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The Significance of the ICJ Advisory Opinion on ILO Convention No. 87 for the Supervision of Compliance with, and the further Development of the Right to Strike

1. Introduction

On 21 May 2026 the International Court of Justice (ICJ) delivered an advisory opinion on the question whether the right to strike is protected by ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise.² A majority of the members of the Court answered that question in the affirmative.

The question had arisen out of a dispute within the ILO concerning the interpretation of Convention No. 87 by the Committee of Experts on the Application of Conventions and Recommendations (hereinafter: the Committee of Experts). On the basis of reports submitted by the member states and observations from employers' and workers' organisations, this Committee periodically assesses whether states are complying properly with the ILO conventions; in doing so it also gives interpretations of treaty provisions.

The ILO has a second committee that is important for the supervision of compliance with conventions: the Conference Committee on the Application of Standards (hereinafter: the Standards Committee). This Committee is composed of representatives of employers' and workers' organisations and of governments; it discusses in particular the more serious compliance problems identified by the Committee of Experts. In addition, the Standards Committee discusses the reports of countries on how they comply with and promote the Declaration on Fundamental Principles and Rights at Work (see section 4). It then submits its conclusions on these matters to the General Conference of the ILO for discussion and approval. This second committee is therefore the channel through which the interpretations of the Committee of Experts are put before the General Conference. All reports and findings of the Committee of Experts are, incidentally, also published and brought to the attention of the member states independently of this route.

In 1992 the Committee of Experts stated that the right to strike is protected by Convention No. 87. The employers' representatives in the Standards Committee, however, challenged that interpretation. They also doubt whether the Committee of Experts has the power to interpret Convention No. 87 at all. They subsequently refused to deal with cases

concerning this Convention in the Standards Committee, as a result of which the work of that committee came to a standstill. The dispute thus led to what the ILO calls an 'institutional crisis'.

After years of fruitless attempts to reach a solution through negotiation, the Governing Body of the ILO decided to request an advisory opinion of the ICJ on this matter.

2. The interpretation followed by the Court

In its Advisory Opinion the Court makes use, for its interpretation, of the Vienna Convention on the Law of Treaties (VCLT), in particular Articles 31 and 32 VCLT.

2.1 Under Article 31, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose

This method calls in the first place for a textual interpretation of Convention No. 87. Article 2 of the Convention provides that workers and employers, without distinction whatsoever, have the right to establish and to join organisations of their own choosing without previous authorisation. Article 3 provides that workers' and employers' organisations 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.

These, and the other articles of Convention No. 87, therefore do not mention the right to strike. This is an important argument of the employers against an interpretation of the Convention that recognises the right to strike. The Court, however, rejects the reasoning that the right to strike cannot fall within Convention No. 87 on the ground that it is not mentioned in it. According to its settled case law, the absence of an express treaty provision on a particular subject does not mean that this subject falls outside the scope of the treaty. It falls outside that scope only where all the relevant provisions, their context and the object and purpose of the treaty point in that direction (Advisory Opinion, para. 68).

The Court then refers to Article 10 of Convention No. 87, which defines an organisation covered by the Convention as any organisation of workers or of

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² icj-cij.org.

employers for furthering and defending the interests of workers or of employers.

It follows from Articles 2, 3 and 10, when these articles are interpreted in good faith and in accordance with their ordinary meaning, that Convention No. 87 gives workers and employers the right to establish organisations for the purpose of furthering and defending their respective interests, so the Court holds. This includes the organisation of their activities and programmes in order to achieve that purpose. Convention No. 87 does not define the terms ‘activities’ and ‘programmes’, as the Court acknowledges. The ordinary meaning of these words covers, however, any activity and any series of planned activities aimed at achieving an objective, including strikes (para. 70).

2.2 In interpreting treaty provisions, account must also be taken of other international agreements

In accordance with Article 31(3)(c) VCLT, in interpreting a treaty account must also be taken of ‘any relevant rules of international law applicable in the relations between the parties’. The Court points to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both UN instruments. Article 8(1)(d) ICESCR expressly protects the right to strike, while paragraph 3 of that article refers to ILO Convention No. 87. Article 22 ICCPR does protect freedom of association, but does not mention the right to strike expressly; the Human Rights Committee has, however, held for 25 years now that this article also covers the right to strike (para. 91).

The Court then observes that, for reliance on ‘other rules of international law’ in the interpretation of a treaty provision, it is not necessary that all parties be bound by those other rules. It is sufficient that the treaties concerned reflect a common understanding of particular articles of the treaty to be interpreted.

Only eight states that have ratified Convention No. 87 are not party to the ICESCR, and seven states that are party to Convention No. 87 have not ratified the ICCPR. Four states that have ratified Convention No. 87 are party to neither of the two UN covenants. They have, however, declared – as the Committee of Experts has noted in its reports – that they have no objection to the interpretation that Convention No. 87 protects the right to strike (Advisory Opinion, para. 94).

The Court then concludes that an interpretation which takes into account the relevant rules of international law laid down in the ICESCR and the ICCPR means that the protection of the right to strike

forms part of the protection of freedom of association that follows from Convention No. 87 (para. 98).

2.3 Supplementary means of interpretation may be used: Article 32 VCLT

With this, the question put to the Court has been answered. The Court then adds a reference to Article 32 VCLT as a supplementary means of interpretation. That article provides that recourse may also be had to supplementary means of interpretation, in particular the preparatory work and the circumstances in which the treaty was concluded.

The travaux préparatoires of Convention No. 87 turn out, however, not to provide any decisive arguments on the question at issue. As far as the right to strike is concerned, they relate mainly to the right to strike of workers in the public sector; they do not deal with the right to strike in general. Because there were differences of opinion at the time the Convention was being prepared, it was decided not to include a provision on the right to strike in Convention No. 87. The preparatory documents are therefore not considered by the Court to be relevant to the question put to it.

2.4 Regional instruments as supplementary means of treaty interpretation

Article 32 VCLT provides that regard may be had in particular to the preparatory work. On the basis of this wording, the Court reasons that it need not confine itself to that material. It then discusses how the right to strike has been incorporated in regional human rights instruments.

Dutch labour lawyers will be familiar with the influence of Council of Europe treaties on the right to take collective action. What is interesting for them is that the ICJ’s Advisory Opinion also mentions far less well-known regional instruments, such as the African Charter on Human and Peoples’ Rights, the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, and the Southern African Development Community Charter of Fundamental Social Rights. All these instruments mention the right to strike either as part of freedom of association or as a separate right. The Arab Charter on Human Rights likewise protects the right to strike.

In this respect these declarations and charters are more modern than the ECHR. The latter treaty, after all, does not mention the right to strike. The European Court of Human Rights has nevertheless derived the right to strike from Article 11 ECHR (freedom of association): see, for example, *Enerji Yapı-Yol Sen v. Turkey*.³ In that judgment the ECtHR notes that the ILO supervisory bodies have recognised the right to strike as a ‘corollaire indissociable’, an inseparable corollary, of freedom of association as protected by

³ ECtHR 21 April 2009, Application no. 68959/01.

ILO Convention No. 87 (para. 24). The ICJ's reference to the ECtHR judgment thus brings us back to the interpretation of the Committee of Experts contested by the employers. That the ECtHR endorses and recognises that interpretation is of course of great significance, since it confirms that the interpretation enjoys broad support.

3. The significance of the Advisory Opinion for the ILO

The Court's conclusion is not new; interpretations by other international bodies had already assumed the link between freedom of association and the right to take collective action.

What is useful, however, is the broad, global overview of the protection of the right to strike and the method by which the Court arrives at its interpretation. It has thereby been established that the interpretation according to which the right to strike flows from freedom of association is not an aberration on the part of a committee whose competence to interpret the Convention might be doubted.

Furthermore, it is important that the Advisory Opinion provides an answer to the question that has paralysed the ILO for a long time. In that crisis the legitimacy of the Committee of Experts was called into question and the assessment of infringements of the right to strike had been suspended.

The Court expressly does not address the precise content, scope and conditions for the exercise of the right to strike. Nor was it asked to do so. In my view it is also better that those questions be answered by a body such as the Committee of Experts. That body can take account of specific situations in individual countries and can, where appropriate, adjust its positions. That flexibility would be lost if the conditions for the right to strike had been laid down in this Advisory Opinion. Given the large number of reports on conventions that the Committee of Experts has to process each year, it would be unworkable to call upon the Court to perform this task from now on.

Nor has the Court pronounced on the competence of the Committee of Experts to give further substance to the scope of the right to strike. That question was, admittedly, initially included in the request, but was subsequently deleted from the question by the Governing Body. In any event, the Court has not held that the Committee of Experts would lack competence.⁴ Moreover, as to substance, the Court follows the interpretation of that Committee, namely

that the right to strike follows from Convention No. 87. It seems to me that the Advisory Opinion implies that the Committee of Experts may continue to interpret the ILO standards.

The Court writes that it cannot speculate on the consequences of its Advisory Opinion for the internal relations within the ILO. How matters will proceed does indeed remain to be seen. Both the employers' and the workers' organisations are calling for constructive consultation with a view to reaching a solution.

4. Implications of the Advisory Opinion for the supervision and development of the right to strike

The reader may wonder what legal significance this Advisory Opinion has, given that the right to strike is already laid down in other international treaties and that many countries have signed those treaties.

In a publication of the International Organisation of Employers (the secretariat of the employers' group at the ILO), together with a bar association (the IBA), it is stated that the employers' group at the ILO does recognise the right to strike. What the employers cannot accept, however, is that the Committee of Experts assesses the content of that right. That is identified as the main sticking point.⁵ The report argues that the Committee of Experts has no formal competence for its interpretations; countries that recognise the right to strike must be able to determine the content of that right themselves.

The annual reports of the International Trade Union Confederation (ITUC),⁶ however, give many examples of rules and/or practices by which the right to strike is severely restricted, including in countries that claim to recognise the right to strike. This is done, among other things, by imposing onerous procedural conditions on strikes, requiring long cooling-off periods, and applying criminal law, for instance in the case of (road) blockades. Sometimes they also have many categories of workers who are not allowed to strike and/or apply a very broad definition of so-called essential services in which strikes are prohibited. The report also names EU countries that are said to be undermining the right to strike.

Even where a country has declared that it recognises the right to strike, this is therefore no guarantee that the right is actually protected. As we have seen, there are by now also various regional treaties that

⁴ Under the ILO Constitution the Committee has no power to interpret conventions, but resolutions of the Governing Body have, ever since the 1930s, instructed the Committee to examine how member states apply ILO conventions. In carrying out that task it is unavoidable that it also interprets the conventions concerned. See J. Agusti-Panareda & K. Curtis, 'The Authoritative Role of the ILO Committee of Experts', in: J. Brudney & J. Bellace (eds.), *The Law and*

Practice of the International Labour Organization, Cheltenham: Edward Elgar 2026, pp. 96-113.

⁵ International Bar Association and International Organisation of Employers, *International Labour Standards in the Contemporary Global Economy*, ibanet.org.

⁶ Most recently ITUC, *2026 ITUC Global Rights Index. The World's Worst Countries for Workers* (ituc-csi.org).

recognise the right, but the ITUC reports criticise in particular the serious violations in Africa and Asia.

Supervision of compliance by an ILO body therefore has important added value. By now 158 ILO member states have ratified Convention No. 87, and these countries can be held to account, on the basis of the Advisory Opinion, for the way in which they deal with the right to strike.

It is further important that the ILO has adopted the Declaration on Fundamental Principles and Rights at Work. It provides that all member states must respect, promote and realise the principles concerning the fundamental rights it mentions, even where they have not ratified the corresponding conventions. Membership of the ILO is therefore sufficient for this purpose.

These fundamental rights include freedom of association and the right to bargain collectively. Those ILO member states that have not yet ratified the conventions containing the fundamental rights set out in the Declaration must report annually on their efforts. These reports are discussed in the Standards Committee. That therefore also applies to freedom of association and collective bargaining.

The ICJ's Advisory Opinion implies that infringements of the right to strike also come under this heading and that the Standards Committee must resume discussing them.

This makes it clearer why the employers in the Standards Committee resisted the contested interpretation of Convention No. 87 so strongly. Now that it has been confirmed that the right to strike is connected with freedom of association, member states that have not ratified Convention No. 87 – and even those that are not party to any treaty on strikes – can also be held to account for the way in which they deal with strikes.

There is scope for discussion as to whether complying with 'the principles' that form the subject matter of a convention means that all the provisions of that convention, and their interpretation by the Committee of Experts, must be complied with.⁷ The content of fundamental rights cannot, however, be determined by the member state concerned alone. That is already apparent from the examples in the ITUC reports referred to above,⁸ which show how the right to strike can be undermined in practice. Standard-setting at international level is therefore of essential importance. Interpretations such as those of

the Committee of Experts will be of great significance in this regard.

The Advisory Opinion is also important for standards laid down in corporate social responsibility declarations, in codes of conduct of undertakings, in international framework agreements and in trade agreements. These often contain references to international labour standards, such as the ILO Declaration on Fundamental Principles and Rights at Work mentioned above and the findings of ILO bodies on them. The UN Global Compact declaration, which undertakings can endorse, also refers to them.⁹

The report of the International Organisation of Employers deals at length with this knock-on effect¹⁰ and expresses the fear that a multinational enterprise with an establishment in a country where strikes are prohibited or impeded may be held to account if it benefits from, or hides behind, the restriction of strikes in that country. If, for example, an undertaking were to call in the authorities (the police) to break a strike, it could also be held to account for this in other countries. A national court could likewise make use of the interpretation of the Committee of Experts in a dispute about compliance with the standards to which the undertaking has committed itself, so the report states.

Finally, reference may be made to the knock-on effect of international labour standards in public procurement. Public Procurement Directive 2014/24 provides that member states shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law (...) or by the provisions of international environmental, social and labour law listed in Annex X. ILO Convention No. 87 is among the instruments listed in that Annex.

The ITUC report also names EU member states said to be committing serious infringements of the right to strike. The provision of the Directive referred to above could be seized upon by other member states to do something about this. They can – in fact the Directive says: must – provide that undertakings performing a contract under a tendered project (including undertakings from countries that turn out to show insufficient respect for the right to strike) comply with fundamental standards such as the right to strike. ILO interpretations have knock-on effects here.

⁷ On this question see, among others, the debate between P. Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime', *EJIL* 2004, 15(3), pp. 457-521, and F. Maupain, 'Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights', *EJIL* 2005, 16(3), pp. 439-465.

⁸ See note 6.

⁹ On these instruments and on developments in this field see also D. van Thiel, *Fundamental Labour Standards and the Shift from International to Transnational Labour Law: Countervailing Power in the Globalised World of Work* (Meijers Series), Leiden 2025.

¹⁰ See note 5.

Such an appeal can and must, admittedly, also be made by the ILO, the EU or the Council of Europe to states that violate the standards. But an approach in which individual companies are confronted with the consequences where fundamental labour standards are violated can be an important addition to this.¹¹ Pressure then also arises from below. The employers' organisation's report shows that this pressure is taken seriously and thus demonstrates – probably unintentionally – the possibilities for promoting compliance with fundamental rights at company level as well.

The Advisory Opinion shows that international labour law also develops because courts and supervisory bodies read international treaties and their interpretations in conjunction with one another. A treaty may contain beautifully formulated standards but insufficient enforcement mechanisms to give effect to them. Another treaty may have enforcement and supervisory instruments but more vaguely formulated standards. The second treaty can then, by referring to ratifications and interpretations of the first treaty, deploy its enforcement provisions to advance the development of that fundamental right.

In the ICJ's Advisory Opinion we see that the large number of ratifications of the ICESCR and the ICCPR, which recognise the right to strike, contributes to the interpretation of ILO Convention No. 87, while the latter convention has a well-developed supervisory mechanism. Subsequently, through references to that latter Convention in codes of conduct for undertakings, individual undertakings can also be held to account. In this way fundamental labour standards gradually develop further, at various levels.

¹¹See also Van Thiel (note 9), who discusses both the possibilities and the limitations of this form of standard-setting.