

INTERNATIONAL COURT OF JUSTICE

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**ADVISORY OPINION REGARDING “RIGHT TO STRIKE UNDER ILO CONVENTION  
No. 87”**

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WRITTEN STATEMENT OF MEXICO

16 May 2024

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## I. INTRODUCTION

1. On 10 November 2023, the Governing Body of the International Labour Organization (“ILO”) adopted a resolution, at its 349*bis* (Special) Session, by which it decided to request the International Court of Justice (“the Court” or “ICJ”) to render urgently an advisory opinion.
2. The operative paragraph of this resolution reads as follows:

*The Governing Body,*

*(...)*

*Decides, in accordance with article 37, paragraph 1, of the Constitution of the International Labour Organization,*

1. *To request the International Court of Justice to render urgently an advisory opinion under Article 65, paragraph 1, of the Statute of the Court, and under Article 103 of the Rules of Court, on the following question:*

*Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?*

2. *Instructs the Director-General to:*

*(a) transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the question, in accordance with article 65, paragraph 2, of the Statute of the Court;*

*(b) respectfully request that the International Court of Justice allow for the participation in the advisory proceedings of the employers’ and workers’ organizations that enjoy general consultative status with the ILO;*

*(c) respectfully request that the International Court of Justice consider possible steps to accelerate the procedure, in accordance with Article 103 of the Rules of Court, so as to render an urgent answer to this request;*

*(d) inform the United Nations Economic and Social Council of this request, as required under article IX, paragraph 4, of the Agreement between the United Nations and the International Labour Organization, 1946.*

3. Afterwards, in its Order of 16 November 2023, the Court invited States parties to the Freedom of Association and Protection of the Right to Organise Convention (Convention 87) to submit written statements on the question submitted to the Court for an advisory opinion. This was informed to the States through letter No. 160767, by the Registrar of the ICJ, Philippe Gautier, in accordance with Article 66, paragraph 2, of the Court's Statute. Accordingly, Mexico submits the following written statement pursuant to the ICJ Order, considering that it is a State party to the Convention 87 since 1 April 1950.

4. The question submitted to the Court is of great relevance for the work of the ILO, and for all States parties to Convention 87, since it has been at the core of a dispute more than three decades old between the main groups of the organization. The interpretation that the Court may render regarding whether the right to strike is protected under Convention 87 will hopefully settle this dispute and bring clarity as to the application of the Convention.

5. This written statement is organized in five sections. First, this introduction that points out relevant background. Second, it addresses the Court's jurisdiction to render the requested advisory opinion. Third, it shows how the right to strike is incorporated into Mexico's domestic law and practice. Fourth, it presents the view of Mexico regarding the question submitted to the Court. Finally, it contains a conclusion in virtue of all the foregoing sections.

## **II. JURISDICTIONAL MATTERS AND PROPRIETY OF THE REQUEST**

### **A. The Court has jurisdiction to render the requested advisory opinion**

6. Article 96(2) of the Charter of the United Nations establishes that, upon the authorization of the General Assembly, specialized agencies may request advisory opinions of the Court on legal questions arising within the scope of their activities. Meanwhile, Article 65(1) of the Statute of the ICJ specifies that the Court may give an advisory opinion on any legal question at the request of a body authorized in accordance with the Charter to make such

a request.<sup>1</sup> Consequently, there are three conditions that must be satisfied in order to affirm the Court's jurisdiction when a request for an advisory opinion is submitted to it by a specialized agency,<sup>2</sup> which in this case are: (a) the ILO is authorized to request this advisory opinion, (b) the opinion requested must be on a legal question, and (c) this question must be one arising within the scope of the activities of the ILO.

**a) The International Labour Organization is authorized to request this advisory opinion**

7. Regarding the first condition, Article 96(1) of the Charter states that the authorization may be given at any time by the General Assembly. Correspondingly, the Assembly authorized the ILO to request advisory opinions from the ICJ in 1946, through Article IX of the *Agreement between the United Nations and the International Labour Organization*, which provides:

*1. The International Labour Organization agrees to furnish any information which may be requested by the International Court of Justice in pursuance of Article 34 of the Statute of the Court.*

*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.*

*3. Such request may be addressed to the Court by the Conference, or by the Governing Body acting in pursuance of an authorization by the Conference.*

*4. When requesting the International Court of Justice to give an advisory opinion, the International Labour Organization shall inform the Economic and Social Council of the request.*

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<sup>1</sup> See *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 20, at para. 21.

<sup>2</sup> See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I. C. J. Reports 1996*, pp. 71-72, at para. 10.

8. Considering that the General Assembly was given a gatekeeping role, it is only in terms of its authorization that specialized agencies can submit requests.<sup>3</sup> Thus, the authorization specified in Article IX, paragraph 2, only puts an additional limitation to the subject matter of the request: legal questions put before the Court cannot concern the mutual relationships of the ILO and the United Nations or other specialized agencies. Whereas paragraphs 3 and 4 provide for procedural aspects that were satisfied, as it is provided in the resolution adopted by the Governing Body of the ILO at its 349*bis* (Special) Session.

9. In this case, the question that the ILO asks the Court to solve concerns the interpretation of Convention 87; hence, it does not cover an issue regarding the relationships between the ILO and the UN or other specialized agencies. Rather, it only requires the Court's interpretation to ascertain whether the right to strike of workers and their organizations is protected under the Convention.

**b) The question presented to the Court is of a legal character**

10. On the second requirement, the Court has explained that “questions framed in terms of law and raising problems of international law... are by their very nature susceptible of a reply based on law... and appear... to be questions of a legal character”.<sup>4</sup> This is independent of the potential political aspects that may be involved, since political considerations do not suffice to deprive the legal character of the question.<sup>5</sup>

11. Here, the ILO has requested the ICJ to clarify whether the right to strike of workers and their organizations is protected under the Convention 87, which demands an exercise of interpretation. This interpretation can only be made in terms of international law, evincing the

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<sup>3</sup> See *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, pp. 20-21, at para. 22.

<sup>4</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, at para. 15; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, pp. 414-415, at para. 25; and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 233-234, at para. 13

<sup>5</sup> See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 234, at para. 13; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 155, at para. 41

legal character of the question and the potential reply. Furthermore, the Court has stated that treaty interpretation is an “essentially judicial task”.<sup>6</sup>

**c) The legal question lodged to the Court falls within the scope of the activities of the International Labour Organization**

12. Turning to the third requirement, which is also enshrined in the authorization given by the General Assembly, the question must have arisen within the scope of the ILO’s activities. In this regard, the ICJ has stated that “[i]n order to delineate the field of activity or the area of competence of an international organization, one must refer to the relevant rules of the organization and, in the first place, to its constitution”.<sup>7</sup>

13. The Constitution of the ILO refers in Article 1 that it is an organization established for the promotion of the objects set forth in the Preamble of the Constitution and in the Declaration concerning the aims and purposes of the International Labour Organization, adopted in 1944, annexed to the Constitution. In first place, the Preamble alludes to the protection of the workers’ interests and rights, which encompasses the principle of freedom of association. In second place, the Declaration of 1944 lays down in its first provision that the freedom of expression and of association are essential to sustained progress.

14. Thus, the ILO considers freedom of association as one of its long-standing and relevant interests, which it has the task of promoting and protecting. In this context, the question referred to the Court concerns the interpretation of a convention concluded within the ILO, the main subject-matter of which is freedom of association and the right to organize. The question submitted by the ILO therefore falls within the scope of its activities.

**B. There are no compelling reasons for the Court to exercise discretion not to render the requested advisory opinion**

15. Once the Court’s jurisdiction is established, thereafter, the Court has the duty to satisfy itself as to the propriety of the exercise of its advisory function by reference to the criterion of

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<sup>6</sup> *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion : I. C. J. Reports 1948*, p. 61.

<sup>7</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I. C. J. Reports 1996*, pp. 74-75, at para. 19

“compelling reasons”.<sup>8</sup> Under the terms of Article 65(1) of the ICJ Statute, the Court “may give” an advisory opinion. These terms have been consistently interpreted by the Court as giving it discretion to decide whether to render or not the opinion. This discretion exists so as to protect the integrity of the Court’s judicial function as the principal organ of the United Nations.<sup>9</sup>

16. Up to date, the ICJ has never, in the exercise of its discretionary power, declined to respond to a request for an advisory opinion. Moreover, its opinion “represents its participation in the activities of the UN and, in principle, should not be refused.”<sup>10</sup> The object of the Court’s opinion is to guide the United Nations in respect of its own action. Accordingly, the consistent jurisprudence of the Court has determined that only “compelling reasons” should lead the Court to refuse its opinion in response to a request falling within its jurisdiction.<sup>11</sup>

17. Arguments that may be advanced as compelling reasons for the Court to decline the exercise of its jurisdiction concern, first, the nature of the right to be interpreted, and second, the context of the adoption of the request and its political history within the ILO. Notwithstanding these positions, the mere fact that the request for an advisory opinion relates to the rights of private individuals is not a reason for the Court to refuse to entertain the present proceedings.<sup>12</sup> Additionally, the jurisprudence of this Court has clarified that the circumstances surrounding the adoption of the request, the origin or the political history of the request, or the distribution of votes in respect of the adopted resolution are not compelling reasons.<sup>13</sup>

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<sup>8</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 157, at para. 45.

<sup>9</sup> See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 416, at para. 29.

<sup>10</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

<sup>11</sup> See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 416, at para. 30. See also *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956*, p. 86; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 156, para. 44.

<sup>12</sup> See *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 333, at para. 20.

<sup>13</sup> See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 417, at para. 33; See also *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 237, at para. 16.

18. The Court has stated that, for instance, there would be a compelling reason for it to decline to give an advisory opinion when doing so would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.<sup>14</sup> However, the case at hand only concerns the interpretation of the Convention 87, without taking into account any underlying dispute between States.

19. That being so, the ILO is a body duly authorized to request this advisory opinion from the Court, the question submitted is of a legal character and falls within the scope of the ILO's activities. The Court's exercise of its advisory jurisdiction is limited to the interpretation of a treaty conceived within the ILO, so it will not circumvent any fundamental principle of international law. Consequently, there are no compelling reasons for the Court to refrain from exercising the advisory jurisdiction conferred on it by the Charter and the Statute. On this basis, it is the position of the Mexican State that the Court should exercise its competence and issue the advisory opinion requested by the ILO.

### **III. MEXICO'S POSITION REGARDING THE RIGHT TO STRIKE**

#### **A. National perspective**

20. The right to strike has been a central component in the fight for labor rights in Mexico. Before the Mexican Revolution, labor conditions in Mexico were extremely unfavorable for workers, with grueling hours and meager wages. Workers began to organize and strike, which was crucial for including labor rights in the revolutionary agenda. One of the most notable strike movements was the Río Blanco strike in 1907, which occurred after employers refused to negotiate labor improvements.

21. In Mexico's view, work is a right and a social duty. It requires respect for the liberties and dignity of the ones who develop it. It must be done under conditions that guarantee a dignified life and health for workers and their dependent relatives. The right to strike bears, thus, a legal weight, but also a social one, as it is the tool to defend the interests of the workers.

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<sup>14</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, at para. 47. See also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, at para. 33.

22. Strikes have had a significant impact on Mexican society, often acting as catalysts for enhancements of the labor conditions. The right to strike and to organize are inherently linked and are foundational components of the country's labor laws. Both rights are enshrined in the Political Constitution of the United Mexican States (Mexican Constitution) and detailed in secondary laws.

23. The Mexican Constitution contemplates, in Article 123, Section A, subsection XVI, the right of workers to organize to defend their interests, constituting unions, associations, etc. Meanwhile, Article 356 of the Federal Labor Law ("FLL") indicates that an association of workers is constituted to study, improve, and defend their interests.

24. Article 123 of the Mexican Constitution enshrines the right to strike, specifically in Section A, sub-sections XVII and XVIII; and in Section B, sub-section X. In this regard, strikes, as well as association and collective bargaining, are conceived as tools of struggle of the working class in order to defend its interests.<sup>15</sup>

25. Article 440 of the FLL defines a strike as the temporary suspension of work carried out by a coalition. Meanwhile, Article 92 of the Federal Law of Workers in the Service of the State defines it as the temporary suspension of work as a result of a coalition of workers, decreed in the manner and terms established by law.

26. Thus, a strike is a temporary suspension of work carried out by a coalition of workers and requires the participation of the majority of them. These requirements underscore the role of organized labor groups in initiating and managing strike actions. The right to organize is a prerequisite to exercise the right to strike; and the right to strike is necessary for organized workers to defend their interests. Therefore, there is an inexorable connection between both rights, demonstrating that the presence of one invariably implies the existence of the other.

27. In Mexico's domestic law, for a strike to exist in legal terms, it must satisfy the requisites and pursue the objectives pointed out in Article 450 of the FLL, which stipulates that:

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<sup>15</sup> See Fourteenth Collegiate Labor Tribunal of the First Circuit, Indirect *Amparo* Proceedings under Review 64/2004 (1 Jul. 2004), p. 40.

*“The strike shall have as purpose to:*

- I. Achieve a balance between the various factors of production, harmonizing the rights of labor with those of capital;*
- II. Obtain from the employer or employers the establishment of a collective labor agreement and demand its review at the end of its validity period, in accordance with the provisions of Chapter III of Title Seven;*
- III. Obtain from the employers the establishment of the law-contract and demand its review at the end of its validity period, in accordance with the provisions of Chapter IV of Title Seven;*
- IV. Demand compliance with the collective labor agreement or the law contract in the companies or establishments where it has been violated;*
- V. Demand compliance with the legal provisions on profit sharing;*
- VI. Support a strike aimed at achieving any of the objectives listed in the previous sections;*
- VII. Demand a review of the contractual wages referred to in articles 399 bis and 419 bis.”*

28. These objectives evince that the right to strike is the strongest resource to which workers can resort to when defending and furthering their rights in a negotiation with employers. It is their ultimate tool available, with an inherent collective nature, demonstrated by their legitimate purposes set out in Mexico’s domestic law that mainly revolve around the conclusion, review, and compliance of collective labor agreements and law-contracts. Furthermore, Article 387 of the FLL clearly underlines the relevance of the right to strike in collective bargaining to protect workers’ rights. This provision states that an employer who hires workers who are members of a union is obliged to enter into a collective bargaining agreement with it upon request. If the employer refuses to sign the contract, the workers may exercise the right to strike provided for in Article 450.

29. In accordance with Article 920 of the FLL, the strike procedure begins with the submission of the list of demands by means of a strike notice, which must meet the following requirements:

- a. It must be addressed to the employer, state the demands, announce the intention to strike if they are not met, clearly express the purpose of the strike, and indicate the day and time when work will be suspended, or the pre-strike term;
- b. It must be presented in duplicate to the competent labor judge;
- c. The notice for the suspension of work must be given at least six days in advance of the date set to suspend work and ten days in advance when it concerns public services; and
- d. The strike notice must be attached with a representativeness certificate, especially when the strike procedure aims to obtain from the employer or employers the conclusion of the collective bargaining agreement or the conclusion of the law-contract.

30. Employers and workers may negotiate to resolve the list of demands delivered to the former in the strike notice. Nevertheless, if no solution is given to the issues presented, the strike begins, and it continues until one of the four situations covered by Article 469 of the FLL puts an end to it: 1) an agreement between the striking workers and the employers; 2) if the employer, at any time, agrees to the demands contained in the strike notice and pays the wages that the workers would have missed; 3) an arbitral award from the person or commission freely chosen by the parties; or 4) by a judicial decision if the workers or employers submit the conflict to a judicial procedure.

31. Striking is a fundamental right which is exercised collectively; thus, its termination does not depend on the expression of the will of one person, but on the collective will of workers. For this reason, the verification of the majority representation is always an aspect that labor authorities must consider.<sup>16</sup>

32. The aforementioned considerations show how the strike aims to balance the rights and obligations of both workers and employers, and the dispositions of the FLL provide a framework where the strike serves for the resolution of labor conflicts. The Mexican Supreme

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<sup>16</sup> See Fifth Collegiate Labor Tribunal of the First Circuit, Indirect *Amparo* Proceedings under Review 78/2019 (9 Dec. 2021), p. 170.

Court of Justice has highlighted that the right to strike is conceived on the principle of social justice of achieving a balance between the factors of production, that is, the labor force, represented by associated workers, and the capital, held by the employer.<sup>17</sup>

33. The right to strike is fundamental for workers to defend their rights. It allows them, and their organizations, to stand up for their interests collectively. The strength of the strike lies in the cohesion of the workers.<sup>18</sup>

## **B. International perspective**

34. The Inter-American System of Human Rights, of which Mexico is a Party, considers the right to strike as a fundamental human right of workers, which they can exercise even outside of their organizations.<sup>19</sup> Article 26 of the American Convention on Human Rights protects this right.<sup>20</sup> Articles 45(c) of the Charter of the Organization of American States and 27 of the Inter-American Charter of Social Guarantees contemplate the right to strike. Similarly, it is enshrined in Articles 8(b) of the Protocol of San Salvador and 8(1)(d) of the International Covenant on Economic, Social, and Cultural Rights.

35. The right to strike is also addressed within the United States-Mexico-Canada Agreement (“USMCA”). Chapter 23 of this treaty emphasizes the commitment of the States Parties to uphold labor rights as recognized by the ILO. Specifically, Article 23.3 states that “[e]ach Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Rights at Work: a) freedom of association and the effective recognition of the right to collective bargaining;”. Furthermore, a footnote added to the term “association” in the treaty explains: “[f]or greater certainty, the right to strike is linked to the right to freedom of association, which cannot be realized without

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<sup>17</sup> See Mexico’s Supreme Court of Justice, Second Chamber, Dissenting judgment 26/2016 (10 Ago. 2016), pp. 33-34.

<sup>18</sup> See Thesis I.5o.T.4 L (11a.), *Mexico’s Federal Judiciary Official Gazette*, Eleventh Period, 9 Dec. 2021, Digital record: 2024203.

<sup>19</sup> See Inter-American Court of Human Rights. Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective. Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, p. 36, at para. 95.

<sup>20</sup> See Inter-American Court of Human Rights. Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective. Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, p. 19, at para. 48.

protecting the right to strike”. Then, the USMCA recognizes the inherent connection between both rights.

36. For Mexico, the right to strike is intrinsically related to the freedom of association and the right to organize, since it is essential to provide effective defense of workers’ rights. The Inter-American Court of Human Rights has recognized this position,<sup>21</sup> while the Committee on Freedom of Association stressed that “[t]he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87”.<sup>22</sup> Similarly, the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association stated that trade unions and the right to strike are fundamental tools for achieving workers’ rights, since they constitute mechanisms to defend their interests collectively, and engage with big business and government on a more equal footing.<sup>23</sup>

37. Therefore, the right to strike must be understood as a prerequisite for the protection of the right to freedom of association. The relationship between both rights makes them non-severable.

#### **IV. RESPONSE TO THE 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)?**

38. The ILO submitted the question under consideration based on Article 37 of its Constitution, which establishes 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”.

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<sup>21</sup> See Inter-American Court of Human Rights. Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective. Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, p. 45, at para. 124.

<sup>22</sup> International Labour Organisation. *Compilation of decisions of the Committee on Freedom of Association*, Sixth Edition, 2018, at para. 754.

<sup>23</sup> See United Nations. Report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/71/386, September 14, 2016, p. 15, at para. 54.

39. There has been a long-standing dispute regarding the interpretation of Convention 87 between the ILO Employers' and Workers' groups, which has lasted more than 30 years. This conflict of views relates to the interpretation of certain provisions of this Convention, in particular, Article 3.<sup>24</sup>

40. The Mexican State notes then, that the question presented to the Court, concerning whether Convention 87 protects the right to strike of workers and their organizations, can only be answered through an exercise of treaty interpretation.

41. Thus, in order to determine whether the right to strike is protected under Convention 87, the treaty must be interpreted applying the rules on treaty interpretation enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). Although the Vienna Convention is not applicable to treaties concluded before its entry into force, Articles 31 and 32 reflect rules of customary international law,<sup>25</sup> which are applicable to Convention 87, adopted in 1948. In the *Case concerning Kasikili/Sedudu Island*, the Court relied on these customary rules to interpret a treaty dating back to 1890 and drew on the current understanding of concepts to illuminate the meaning of the words of that treaty.<sup>26</sup>

42. Article 31, paragraph 1, of the Vienna Convention provides that "[a] treaty 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 light of its object and purpose". Thus, all these elements must be taken into account as a whole to interpret Convention 87. In this case, the relevant provision of Convention 87 lies on Article 3, which has been interpreted as the Article of Convention 87 from which it follows that the right to strike is protected by that Convention.<sup>27</sup>

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<sup>24</sup> See ILO Governing Body, 349th bis (special) Session, Geneva, 10 November 2023. Doc. GB.349bis/INS/1/1, para 1.

<sup>25</sup> See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, *I.C.J. Reports 2021*, p. 95, at para. 75.

<sup>26</sup> See *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I. C. J. Reports 1999*, p. 1060, at para. 20 *et seq.*

<sup>27</sup> See International Labour Conference, 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), pp. 65-66, at paras 147-151; See also International Labour Conference, 69th Session, 1983, Freedom of Association and Collective Bargaining: General Survey, Report III (Part 4 B), pp. 58 and 62, at paras. 180-181 and 199-201; Inter-American Court of Human Rights. Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective. Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, p. 37, at para. 96.

43. Interpretation must regard primarily to the text of the treaty, considering that the context of any provision is also encompassed by the text of other provisions in the instrument.<sup>28</sup>

Convention 87 provides in Article 3 that:

*“1. 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.*

*2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.”*

44. Regarding the term “organization”, Article 10 clarifies that it means “any organisation of workers or of employers for furthering and defending the interests of workers or of employers”. In this regard, the elements described in Article 3 are connected with the purpose of an organization under the treaty. Thus, the drawing of constitutions and rules, the election of representatives, the organization of its administration and activities, as well as the formulation of its programs, bear the same objective: furthering and defending the interests of workers or of employers.

45. In particular, the term “activities” bears a wide scope since it does not refer to any particular activity. Consequently, it must be understood as covering any activity performed with the aim of furthering and defending the interests of workers or of employers.

46. Now, turning to the object and purpose of the Convention, the Court usually refers to the treaty’s title and preamble as means to ascertain these elements.<sup>29</sup> In this case, the title of Convention 87 suggests that its purpose is to protect both freedom of association and the right to organize, while its preamble states, in the relevant part:

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<sup>28</sup> See *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, pp. 29-30, at para 65.

<sup>29</sup> See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 98, at para. 84; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 31, at para 70.

*“Having decided to adopt, in the form of a Convention, certain proposals concerning freedom of association and protection of the right to organise, which is the seventh item on the agenda of the session;*

*Considering that the Preamble to the Constitution of the International Labour Organisation declares “recognition of the principle of freedom of association” to be a means of improving conditions of labour and of establishing peace;*

*Considering that the Declaration of Philadelphia reaffirms that “freedom of expression and of association are essential to sustained progress”;*”

47. The preamble of the Convention sets out the relevance of freedom of association, which is essential to sustained progress and a means of improving conditions of labor and of establishing peace. This adds to the interpretation of Convention 87, in particular Article 3, regarding the purpose of organizations’ activities to promote and defend the interests of workers and employers.

48. Bearing the above in mind, the question to be addressed now is whether the right to strike is covered by Article 3, as an activity to promote and defend workers’ interests. Article 31 of Vienna Convention establishes that:

*“There shall be taken into account, together with the context:*

*(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

*(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;”*

49. On the one hand, agreements as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties, which must be read into the treaty for purposes of its interpretation.<sup>30</sup> It requires a common understanding regarding the interpretation of a treaty, which the parties are aware of and accept implicit or explicitly.<sup>31</sup>

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<sup>30</sup> See *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I. C. J. Reports 1999, p. 1075-76, at para. 49.

<sup>31</sup> See International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, U.N. Doc. A/73/10, (2018), Conclusion 10.

50. On 23-25 February 2015, the International Labour Office hosted a tripartite meeting on Convention 87, in relation to the right to strike and the modalities and practices of strike action at national level. In this context, addressing the relation between said convention and right, the Government Group<sup>32</sup> stated:

*“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.”*<sup>33</sup>

51. This statement perfectly acknowledges the relationship between the right to strike and the right to organize activities for the purpose of promoting and protecting workers’ interests. Accordingly, the strike is the *sine qua non* activity that supports the interests of organized workers, which encompasses collective bargaining on labor conditions and salaries, as well as the defense of all their rights, including the right to organize or join an organization.

52. After the statement was presented in the meeting, other States’ representatives added to this position. The group of Latin American and Caribbean countries stated that “[t]he right of a trade union to freely organize its activities and to formulate its program 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”.<sup>34</sup> Similarly, other group representatives and countries, including Mexico, agreed with the view that the right to strike is protected under Convention 87.<sup>35</sup> This position met no objection by any government.

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<sup>32</sup> The Government Group is composed of six regional groups: Africa group, Asia and the Pacific group (ASPAG), group of Latin American and the Caribbean countries (GRULAC), group of Industrialized Market Economy Countries (IMEC), Eastern European group (EEG), and Western European group (WEG).

<sup>33</sup> International Labour Organization. Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, TMFAPROC/2015/2, (23-25 February 2015), Appendix II: Government Group Statement, at para 4.

<sup>34</sup> International Labour Office, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, “Final report of the Meeting”, TMFAPROC/2015/4, (Geneva, 23–25 February 2015), at para. 11.

<sup>35</sup> See These representatives spoke on behalf of: Nordic countries, United States, Germany, France, Mexico, Italy, and Panama; See International Labour Office, Tripartite Meeting on the Freedom of Association and Protection

53. On the other hand, subsequent practice in the application of a treaty constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.<sup>36</sup> It may consist of any conduct of a party in the application of the treaty, whether in the exercise of its executive, legislative, judicial, or other functions.<sup>37</sup>

54. In a judicial case before the High Court of Botswana, held at Lobatse, an issue arose regarding whether freedom of association included the right to strike under national law. The case was reviewed under national and international law, including ILO Convention 87. The judge in turn resorted to international law so as to interpret national law in a consistent manner, and then answered the question as follows:

*“The right to freedom of association in international law includes the right to strike. It follows, in my view that if employees are free to associate and to bargain collectively, then the right to strike is necessarily implied in situations where collective bargaining fails to achieve the desired results.”*<sup>38</sup>

55. In particular, judicial cases from national courts in Colombia,<sup>39</sup> Fiji,<sup>40</sup> and South Africa,<sup>41</sup> have adopted the view that the right to strike is protected under Convention 87. Particularly, the examples from Colombia and Fiji recognize that the right to strike is an important means available to workers and their organizations for the promotion and protection of their economic and social interests. Hence, the exercise of the right to strike constitutes an activity for the promotion and protection of workers’ interests.

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of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, “Final report of the Meeting”, TMFAPROC/2015/4, (Geneva, 23–25 February 2015), at paras. 15-18, 22-23, and 25.

<sup>36</sup> See *Kasikili/Sedudu Island (Botswana/Namibia)*, *Judgment*, I. C. J. Reports 1999, p. 1075-76, at para. 49.

<sup>37</sup> See International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, U.N. Doc. A/73/10, (2018), Conclusion 5(1).

<sup>38</sup> Botswana - High Court of Lobatse, *Botswana Public Employees’ Union and others v. Minister of Labour and Home Affairs and others*, MAHLB-000674-11, 9 August 2012, p. 87, at para. 250.

<sup>39</sup> See Constitutional Court of Colombia, 3 September 2008, Decision No. C-858/08, p. 17 *et seq.*

<sup>40</sup> See Arbitration Tribunal, *Fiji Electricity & Allied Workers Union v. Fiji Electricity Authority*, 9 May 2006, [2006] FJAT 62; FJAT Award 24 of 2006.

<sup>41</sup> See Labour Court of South Africa, *Chamber of Mines of South Africa v. Association of Mineworkers of South Africa, National Union of Mineworkers, United Association of South Africa*, 23 June 2014, Case No. J99/14, p. 29, at paras. 60-61.

56. Therefore, the application of the general rule of interpretation to Convention 87, in particular Article 3, makes it clear that said Convention protects the right to strike.

57. Accordingly, since the interpretation resulting from the application of Article 31 of the Vienna Convention is clear, there is no need to resort to supplementary means of interpretation, as contained in Article 32 of the same convention.<sup>42</sup> The general rule of interpretation is the primary criteria for interpreting a treaty, and in this case the result of said exercise is quite clear, so there is no ambiguous or obscure meaning, or an interpretation manifestly absurd or unreasonable, which would call for the necessity to resort to supplementary means of interpretation.

## V. CONCLUSIONS

58. For the reasons given above, the Government of Mexico is of the view that the answer to be given to the question presented to the International Court of Justice should be that, indeed, 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).

59. The right to strike is fundamental for workers to be able to defend their rights and promote their interests. This right operates in its strongest form when organized workers advance it as a collective movement.

60. Mexico's position is that there is an inexorable relationship between the right to organize and the right to strike, where the existence of one invariably implies the existence of the other. The strike is then a *sine qua non* activity to support organized workers' activities: collective bargaining on labor conditions and salaries, as well as the defense of their rights, which includes the right to organize or join an organization. Thus, the ultimate purpose of the strike is to achieve a balance between the various factors of production, harmonizing the rights of labor with those of capital.

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<sup>42</sup> See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 100, at para. 89.

61. Therefore, the ICJ has an extraordinary opportunity to provide assistance or recommendations to guide the ILO and States regarding on the possible actions required to ensure the adequate implementation and monitoring of Convention No. 87, particularly the right to strike.

62. Finally, Mexico respectfully reserves the right to address further issues in later stages of the proceedings, including the right to revise or to supplement the arguments raised in the present written statement.

The Hague, 16 May 2024

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**Ambassador of Mexico to the Kingdom of the Netherlands**