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# The ICJ Advisory Opinion on the Right to Strike: "Much Ado About Something"

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## 1. *From an ILO supervisory principle to a treaty right*

The Advisory Opinion rendered by the International Court of Justice (ICJ) on 21 May 2026 marks a development in the international legal protection of the right to strike. The Opinion matters not only because the Court answered the International Labour Organization (ILO) Governing Body's question affirmatively, but also because that answer has consequences for the interpretation and application of Convention No. 87, the ILO supervisory system, and national legal orders.

The Court's central conclusion is unequivocal: it held that "the right to strike of workers and their organisations is protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)". This conclusion puts an end, at least as regards the existence of the right under Convention No. 87, to a controversy that had affected the functioning of the ILO supervisory system for several decades.

The Opinion's first and most important consequence concerns the legal foundation of the right to strike. Before this decision, the proposition that Convention No. 87 protects the right to strike rested primarily

upon the interpretation progressively developed by the ILO supervisory bodies. Over time, the Committee on Freedom of Association (CFA), the Committee of Experts on the Application of Conventions and Recommendations (CEACR), and Commissions of Inquiry have converged on the proposition that the right to strike is an essential means by which workers and their organisations defend their occupational interests. The Court itself acknowledges that these bodies have progressively recognised the right to strike as protected by Convention No. 87 and have maintained that position for decades.

The employers' group had, however, persistently contested this interpretation, arguing that Convention No. 87 contains no express reference to strikes and that the supervisory bodies lacked authority to create obligations not adopted by the International Labour Conference. The resulting disagreement eventually contributed to a serious institutional impasse within the ILO.

The ICJ Opinion substantially changes the terms of that controversy. The right to strike can no longer be described simply as a principle developed by the ILO supervisory bodies through an expansive interpretation of Convention No. 87. According to the Court, the Convention itself provides the protection.

The Court reaches this conclusion principally through the general rules of treaty interpretation. In its view, strike action constitutes one of the principal activities and tools through which workers and their organisations promote their interests and improve working conditions. It therefore contributes to the effective exercise of freedom of association. The Court therefore concludes that the ordinary meaning of the Convention's provisions, interpreted in good faith, in context, and in light of the Convention's object and purpose, indicates that the protection of the right to strike is encompassed within the protection of the freedom of association.

This reasoning is significant and should not be underestimated. The right to strike is not treated as an autonomous right added to Convention No. 87. Rather, it is understood as an element of the freedom of association the Convention already guarantees. In other words, freedom of association would lose some of its effectiveness if workers' organisations could exist formally but were denied one of the principal collective means of pursuing and defending their members' interests.

### 2. *Consequences for States parties*

A second consequence concerns the obligations of States parties to Convention No. 87. Those States must henceforth apply the Convention on the premise that it safeguards the right to strike.

This does not mean that Convention No. 87 establishes an unlimited or absolute right to strike. It does mean, however, that a State party cannot maintain that its legislation complies with Convention No. 87 merely because it guarantees the freedom to establish and join trade unions while imposing restrictions preventing those organisations from taking strike action.

The Opinion therefore changes the starting point for assessing national legislation on the right to strike. The question is no longer whether Convention No. 87 contains such a right since the ICJ has answered that question affirmatively. The relevant question is whether national restrictions on exercising that right are compatible with the freedom of association guaranteed by the Convention.

This distinction also affects the relationship between international and domestic law. National legislation may set out procedures and conditions governing strikes, but for States parties to Convention No. 87, domestic law cannot be the sole and ultimate source of the right. The Convention defines the international framework so that domestic legislation must regulate the exercise of an internationally protected right rather than decide whether such a right exists at all.

The Court's examination of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is significant in this respect. It recalls that Article 8(1)(d) ICESCR expressly protects the right to strike, while Article 8(3) prevents States parties to Convention No. 87 from adopting legislative measures that would prejudice the guarantees contained in that Convention.

The effect is to reinforce the idea that domestic regulation of strike action is not unlimited: national legislation must operate within the framework of the international guarantees that bind the State.

### 3. *The Opinion does not determine the precise scope of the right*

The Opinion's significance must nevertheless be qualified in one important respect. The Court expressly states that its conclusion that Conven-

tion No. 87 protects the right to strike "does not entail any determination on the precise content, scope or conditions for the exercise of that right". This limitation is fundamental to understanding the Opinion's future consequences.

The Court has settled the question of the right's existence but has deliberately refrained from defining its full normative regime. It has therefore not determined the precise rules applicable to such matters as restrictions on strikes in essential services, minimum-service requirements, procedural prerequisites, strikes by particular categories of public employees, sympathy or solidarity strikes, political strikes, sanctions imposed on workers or trade unions, or the consequences of an unlawful strike.

The principal controversy is therefore likely to move from the existence of the right to the legitimacy of restrictions placed upon it. Before the Opinion, opponents of the established ILO approach could maintain that Convention No. 87 contained no right to strike at all. After this decision, that argument no longer aligns with the ICJ's interpretation. Disagreement will instead concern which restrictions the Convention permits and how to determine the right's content. These are potentially the most important unresolved issues arising from the Opinion.

### 4. *Consequences for the ILO supervisory system*

The Opinion is also likely to have profound consequences for the ILO supervisory machinery. The long-standing controversy over the right to strike had become an institutional controversy over the CEACR's authority. Employers' representatives challenged both the substantive conclusion that Convention No. 87 protected strike action and the Committee of Experts' competence to reach such an interpretation.

The Court does not resolve every aspect of the second question. Indeed, the question submitted to it was deliberately confined to whether Convention No. 87 protects the right to strike. The Court therefore did not determine the CEACR's general institutional competence to specify the scope and limits of the right.

Nevertheless, its reasoning substantially strengthens the ILO supervisory bodies' position. The Court notes that these bodies have progressively converged in recognising the protection of the right to strike. More im-

portantly, in discussing supplementary means of interpretation, the Court states that it may accord "great weight" to the pronouncements of ILO supervisory bodies and considers them to confirm the interpretation the Court independently reached.

The implications are significant. The proposition that the CEACR simply created a right having no foundation in Convention No. 87 has lost much of its force. The ICJ has reached essentially the same conclusion through its own interpretation of the Convention.

At the same time, however, the Court has not automatically transformed the entire body of CEACR or CFA jurisprudence concerning strikes into binding treaty law. This distinction is particularly important. Confirming the existence of the right does not necessarily confirm every proposition developed by the supervisory bodies concerning its scope, legitimate purposes, permissible restrictions, and conditions of exercise.

The future debate within the ILO will therefore likely concern the extent to which the supervisory bodies can derive their detailed principles from Convention No. 87 after the Court recognises the underlying right.

### 5. *The possible end of the institutional impasse within the ILO*

The Opinion may also remove one of the principal causes of the institutional deadlock that had affected the ILO's standards-supervision machinery.

The disagreement became particularly acute from 2012 onwards and led the Committee on the Application of Standards to refrain from addressing the right to strike in its conclusions on individual cases under Convention No. 87. The request for an advisory opinion followed unsuccessful attempts to resolve the disagreement through negotiations within the ILO.

The ICJ has now provided an authoritative answer to the foundational legal question that generated that dispute. Consequently, the argument that cases involving strike restrictions cannot properly be examined under Convention No. 87 because the Convention does not protect the right to strike can no longer be maintained consistently with the Court's interpretation.

This could permit the ILO supervisory machinery to return to substantive consideration of national strike legislation and practice under Convention No. 87.

However, institutional disagreement may not disappear entirely. Instead, it may shift to questions about the permissible limits of the right and supervisory bodies' authority to set detailed standards in this field.

### 6. *Consequences for national courts*

The Opinion is also likely to influence domestic judicial interpretation. It does not itself annul or invalidate national legislation. Nor does the Opinion determine the domestic legal effects of Convention No. 87 in each State party. Those consequences depend upon the constitutional system concerned, including the domestic status of treaties, the possibility of direct application of international labour conventions and the relationship between international norms and domestic legislation.

Nevertheless, when national courts, especially supreme courts, consider international labour law and relevant conventions, the Opinion will come to the fore, as it substantially strengthens Convention No. 87's relevance in strike-related litigation.

Judges can no longer approach Convention No. 87 on the assumption that its silence concerning the word "strike" excludes strike action from its scope. The ICJ has expressly rejected that logic. Instead, courts applying or taking Convention No. 87 into account must start from the opposite proposition that the right to strike forms part of the freedom of association protected by the Convention.

The Opinion may therefore be particularly important in disputes concerning statutory limitations on strike action. The legal question becomes whether the restriction preserves the substance and effectiveness of the internationally protected freedom of association.

### 7. *The European dimension*

For European countries, the ICJ Opinion reinforces an already existing convergence between ILO law and European human-rights law.

The Court expressly considers the European Court of Human Rights' jurisprudence on Article 11 of the European Convention on Human Rights (ECHR). It observes that the Strasbourg Court has interpreted freedom

of association to include the protection of the right to strike and has recognised strike action as one of the most significant means by which trade unions may protect their members' occupational interests. Under certain circumstances, restrictions on strike action may therefore affect the very essence of freedom of association. The conceptual convergence is evident. Under both Convention No. 87, as the ICJ now interprets it, and Article 11 ECHR, strike action is understood not as something external to freedom of association but as a means through which collective freedom becomes effective.

For European States parties to Convention No. 87, national strike regulation therefore operates within overlapping international frameworks. The ICJ Opinion strengthens the possibility of reading these systems in a mutually reinforcing manner.

As for the European Union, the Opinion seems largely irrelevant. The right to strike is a fundamental right of the Union, recognised by both Article 28 of the Charter of Fundamental Rights of the European Union and the case law of the Court of Justice, even though, under Article 153.5 of the Treaty on the Functioning of the European Union, the Union does not have general competence over this field.

## 8. *Conclusion*

The principal consequence of the Advisory Opinion is a transformation in the legal status of the right to strike within the framework of Convention No. 87. What had long been defended principally as the interpretation of the ILO supervisory bodies has now been authoritatively confirmed by the ICJ: the right to strike of workers and their organisations is protected by Convention No. 87.

The Opinion therefore resolves one controversy but opens another. The existence of the right under Convention No. 87 should now be regarded as settled. Its precise content, scope, permissible limitations and conditions of exercise remain to be determined. The Opinion's future significance will therefore depend largely on how the ILO supervisory bodies, national legislatures, and domestic courts develop these questions.

The resulting legal framework can be summarised in a simple distinction: the right has been judicially confirmed; its normative content remains

under construction. The centre of the international debate on strikes will therefore shift from "Does Convention No. 87 protect the right to strike?" to the more complex question, "What exactly does that protection require of States?".

Finally, major countries such as the United States, China, and India have not ratified Convention No. 87. Nevertheless, these countries are populous, industrialised, and represent a significant share of the global workforce. As a result, since 1948, billions of workers worldwide have not had their freedom of association recognised under international law and are still denied the right to strike. Moreover, as noted, the Opinion seems largely irrelevant for the 27 EU Member States, since the Union already recognises the right to strike.