

INTERNATIONAL COURT OF JUSTICE

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

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WRITTEN COMMENTS OF MEXICO

September 2024

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## I. INTRODUCTION

1. On 16 May 2024, Mexico submitted its written statement on the question requested by the International Labour Organization (“ILO”) to the International Court of Justice (“The Court” or “ICJ”): *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. Pursuant to the Order of the President of the ICJ of 16 November 2023, Mexico hereby submits its written comments on the other written statements presented in connection with the present advisory proceedings.

3. It is worth noting that out of all States and organizations that filed written statements, none challenged the Court’s ability to render the advisory opinion requested by the ILO, both in terms of its jurisdiction and discretion. Considering this, and the reasons advanced by Mexico in its written statement of 16 May, the Court should consider that the conditions to deliver its opinion are satisfied. In any case, under the *kompetenz-kompetenz* principle, it remains within the Court’s authority to decide on its own jurisdiction should any doubt arise.

4. Thus, Mexico’s written comments will focus on the question submitted by the ILO, and on the response to specific issues arising from the written statements submitted by other States and organizations. Following this introduction, in Part II Mexico will address the correct interpretation of Convention 87, according to the general rule of interpretation. After the protection of the right to strike is confirmed under said treaty, Part III will cover the elements to be considered when assessing the content and scope of that right. Finally, Part IV summarizes the conclusions reached by these written comments.

## II. WRITTEN COMMENTS ON THE CORRECT INTERPRETATION OF CONVENTION 87

5. Some States and international organizations have argued that the right to strike of workers and their organizations is not protected under the Freedom of Association and Protection of the Right to Organise Convention (“Convention 87”). The main argument concentrates on the lack of an explicit reference to this right in the text of the treaty. This position is allegedly supported by an exercise of interpretation, which is incomplete under



Mexico's perspective. Besides, some views have been advanced to diminish the authority of the ILO committees that have stated that the right to strike is protected under said Convention.

6. Mexico contends that the right to strike is protected under Convention 87, as affirmed through: A) an interpretation of the terms of Convention 87, read in their context and in light of its object and purpose; and B) a subsidiary resort to the ILO committees, whose opinions could be considered as an additional element for the interpretation of Convention 87.

**A. The interpretation of the terms of Convention 87, read in their context and in light of its object and purpose**

7. The general rule of interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention") encompasses different elements that must be assessed as a whole.<sup>1</sup> As the International Law Commission ("ILC") clarified in its commentary to said convention "the application of the means of interpretation in the article would be a single combined operation",<sup>2</sup> and then "the process of interpretation is a unity and [...] the provisions of the article form a single, closely integrated rule".<sup>3</sup> Thus, the various elements of Article 31 must be taken into account when considering whether the right to strike is protected under Convention 87.

8. As Mexico submitted in its written statement, the relevant provision of this treaty lies on Article 3, from which it follows that the right to strike is protected by that Convention. This Article provides that workers' organizations shall have the right to organize their activities. These activities must align with the object and purpose of the Convention: protect the freedom of association and the right to organize, all in the interest of furthering and defending the interests of workers or of employers. Subsequent agreements and practice support that the right to strike is fundamental to this end, and is inherently linked to the freedom of association.

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<sup>1</sup> See *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2017, p. 29, at para 64.

<sup>2</sup> International Law Commission, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission, 1966, vol. II*, p. 219, at para. 8.

<sup>3</sup> International Law Commission, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission, 1966, vol. II*, p. 220, at para. 8.



9. Mexico is aware of the position upheld by some States and organizations, who argued that the terms of the Convention are very general and cannot be understood to include any protection of the right to strike; particularly with regard to “activities”, which Mexico claims serves as the gateway to the right to strike. While Mexico acknowledges that the term bears a wide scope and does not refer to any particular activity, however, within the treaty, an “activity” must be understood as any action undertaken with the aim of furthering and defending the interests of workers or of employers, which, in case of workers, includes strike action.

10. Besides, it must be noted that the maxim *ut res magis valeat quam pereat*, which is implicit in Article 31 of the Vienna Convention, mandates that “[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted”.<sup>4</sup>

11. In this case, the Court confronts two possible interpretations, one where the right to strike is protected under Convention 87, and one where it is not. The former enables the treaty to have appropriate effects, while the latter does not. This is evident from the object and purpose of the treaty, which aims for the improvement of workers’ interests and the means to safeguard them. Accordingly, States recognize 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>5</sup>

12. Moreover, the good faith principle obliges States to apply the treaty in a reasonable way and in such a manner that its purpose can be realized.<sup>6</sup> 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 businesses and government on a more equal

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<sup>4</sup> See International Law Commission, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, vol. II, p. 219, at para. 6.

<sup>5</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>6</sup> See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports* 1997, p. 79, at para. 142.



footing.<sup>7</sup> The protection of the right to strike is a fundamental condition to protect the freedom of association and comply with the object and purpose of Convention 87.

13. Consequently, the right to strike must be necessarily deemed to be protected under the Convention, as a result of an integral and good faith interpretation that makes the treaty effective.

#### **B. Subsidiary resort to the ILO committees**

14. Mexico notes that the opinions of the ILO committees regarding the protection of the right to strike under Convention 87 resulted in a debate between ILO members, particularly because of the divergent views as to the value to be attached to them. This division is also present in the written statements submitted by States and organizations.

15. In this respect, Mexico considers that, while indeed, their opinions cannot be considered as binding; nonetheless, they could be given thorough consideration. Specifically, the Committee of Experts on the Application of Conventions and Recommendations (“CEACR”) and the Committee on Freedom of Association (“CFA”).

16. Resort to the conclusions provisionally adopted by the ILC throw light upon the value to be given to the views of collective bodies such as the ILO committees. In this regard, subsidiary means are auxiliary in nature *vis-à-vis* the sources of law found in treaties; and can be resorted to when identifying, interpreting and applying the rules of international law derived from them.<sup>8</sup> When assessing their weight, regard should be had to, *inter alia*, their degree of representativeness; the quality of the reasoning; the expertise of those involved; the level of agreement among those involved; the reception by States and other entities; and, the mandate conferred on the body.<sup>9</sup>

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<sup>7</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.

<sup>8</sup> See International Law Commission, Second report on subsidiary means for the determination of rules of international law, by Special Rapporteur Charles Chernorr Jalloh, 30 January 2024, U.N. Doc. A/CN.4/769, Annex III, Draft conclusion 6.

<sup>9</sup> See International Law Commission, Second report on subsidiary means for the determination of rules of international law, by Special Rapporteur Charles Chernorr Jalloh, 30 January 2024, U.N. Doc. A/CN.4/769, Annex III, Draft conclusion 3.



17. The CEACR is an independent body composed of 20 eminent jurists appointed by the ILO Governing Body (“GB”). These experts come from different geographic regions, and legal systems. Therefore, the composition of the CEACR has a high degree of representativeness and expertise. The CEACR has the following mandate:

*The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO Member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by Member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee’s work based on its impartiality, experience and expertise. The Committee’s technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for more than 90 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers’ and workers’ organizations. This has been reflected in the incorporation of the Committee’s opinions and recommendations in national legislation, international instruments and court decisions.*<sup>10</sup>

18. In 2012, the CEACR upheld in its annual report the recognition and protection of the right to strike under Convention 87. The Committee stated that “[s]trikes are essential means available to workers and their organizations to protect their interests”.<sup>11</sup> Although this

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<sup>10</sup> International Labour Conference, Application of International Labour Standards 2021: Addendum to the 2020 Report of the Committee of Experts on the Application of Conventions and Recommendations, 109<sup>th</sup> Session, 2021, Doc. ILC.109/III/Add.(A), p. 13, at para. 43.

<sup>11</sup> See International Labour Conference, Giving Globalization a Human Face, 101<sup>st</sup> Session, 2012, Doc. ILC.101/III/1B, Report III (Part 1B), p. 46, at para. 117.



statement aroused a dispute as to its validity, it should be noted that the CEACR considered the right to strike stemmed from Articles 3 and 10 of the Convention, resulting from the application of the general rule of interpretation.<sup>12</sup>

19. On the other hand, the ILO has special procedures for the examination of complaints alleging violations of freedom of association, which are handled by the CFA. This body, created in 1951, is composed of nine regular members representing in equal proportion the Government, Employer, and Worker groups of the GB, who participate in personal capacity.<sup>13</sup> The mandate of the Committee consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions.<sup>14</sup>

20. Complaints may be brought against a member State by employers' and workers' organizations. When the CFA receives a case, it establishes the facts by conducting a dialogue with the government concerned. If it finds that there has been a breach of freedom of association standards or principles, it issues a report through the GB and makes recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of its recommendations.<sup>15</sup>

21. According to the ILO's compilation of decisions, the CFA has made important statements in relation to the right to strike, in the framework of case resolutions. The most relevant are:

*The Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests.*<sup>16</sup>

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<sup>12</sup> See International Labour Conference, Giving Globalization a Human Face, 101st Session, 2012, Doc. ILC.101/III/1B, Report III (Part 1B), p. 48, at para. 118.

<sup>13</sup> International Labour Organization, Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, at para. 7.

<sup>14</sup> International Labour Organization, Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, at para. 14.

<sup>15</sup> See International Labour Organization, *Rules of the game: An introduction to the standards-related work of the International Labour Organization*, 2019, p. 114.

<sup>16</sup> International Labour Organization, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., 2006, at para. 521.



*The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.*<sup>17</sup>

*The prohibition on the calling of strikes by federations and confederations is not compatible with Convention No. 87.*<sup>18</sup>

22. It is particularly meaningful to note that the CFA has reached these conclusions on more than one occasion.<sup>19</sup>

23. Thus, ILO committees' opinions on the right to strike could be considered as subsidiary means when analyzing whether this right is protected by Convention 87; and, in this case, they reinforce the conclusion achieved through treaty interpretation.

### **III. WRITTEN COMMENTS ON THE CONTENT AND SCOPE OF THE RIGHT TO STRIKE UNDER CONVENTION 87**

24. Some written statements sustain that, besides the lack of an explicit reference to the right to strike in Convention 87, the absence of any indication on its content and scope further shows that it is not protected under said treaty. Nonetheless, both issues should be considered separately. Once it is established that the right to strike is protected under Convention 87, a further exercise of interpretation may define its content and scope.

25. Although Mexico recognizes that the Court is not called upon to determine these aspects of the right to strike under said Convention, it would greatly assist the ILO and its members if the Court could provide clarity on the elements to be considered in its subsequent determination. In this line, Mexico will now address the elements that it considers appropriate for this task.

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<sup>17</sup> International Labour Organization, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., 2006, at para. 523.

<sup>18</sup> International Labour Organization, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., 2006, at para. 525.

<sup>19</sup> See International Labour Organization, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., 2006, at paras. 521, 523 and 525. See also International Labour Organization, Compilation of decisions of the Committee on Freedom of Association, available at [https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002\\_HIER\\_ELEMENT\\_ID:P70002\\_HIER\\_LEVEL:3945366,1](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID:P70002_HIER_LEVEL:3945366,1)



26. In the section above, and in Mexico's written statement, it is contended that Convention 87 protects the right to strike as an essential activity for the promotion and protection of workers' interests. Thus, an analysis pursuant to the general rule of interpretation should operate over this assertion, in order to define the content and scope of this right within the object and purpose of the treaty.

27. Any relevant subsequent agreement or practice of States parties should also be considered together with the context. The ILC concluded that subsequent agreements and practice "may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties",<sup>20</sup> which does not imply an intention to amend or to modify the treaty. As shown by Mexico's written statement, several States coincide with the view that the right to strike is necessarily protected by Convention 87, since it serves to protect workers freedom of association, among other rights and interests.

28. Additionally, the opinions from ILO committees could be awarded due consideration in defining the content and scope of the protection of the right to strike under Convention 87. Particularly, the CEACR has pointed out some elements concerning the peaceful exercise of the right to strike, its objectives and the conditions for its legitimate exercise:<sup>21</sup>

(i) the right to strike is a right which must be enjoyed by workers' organizations;

(ii) as an essential means of defending the interests of workers through their organizations, only limited categories of workers may be denied this right and only limited restrictions may be imposed by law on its exercise;

(iii) the objectives of strikes must be to further and defend the economic and social interests of workers; and

(iv) the legitimate exercise of the right to strike may not result in sanctions of any sort.

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<sup>20</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 7(1).

<sup>21</sup> See International Labour Conference, Giving Globalization a Human Face , 101st Session, 2012, Doc. ILC.101/III/1B, Report III (Part 1B), p. 46, at para. 122.



29. Similarly, the CFA has reached relevant conclusions as to the content and scope of the right to strike, such as: importance of the right to strike and its legitimate exercise, objective of the strike, among others. For instance:

*The occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.*<sup>22</sup>

*The right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests.*<sup>23</sup>

30. Consequently, the protection of the right to strike is guaranteed to the extent that it constitutes an activity developed by workers, as a means for furthering and defending their interests.

31. Additionally, it is worth mentioning that the protection granted by States to the right to strike under domestic law is complemented by international law. This treaty only sets out its protection as long as it relates to its object and purpose. Article 8 of Convention 87 sheds light upon this issue. It states that “[i]n exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land”. Similarly, it provides “[t]he 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 this Convention”.

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<sup>22</sup> International Labour Organization, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., 2006, at para. 526.

<sup>23</sup> International Labour Organization, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., 2006, at para. 531.



#### IV. CONCLUSIONS

32. The Government of Mexico is convinced that the right to strike is protected under Convention 87. Therefore, Mexico requests the International Court of Justice to consider this approach during its deliberation.

33. An appropriate exercise of interpretation concerning Convention 87, in light of all the relevant elements of said treaty, provides the unequivocal result that the right to strike must be protected so the object and purpose of the Convention can be fully realized and be given full effect. Along with this, the Court could consider the opinion of the ILO committees, taking into account their mandate and specialized approach to the question under review, without replacing the will of States parties. Furthermore, it would be of great value if the Court could provide guidance to ILO members on the significance to be attributed to the opinion of these committees.

34. Similarly, the content of the right to strike and the scope of the protection granted by Convention 87 must be ascertained through treaty interpretation, and resort to subsidiary means of international law, where appropriate. This approach would provide an appropriate qualification of this right within the framework of the Convention, without undermining to domestic regulations.

35. The opinion of the Court as to the protection of the right to strike will help to solve a longstanding debate within the ILO. Considering this, any guidance the Court could give about the actions required to secure the appropriate implementation of Convention 87 would provide certainty and strengthen the work of the ILO.

36. 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 statement.

The Hague, 13 September 2024



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