



# **Freedom of Association & the Right to Strike: Towards an ICJ Resolution?**

A public international law perspective on  
*Right to Strike under ILO Convention No. 87*

# Issues to consider

- International Labour Organization and the International Court of Justice
- Procedure
  - Jurisdiction of the ICJ and the admissibility of the request for the advisory opinion
  - Necessity for an urgent answer
  - Participation by employers' and workers' organizations
  - Legal effect of the advisory opinion
- Substance
  - *Right to Strike under ILO Convention No. 87* (Order of 16 November 2023)  
(published earlier today)

# International Labour Organization and the International Court of Justice

- International Labour Organization
- A specialised agency of the United Nations
- United Nations Charter art 63(1) ('The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations.'), generally arts 57, 63
- 1946 Relationship Agreement between the International Labour Organization and the United Nations
  
- Historically established 'as part of the organization of the League [of Nations]' (Versailles Treaty art 392)
- Possibly relevant because all six advisory opinions relating to the ILO were rendered by the Permanent Court of International Justice of the League, see ILO Office background report (14 September 2023) GB.349bis/INS/1/1 Appendix Annex II

# International Labour Organization and the International Court of Justice II

- International Court of Justice
- Primary judicial organ of the United Nations
- Contentious cases and advisory opinions
- Advisory opinions addressed in UN Charter art 95, ICJ Statute Chapter IV (arts 65-8), Rules of the Court Part IV (arts 102-9), Practice Direction XII
  
- Some recent advisory opinions
- *Judgment no 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion)* [2012] ICJ Rep 10
- *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95

# International Labour Organization and the International Court of Justice III

- Relevant documents
- ILO Office background report (14 September 2023) GB.349bis/INS/1/1
- Summary of comments received from constituents (13 October 2023) GB.349bis/INS/1/2
- Office note: The binding legal effect of ICJ advisory opinions
- Office note: Legal basis for requesting an advisory opinion
- Office note: ICJ advisory proceedings – Relevant jurisprudence
- Comments from Employers' Secretariat on the additional Office notes
- Resolution adopted by the ILO Governing Body at its 349<sup>th</sup> *bis* (Special) Session on 10 November 2023
- Letter of ILO Director General to the President of the ICJ of 13 November 2023
- *Right to Strike under ILO Convention No. 87* (Order of 16 November 2023)

# Jurisdiction and admissibility

The terms of Article 96, paragraph 2, of the Charter, Article 65, paragraph 1, of the Statute of the Court and the authorization given to the Fund by Article XIII, paragraph 2, of the Relationship Agreement state certain requirements which are to be met if an opinion is to be requested. In terms of those requirements, the Fund's request for review of a judgment concerning its hosting of the Global Mechanism and the question of whether it employed Ms Saez García do present "legal questions" which "arise within the scope of the Fund's activities".

*Judgment no 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion) [2012]*  
ICJ Rep 10 para 26

# Jurisdiction and admissibility II

In the light of the preceding analysis, a number of concluding observations may be made: ... (c) Both questions are legal in nature, are directly related to the activities of the Organization and refer to issues falling within its sphere of competence. (d) Authoritative guidance may be requested from the International Court of Justice on both questions, under article 37(1) of the ILO Constitution and article IX(2) of the Agreement between the United Nations and the International Labour Organization. ... . (e) The request for an advisory opinion may be validly addressed to the Court by the Governing Body pursuant to the delegated authority it has received from the Conference.

# Jurisdiction and admissibility III

Article 65 of the Statute of the Court makes it clear that it has a discretion whether to reply to a request for an advisory opinion: “The Court may give an advisory opinion on any legal question . . .” That discretion exists for good reasons. In exercising that discretion, the Court has to have regard to its character, both as a principal organ of the United Nations and as a judicial body. The Court early declared that the exercise of its advisory jurisdiction represents its participation in the activities of the Organization and, in principle, a request should not be refused . . . . That indication of a strong inclination to reply is also reflected in the Court’s later statement, in the only other challenge to a decision of the ILOAT brought to it, that “compelling reasons” would be required to justify a refusal . . . .

*Judgment no 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion) [2012] ICJ Rep 10 para 33*



# Necessity for an urgent answer

When the body authorized by or in accordance with the Charter of the United Nations to request an advisory opinion informs the Court that its request necessitates an urgent answer, or the Court finds that an early answer would be desirable, the Court shall take all necessary steps to accelerate the procedure, and it shall convene as early as possible for the purpose of proceeding to a hearing and deliberation on the request.

Rules of the Court art 103

As instructed by the Governing Body, I respectfully request that the Court ... consider possible steps to accelerate the procedure, in accordance with Article 103 of the Rules of Court.

Letter of ILO Director General to the President of the ICJ of 13 November 2023

# Necessity for an urgent answer II

- No request for urgency
- *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (UNGA Res 77/247 adopted on 30 December 2022, UNSG informs the Court on 17 January 2023, the Court on 3 February fixes 25 July and 25 October as the time-limit for the first and second rounds or written statements, public hearing scheduled to open on 19 February 2024)
- *Obligations of States in respect of Climate Change* (UNGA Res 77/276 adopted on 29 March 2023, UNSG informs the Court on 12 April, the Court on 20 April fixes 20 October and 22 January 2024 as the time-limit for the first and second rounds or written statements, the Court extends on 4 August the time-limit to 22 January and 22 April)
- Request for urgency
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (UNGA Res ES-10/14 adopted on 8 December 2003, UNSG informs the Court on 10 December, the Court on 19 December fixed 30 January 2004 as the time-limit for written statements and fixed 23 February 2004 as the date for the opening of the said hearings, hearings held 23-25 February, opinion rendered on 9 July)

# Necessity for an urgent answer III

2. Fixes 16 May 2024 as the time-limit within which written statements on this question may be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute;

3. Fixes 16 September 2024 as the time-limit within which States and organizations having presented written statements may submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute[]

*Right to Strike under ILO Convention No. 87 (Order of 16 November 2023) paras 2, 3*

# Participation by employers' and workers' organizations

Participation in advisory proceedings consists in submitting written statements and, if the Court decides to hold hearings, presenting oral arguments. ... In deciding which States, international organizations or other entities should be invited to participate in advisory proceedings under article 66(2) of its Statute, the Court seeks to ensure that all actors likely to provide information that may not otherwise be available to the Court are involved in the proceedings. Adopting a pragmatic approach, the Court is prepared to accept the participation of actors other than intergovernmental organizations and States, if this is in the interest of obtaining the most accurate and factual information possible or if the special circumstances of the case necessitate it.

ILO Office background report (14 September 2023) GB.349bis/INS/1/1 Appendix para 103 (emphasis added), see further GB.322/INS/5 (16 October 2014) paras 39-47

# Participation by employers' and workers' organizations II

Expressing the hope that, in view of the ILO's unique tripartite structure, not only the governments of ILO Member States but also the international employers' and workers' organizations enjoying general consultative status in the ILO would be invited to participate directly and on an equal footing in the written proceedings and any oral proceedings before the Court,

Last preambular recital of the resolution adopted by the Governing Body of the ILO at its 349<sup>th</sup> *bis* (Special Session)

As instructed by the Governing Body, I respectfully request that the Court allow for the participation in the advisory proceedings of the employers' and workers' organizations that enjoy general consultative status with the ILO ... . At present, the following six organizations have been granted general consultative status by the Governing Body: International Organisation of Employers (IOE); International Trade Union Confederation (ITUC); World Federation of Trade Unions (WFTU); International Cooperative Alliance (ICA); Organization of African Trade Union Unity (OATUU); Business Africa.

Letter of ILO Director General to the President of the ICJ of 13 November 2023

# Participation by employers' and workers' organizations III

4. Decides further that, in light of the particular tripartite structure of the International Labour Organization, which is comprised of representatives of Governments, employers and workers, six organizations having been granted general consultative status at the International Labour Organization by the Governing Body (the International Organisation of Employers, the International Trade Union Confederation, the World Federation of Trade Unions, the International Cooperative Alliance, the Organization of African Trade Union Unity and Business Africa) are also considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion; and decides therefore to invite those organizations to make written contributions to the Court within the above time-limits[]

*Right to Strike under ILO Convention No. 87 (Order of 16 November 2023) para 4*

# Legal effect of the advisory opinion

... advisory opinions relating to the interpretation of the ILO Constitution or of an international labour Convention are endowed with binding effect because art 37(1) expressly provides so (I). More broadly, there is strong support in State practice and legal scholarship that the legal effect of an ICJ advisory opinion is in reality as authoritative as a judgment and that the requesting organ is bound by the Court's 'advice' (II).

Office note: The binding legal effect of ICJ advisory opinions para 3

Paragraph 3 of this document states that “advisory opinions relating to the interpretation of the ILO Constitution or of an international labour Convention are endowed with binding effect because article 37(1) expressly provides so.” We consider this argument legally inconsistent.

Comments from Employers' Secretariat on the additional Office notes

# Legal effect of the advisory opinion II

Under Article XII, paragraph 2, of the Statute of the ILOAT and of its Annex, the opinion of this Court given in terms of those provisions is “binding”. As the Court said in the 1956 Advisory Opinion, that effect goes beyond the scope attributed by the Charter and the Statute of the Court to an advisory opinion. It does not affect the way in which the Court functions; that continues to be determined by its Statute and Rules . . . .

*Judgment no 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion) [2012] ICJ Rep 10 para 28*



# Legal effect of the advisory opinion III

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.

ILO Constitution art 37(1)

Acknowledging the final and binding nature of any advisory opinion so obtained[]

ILO Office background report (14 September 2023) GB.349bis/INS/1/1 Appendix Annex I (penultimate preambular recital of Draft Governing Body Resolution)

# Substance

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)?