Convention, this does not imply that such action cannot be made subject to restrictions, including prohibitions in certain circumstances. It is the opinion of Norway that the protection offered under Article 3 offers a general protection against blanket prohibitions in domestic legislation that would hinder meaningful exercise of that type of activity which, as argued in this written statement, constitutes a normal and well-established activity available to workers' organisations for the furtherance and defence of the interests of workers. It does not prohibit states from taking steps to regulate the exercise of strike action as long as the State stops short of adopting regulations that would in effect hinder any meaningful exercise of this right.[6] As already noted by Norway, any responsible government has an ultimate obligation to prevent labour conflicts from causing severe damage to other societal

[6] It is noted in this context that statements made by the Committee of Experts with regard to the question of a right to strike protected by the Convention also appear to refer to domestic action entailing a "general prohibition" or a "general ban" on strikes. See, for example, International Labour Conference, 58th Session, 1973, Report III (Part 4B), Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, page 44, para. 107, where the committee states the following: "[...] *A general prohibition of strikes constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interests of their members (Article 10 of Convention No. 87) and of the right of trade unions to organise their activities (Article 3); it should be recalled, in this connection, that Article 8 of the Convention establishes that 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, including the right of trade unions to organise their activities*". Accessed 13 May 2024. See also International Labour Conference, 69th Session, 1983, Report III (Part 4B), Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, page 63, para. 205, where the Committee of Experts states the following: "[...] *A general ban on strikes seriously limits the means at the disposal of trade unions to further and defend the interests of their members (Article 10 of the Convention) and their right to organize their activities (Article 3) and is, therefore, not compatible with the principles of freedom of association*". Accessed 13 May 2024.

interests, such as, in particular, life, personal safety, health and other vital societal interests. This requires a balancing of interests, which needs to be approached with due sensitivity.

24. A fundamental principle in the Norwegian collective bargaining system is that the labour market stakeholders are responsible for collective agreements and for upholding industrial peace. This includes a duty to conduct industrial action in a responsible manner. There is nevertheless broad agreement that the government has an obligation to intervene if the industrial action poses a risk to life, health, or safety, or leads to other serious societal consequences. In such cases, the government will present a bill to the Parliament, the Storting, with a proposal for the strike in question to be prohibited and for the conflict to be resolved through compulsory arbitration by the National Wages Board, an independent, impartial, broadly composed and representative organ. This practice, known in Norway under the term *tvungen lønnsnemd*, has been practiced in Norway historically and at no point has Norway accepted that the application of this system for the avoidance of serious societal consequences stemming from strike action would be contrary to its international obligations, including herein its obligations under the Convention. The restrictive legal basis according to which the system is structured, and its exceptional use, itself underscores and highlights the centrality of the right to strike and its wide acceptance in Norwegian society as a legitimate measure for the defence of the interests of workers.

25. Norway submits that the Court is not asked in this case to decide on the scope of the right to strike action that enjoys protection under the Convention. The question posed to the Court is concerned with whether the right to strike of workers and their organisations as such is protected under the Convention. The limits to such a right do not form part of the question. Norway consequently does not consider it pertinent at this stage to comment any further on the nature and extent of those limits beyond what has been referred to in the above.

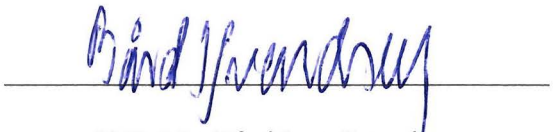
IV. Conclusion

26. In conclusion, the Kingdom of Norway emphasises the importance of freedom of association and the right to organise as protected under the Convention and by the work of the ILO throughout its century of existence. It is submitted that strike action is recognised

internationally as a normal and well-established part of the activities and programmes that trade union organisations pursue for the promotion and defence of the workers' interests, and that the Convention for the reasons set out above protect the right to strike of workers and their organisations. This position is presented here without prejudice to the question of the scope of and limits to that protection, which is considered to be a matter falling outside the question posed to the Court by the Governing Body of the ILO.

27. The Kingdom of Norway trusts and highly appreciates the Court's competence to examine and interpret the Convention and, by doing so, to offer guidance to States parties, the ILO and the ILO Constituents on the appropriate implementation and application of its provisions. Against this backdrop, the Kingdom of Norway welcomes the Court's consideration of the question referred to it and reiterates its satisfaction with the fact that the decision of the Court will contribute to a resolution to a disagreement that has affected the work of the ILO.

Respectfully submitted on behalf of the Kingdom of Norway,



H.E. Mr. Bård Ivar Svendsen

Ambassador of Norway to the Kingdom of the Netherlands