DECLARATION OF JUDGE CLEVELAND

1. I agree with the Advisory Opinion of the Court. I write separately to address the relationship between freedom of association and the right to strike under both ILO Convention No. 87 and other international instruments.

2. A strike is a form of associational activity pursued by workers in order to improve their conditions of work. Nothing in the submissions before the Court convincingly explains why Convention No. 87, which protects "Freedom of Association" of workers, including their right to form "organizations" and to organize "activities" to improve their conditions of work and defend their interests (Articles 3 and 10), is properly interpreted to exclude strike activity.

3. In my view, the only colourable argument for such a (mis)interpretation would be that Convention No. 87 is limited *ratione materiae* to purely internal associational activities. Under this construction, the Convention, *arguendo*, would protect the right of workers to form organizations, to draw up constitutions and administrative rules and to pursue activities, but only within the organization. Such an interpretation, however, is not supported by the Convention's language, which imposes no such qualification on "activities" (Advisory Opinion, paras. 69-70). More importantly, the reading would render the Convention largely meaningless, as it would exclude from the Convention's protection not only strike activity, but all external activities that worker organizations pursue in order to advance their interests, including collective bargaining activity, advocating on behalf of workers with employers, legislative and policy development, and litigation. This would turn a treaty ostensibly devoted to protecting freedom of association in order to improve working conditions into an instrument that allows workers to meet and talk, but not to take any action to achieve their goals.

4. Even most of the participants who urge that Convention No. 87 does not protect the right to strike understandably do not adopt the above interpretation. Instead, they contend that the Convention protects external associational activities *other than* strike activities. In other words, "activities" under the Convention would include collective bargaining and the other types of external activities set forth above, but not the right to strike. Nothing in the terms, context or object and purpose of the treaty, however, supports a reading that would include other ordinary activities of worker organizations that advance their interests, yet *sub silentio* exclude the right to strike.

5. Workers do not form organizations to play cards. They associate to try to enhance their collective power in order to secure better wages, hours and working conditions. While ordinarily an instrument of last resort, a strike is a vital tool for protecting workers from exploitation and defending human dignity in the workplace. Without the right to strike, employees lose the leverage needed to overcome power asymmetry in the workplace and at the bargaining table, so employers no longer need to negotiate in good faith. Many of the most fundamental protections enjoyed by workers today — and that are the focus of concern in the preamble to the Constitution of the ILO — were earned through, *inter alia*, strike activity[1]. As the ILO Government Group recognized in 2015, "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"

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[1] See J. Vogt et al., *The right to Strike in International Law*, Oxford, Hart Publishing, 2020, p. vii; see also G. Cross, "*Les Trois Huits*: Labor Movements, International Reform, and the Origins of the Eight Hour Day, 1919-1924", *French Historical Studies*, Vol. 14, No. 2, 1985, pp. 240-268.

(Advisory Opinion, para. 114, citing Government Group Statement, 23 February 2015, GB.323/INS/5/Appendix I, Annex II, para. 4).

6. Convention No. 87 broadly protects "freedom of association" in the employment context. It does not purport to define "freedom of association" or "activities", other than to indicate that the scope of freedom of association under the Convention extends to activities that advance the workplace interests of worker or employer organizations (Article 10), and to establish certain limitations under Article 8, paragraph 1, and Article 9 (see Advisory Opinion, para. 71). This broad, open language encompasses the associational activities that worker organizations pursue in order to improve working conditions and advance their interests in the exercise of their right to freedom of association.

7. The background and negotiating history of the Convention indicate that this breadth of language was intentional. As early as 1926, the ILO Office recognized that "the right of association for trade purposes is a special application of the general right of association"[2]. In a preliminary exploration of formulating a general convention on freedom of association, the ILO Office decided not to pursue an instrument that would seek to specifically define freedom of association and determine its legal limits. The Office instead decided to pursue an instrument that would only lay down the general concept of freedom of association as enshrined in the ILO Constitution and provide a machinery for complaints[3]. This position was carried forward when the project of drafting the convention on freedom of association was finally engaged. As the ILO Chairperson emphasized in 1948, Convention No. 87 "was not intended to be a 'code of regulations' for the right to organise", but a "statement of certain fundamental principles"[4]. Given the indeterminacy of the concept of freedom of association at the time, a conscious choice was made not to define it or to specify its content. Instead, general and adaptive language was chosen.

8. The background and negotiating history of the Convention also make clear that the drafters were conscious of the relationship between freedom of association and the right to strike. Again, an early assessment by the ILO in 1927 conducted "a comparative analysis of various aspects of freedom of association across countries including trade disputes and the right to strike"[5]. The resulting report recognized that "[t]he trade dispute represents for a trade union its primary form of external activity" and noted "the intimate relationship between the right to combine for trade purposes and the right to strike"[6].

9. The questionnaire put to Member States in 1948 during the negotiation of Convention No. 87 supports the view that Member States and the ILO Office understood that freedom of association could be interpreted as encompassing the right to strike. As the Court indicates, the ILO Office asked Member States whether it would be desirable for the draft convention to provide that "recognition of the right of association of public officials by international regulation *should in no way prejudge* the question of the right of such officials to strike?" (Advisory Opinion, para. 106; emphasis added). As phrased, the question assumed that absent such a provision, the draft

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[2] Written Statement of the ILO, para. 292, quoting Minutes of the 30th Session of the Governing Body, January 1926, pp. 105-106.

[3] *Ibid.,* para. 293, citing Minutes of the 30th Session of the Governing Body, January 1926, pp. 106-107.

[4] *Ibid.*, para. 312, citing International Labour Conference, 31st Session, 1948, Record of Proceedings, Appendix X, Freedom of Association and Protection of the Right to Organise, p. 77. See also *ibid*., para. 318.

[5] Written Statement of the ILO, para. 295.

[6] International Labour Conference, 10th Session, 1927, Freedom of Association, Report and Draft Questionnaire, p. 75.

Convention could be understood as "prejudging" the right of public officials to strike. The affirmative answers of the significant majority of States indicate that they also recognized this inference (Advisory Opinion, para. 110). Moreover, the fact that the question was limited to public officials left untouched whatever presumption the Convention might create with respect to the right to strike more generally.

10. In addition, at the time Convention No. 87 was adopted, 14 of the ILO Member States were also signatories to the Charter of the Organization of American States, the foundational instrument of the organization that had been adopted earlier that year in Bogotá. As the Court notes, Article 45 *(c)* of the Charter expressly recognizes the right to strike as part of freedom of association, stating that workers "have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike" (Advisory Opinion, para. 133). At least these 14 States participating in the negotiation of Convention No. 87 thus would have understood that freedom of association for workers could include the right to strike.

11. Aspects of the negotiating history point in various directions, and the history is ultimately inconclusive (Advisory Opinion, para. 138). Nevertheless, the drafting history supports the view that the Convention was intentionally framed in broad terms, and nothing in the *travaux préparatoires* establishes that Convention No. 87 was intended *sub silentio* to exclude the right to strike.

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12. I also agree with the Court that international and regional instruments addressing freedom of association and the right to strike constitute both relevant rules of international law within the meaning of Article 31, paragraph 3 *(c)* of the Vienna Convention on the Law of Treaties and subsidiary means of interpretation as reflected in Article 32 of that instrument.

13. As the Court indicates, both Article 22 of the International Covenant on Civil and Political Rights (ICCPR) on freedom of association and Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) addressing worker rights expressly reference Convention No. 87 (Advisory Opinion, para. 91). This invocation is unusual and is a strong indication that both the ICCPR and ICESCR provisions are understood as addressing freedom of association.

14. Paragraph 1 of Article 8 of the ICESCR recognizes four related protections: the right to form and join trade unions, the right of trade unions to establish confederations, the right of unions to function freely and the right to strike. Like Convention No. 87 (Article 9), paragraph 2, of Article 8 then allows lawful restrictions on the exercise of these rights by members of the armed forces and police. Paragraph 3 then provides:

> "Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention."

This savings clause for Convention No. 87 on Freedom of Association applies to the entirety of Article 8. The grouping of the right to strike in paragraph 1 alongside other rights that unquestionably are protected by freedom of association, and the application of paragraph 3 to the entire article, strongly support the interpretation that all of the rights in paragraph 1 are associational rights to which Convention No. 87 is relevant, including the right to strike. In this sense, Article 8 of the ICESCR

reflects a further elaboration of the freedom of association in the workplace recognized by Article 22 of the ICCPR and Convention No. 87.

15. In addition to the Charter of the Organization of American States, which as noted expressly includes the right to strike as part of freedom of association in the workplace, some of the international and regional instruments addressed by the Court, such as the ICCPR (Article 22) and the European Convention on Human Rights (Article 11), address freedom of association but do not expressly address the right to strike. As the Court notes, however, for many years such treaties consistently have been interpreted as including the right to strike (Advisory Opinion, paras. 91 and 127). Other treaties may group together, in varying combinations, protection of the rights to form and join trade unions, to bargain collectively and to strike, without expressly referring to freedom of association (see e.g. the Arab Charter on Human Rights and the San Salvador Protocol, Advisory Opinion paragraphs 125 and134). As with the ICESCR, this approach does not suggest that these rights are not forms of freedom of association.

16. It is often the case that certain dimensions of a general right may be separated out for particular treatment. The Universal Declaration on Human Rights, for example, protects freedom of association in Article 20, paragraph 1, and the right to form and join trade unions in Article 23, paragraph 4. This does not mean that the right to form and join trade unions is not a form of freedom of association. Similarly, the presence of a specific clause protecting the equality of men and women in Article 3 of the ICCPR does not mean that discrimination on the basis of sex is not included in more general prohibitions on discrimination, whether in Article 26 of the ICCPR or elsewhere. Aspects of rights may be singled out to highlight their importance and to further elaborate their protection in a particular context. For this reason, freedom of association in the workplace is often given distinct treatment, including the rights to form and join trade unions, to bargain collectively and to strike.

17. Moreover, as the Inter-American Court of Human Rights has explained, the right to strike is an associational right that workers can exercise in the context of trade associations as well as independently. The right to strike therefore may be addressed separately from the right of workers to form and join trade associations[7]. This does not mean, however, that the right to strike is not part of the freedom of association exercised by workers and their organizations, any more than separate treatment of collective bargaining would so indicate.

18. The pivotal consideration is that the international and regional instruments reviewed by the Court either uniformly have been interpreted as including the right to strike in the general protection of freedom of association or otherwise support the understanding that the right to strike is a form of freedom of association in the workplace. This uniformity of approach is relevant to construction of Convention No. 87 pursuant to the principles reflected in Article 31, paragraph 3 *(c)* and Article 32 of the Vienna Convention on the Law of Treaties. It also further supports the view that the ordinary meaning of freedom of association in the context of Convention No. 87 encompasses the right to strike.

19. Finally, although the Court does not examine the question — given the breadth of recognition of the right to strike in numerous overlapping international and regional instruments, as

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[7] IACtHR, *Case of Former Employees of the Judiciary* v. *Guatemala, Preliminary Objections, Merits and Reparations, Judgment of 17 November 2021, Series C No. 445*, p. 33, para. 106.

well as in bilateral and trade agreements[8], the constitutional protection of the right to strike in at least 97 States[9] and its legislative protection in more than 150 others[10] — a compelling case can be made that protection of the right to strike is a principle of customary international law. Such a customary international norm would also constitute a relevant rule of international law in the interpretation of Convention No. 87.

20. The Court repeatedly has recognized that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[11]. Convention No. 87 concerning freedom of association and the right to organize, when construed in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the treaty's object and purpose, must be understood as including the right to strike. In addition to the other considerations taken into account by the Court, the broad language of the treaty, the overarching object and purpose of the Convention and the International Labour Organization in which it is embedded, and the consistent recognition of freedom of association as encompassing the right to strike in international and regional instruments and jurisprudence, all point to this conclusion.

(Signed) Sarah H. CLEVELAND.

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[8] See e.g. Agreement on labour cooperation between Canada and the Republic of Colombia, 21 November 2008, United Nations, *Treaty Series (UNTS)*, Vol. 3248, No. 55156, Art. 1 ("Each Party shall . . . provide protection for the following internationally recognized labour principles and rights: *(a)* freedom of association and the right to collective bargaining (including protection of the right to organize and the right to strike)"); Agreement between the United States of America, the United Mexican States, and Canada, 30 September 2018, Art. 3.3 (1) ("Each Party shall adopt and maintain . . . the following rights, . . . *(a)* freedom of association", and its explanatory footnote: "[T]he right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike.").

[9] See J. Vogt et al., *The Right to Strike in International Law* (2020), pp. 170-171, Annex III (surveying 97 States (93 of which are parties to Convention No. 87).

[10] This was the conclusion of the ILO's 2015 survey of 185 ILO Member States, including all 158 States parties to Convention No. 87. ILO, Governing Body, GB.323/INS/5/Appendix III, The Standards Initiative, Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised) (Geneva, 23-25 February 2015), March 2015, p. 22, para. 63.

[11] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53; see also *Obligations of States in respect of Climate Change*, *Advisory Opinion of 23 July 2025*, para. 311.