

INTERNATIONAL COURT OF JUSTICE

REQUEST FOR ADVISORY OPINION

RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

Written Statement of the Federative Republic of Brazil

30th May 2024

INTRODUCTION

1. Pursuant to the International Court of Justice Order dated 16th November 2023, Case No. 191, the Federative Republic of Brazil has the honor to present this Written Statement regarding the advisory proceedings entitled “*Right to Strike under ILO Convention No. 87*” (<https://www.icj-cij.org/case/191>).
2. The 349th (bis) session of the International Labour Organization - ILO Governing Body, on November 10, 2023, adopted a Resolution on the interpretation of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize with respect to its application to the right to strike. In the Resolution, the Governing Body, due to the serious and persistent disagreement among the tripartite Constituents over the interpretation of the Convention, requested the ICJ to render urgently an advisory opinion, based on Article 37, paragraph 1, of the ILO Constitution.
3. Due to the importance given by the Federative Republic of Brazil to the promotion and protection of workers’ rights, including the right to strike, Brazil has decided to take part in the present advisory procedure as a member of the International Labour Organization, despite not being a party to Convention No.87, in accordance with Article 66, paragraph 3, of the Statute of the Court.
4. Brazilian Federal Constitution ensures workers’ freedom of association and the right to establish or join organizations without previous authorization from the Government. Brazil is a signatory to the Convention No. 87 and may yet ratify it. Therefore, it has an evident interest in its interpretation by the International Court of Justice.

CONSIDERATIONS ON JURISDICTION AND JUDICIAL PROPRIETY

5. According to Article 65(1) of its Statute, "the Court may give an advisory opinion on any legal question at the request of whatever body authorized by or in accordance with the Charter of the United Nations to make such a request". By virtue of Article 96, paragraph 2, of

the Charter of the United Nations, in addition to the General Assembly and the Security Council, “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”.

6. In the Agreement between the United Nations and the International Labour Organization, the UN General Assembly authorized the ILO to request advisory opinions to the Court on legal questions arising within the scope of its activities. In the present case, the opinion was requested by the Governing Body acting in pursuance of an authorization by the Conference, in accordance with article IX of the Agreement, and 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.

7. In addition, article 37 of the ILO Constitution provides that “any 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”.

8. Brazil considers that all conditions for the Court to have advisory jurisdiction are satisfied, according to its settled jurisprudence (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996, pp. 71–72). The ILO is duly authorized, under the Charter, to request advisory opinions from the Court; the opinion requested is on a legal question; and this question arises from within the scope of the activities of the ILO.

9. Furthermore, Brazil considers that there is no compelling reason for the Court to use its discretionary power not to give its opinion to the International Labour Organization. Given its responsibilities as one of the principal organs of the United Nations, Brazil’s position is that the Court should exercise its advisory jurisdiction in order to assist the specialized agency in its functions.

THE RIGHT TO STRIKE IN BRAZIL

10. The right to strike is legally provided for in the Brazilian Constitution, in articles 9 and 37, which are worded as follows:

Art. 9 The right to strike is guaranteed, and it is up to the workers to decide on the opportunity to exercise it and on the interests they must defend through it.

§ 1º The law will define the essential services or activities and regulate on how to meet the urgent needs of the community.

§ 2º Any abuses committed subject those responsible to the penalties of the law.

(...)

Art. 37. The direct and indirect public administration of any of the Powers of the Union, of the States, of the Federal District and of the Municipalities shall comply with the principles of legality, impersonality, morality, publicity and efficiency, and with the following:

(...)

VII - The right to strike shall be exercised under the terms and within the limits defined by specific law;

11. At the national level, the right to strike is regulated by Law No. 7.783, of June 28, 1989, which provides for the exercise of the right to strike, defines essential activities, and regulates the fulfillment of the urgent needs of the community in order to safeguard the exercise of labour rights in line with the public interest of society.

12. It is also worth noting the relevance and urgency of the expansion of rights and guarantees in the labour sphere and of the effective democratization of labour relations in Brazil. In this context, Decree No. 11.477, of April 6, 2023, established an interministerial Working Group tasked to prepare a proposal for the restructuring of labour relations and the valorization of collective bargaining in Brazil.

13. In addition, the government, through social actors and in line with ILO Conventions No. 151 and 159, both ratified by Brazil, and with the objective of implementing and ensuring the exercise of the right to strike in Brazil, established an interministerial Working Group via Decree No. 11.669, of August 28, 2023, with the task of submitting a proposal for the regulation of collective bargaining in labour relations. It comprises the right to strike in the public service. The right to strike in Brazil is guaranteed in a context in which the Brazilian Federal Constitution ensures workers' freedom of association and the right to establish or join organizations without previous authorization from the Government.

14. Brazil also ratified the International Covenant on Economic, Social and Cultural Rights, whose Article 8 ensures workers' rights to freely associate and organize themselves, including their right to strike.

CONSIDERATIONS REGARDING THE RIGHT TO STRIKE

15. Social dialogue and collective bargaining, together with full respect for freedom of association, play a key role in promoting decent work. These instruments provide a platform for collaboration between employers, workers and governments to address work-related challenges, promote fair working conditions and ensure the well-being of all stakeholders. Decent work and the generation of formal jobs are important for social inclusion and wealth distribution.

16. The promotion of fair working conditions includes the right to strike. Together with freedom of association, the right to strike contributes to bringing full balance to the workplace. It does not contradict but enhances social peace by providing workers with a tool to promote decent work and the balance of capital and labour relations, inherent in trade union freedom. It is a right to be preserved.

17. For Brazil, democracy in the workplace is essential and it has the right to strike as its cornerstone. The right to strike brings fairness and equality to negotiations, as it compensates the asymmetry in work relations naturally arising from the economic power of employers. It often enables inclusion in decision-making processes, allowing for policy-making that responds to the needs and aspirations of workers.

18. Collective bargaining, a fundamental right, allows workers and their representatives to negotiate terms and conditions of employment, contributing to the equitable distribution of resources and the reduction of disparities in the workplace.

19. As tools that promote open communication, understanding and consensus building, social dialogue and collective bargaining uphold the principles of social justice and help create an environment where the interests of workers, employers and society are in harmony, thereby increasing productivity while reducing inequalities.

THE RIGHT TO STRIKE IS PROTECTED BY ILO CONVENTION No. 87

20. In July 2023, Brazil was one of the first ILO Constituents to officially support the proposal of the Worker's Group to discuss the right to strike at the Governing Body and to refer the dispute on the interpretation of Convention No. 87 to the International Court of Justice, in accordance with article 37 of the ILO Constitution.

21. Brazil understands that the essence of Convention 87 is closely related to ensuring democracy at the workplace. The underlying reason for the existence of this convention is, actually, the balance of power between workers and employers at the working environment. Legal certainty and clarity on the scope of Convention No. 87 is of urgent importance to the world of work.

22. Articles 2, 3 and 10 of ILO Convention No. 87 establish the scope of freedom of association and of the right to organize, of which the right to strike is a corollary. Brazil considers that, according to these provisions, this right must be understood in the broadest terms, granting workers freedom to act collectively in order to defend and further their common interests. This collective action is not limited to the establishment of trade unions, federations or confederations. It can and must also include the right to strike.

23. In Brazil's view, this conclusion flows from two main basic assumptions. First, strikes are essentially collective actions; it is impossible to conceive a strike that does not include a group of workers acting in some degree of coordination with a view to achieving certain goals of common interest. Second, strikes are one of the main instruments, if not the most powerful one, at the disposal of trade unions and similar organizations to engage in collective bargaining. In fact, from a historical point of view, the right to strike features prominently in the action of trade unions as a key element of its bargaining power. Therefore, it is an inherent aspect of their activity. One does not exist without the other.

24. Article 3 imposes on authorities the obligation to refrain from restricting or impeding the lawful exercise of the rights of workers' organizations to draw up their constitutions and rules, to organize their administration and activities and to formulate their programmes. This obligation clearly includes the need for respecting the right to strike, which extends to all workers regardless of the nature of the contractual relationship they maintain with their

employers and whether they are unionized or not. Brazil highlights that the right to strike derives from the workers' right to freely associate and organize themselves.

25. One of the main purposes of Convention No. 87 is exactly to protect freedom of association from any interference that would restrict this right or impede its lawful exercise. Curtailing the right to strike would prevent workers from fully exercising their right to organize freely, depriving workers' organizations from one of their main means of action. Therefore, an interpretation that excludes the right to strike from the freedom of association and the right to organize would hinder full achievement of the purposes of Convention No. 87. This interpretation would be incompatible with the object and purpose of the Convention.

26. Workers' rights are human rights. Brazil believes that, within the boundaries of the legal text, human rights provisions must always be construed extensively, so as to grant the highest and widest-reaching possible degree of protection. There is nothing in ILO Convention No. 87 that explicitly bars its application to the right to strike. Conversely, there are strong arguments for contending that it does protect this right.

27. Such arguments enjoy the support of a significant part of the ILO membership, as well as of the ILO supervisory bodies, which, according to the ILO's Request for an Advisory Opinion, "have consistently observed that the right to strike is a corollary to the fundamental right to freedom of association". In this vein, it is Brazil's view that the Court should take into account this subsequent practice in the application of Convention No. 87 as an objective evidence of the understanding of the parties as to the interpretation of the treaty, as set out in article 31(3) of the Vienna Convention on the Law of Treaties.

CONCLUSION

28. For the reasons above, Brazil submits that:

- 1) The Court accept this written statement of Brazil;
- 2) The Court should exercise its advisory jurisdiction in these proceedings;

3) Freedom of association and the right to strike are intrinsically linked. Therefore, Brazil understands that the right of workers to strike is protected under the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87);

4) Brazil, in its Federal Constitution and labour legislation, provides for guarantees and protects the right of workers to strike.

29. The present statement is without prejudice to the possibility to submit further comments regarding the statements presented by other States and organizations, in accordance with the timetable set by the Court. The Federative Republic of Brazil also reserves its right to participate in any hearings, as set by the Court in due course.

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The Federative Republic of Brazil to

The Kingdom of The Netherlands