INTERNATIONAL COURT OF JUSTICE

Right to strike under ILO-Convention No. 87

(Request for Advisory Opinion)

WRITTEN STATEMENT OF GERMANY

6 May 2024

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I. Introduction

1. On 13 November 2023, the Director-General of the International Labour Organization (ILO) transmitted the resolution of the ILO Governing Body of 10 November 2023 to the International Court of Justice by which it decided to request the International Court of Justice to render an advisory opinion on the question of whether 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 (ILO Convention No. 87).

2. On 16 November 2023, the Court ordered that States parties to ILO Convention No. 87 could by 16 May 2024 present written statements in accordance with Article 66 (2) of the ICJ statute.

3. With reference to this judicial order, Germany respectfully submits the present written statement to the Court in order to set out Germany's position on the question upon which the advisory opinion was requested by the ILO Governing Body.

4. Germany was a member of ILO from 1919 to 1933, and is a member then again since 1951. Germany has ratified a total of 87 ILO Conventions and two protocols.[1]

5. Germany recognises the fundamental principles and rights at work as human rights and has a long-standing social state tradition. Social partnership is a concept that enjoys a high status in German society. Germany is thus particularly committed to the legal instruments and values of the ILO.

6. Since 1954, Germany holds one of ten permanent seats on the ILO Governing Body and it is the fourth largest contributor to ILO's Regular Budget.

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[1] Of these, 61 Conventions are in force. 18 Conventions and one protocol were revoked, six Conventions were repealed.

7. Germany is a party to ILO Convention No. 87 since its ratification on 20 March 1957 and is thus entitled to submit a written statement.

8. The German written statement is structured as follows: Following this (I.) introduction, Germany will submit its (II.) interpretation of Convention No. 87 according to the Vienna Convention on the Law of Treaties. Subsequently (III.) Germany's position and decades-long state practice vis-à-vis ILO, its organs and ILO state parties, regarding the question raised here will be set out. Finally, we will refer to the consistent (IV.) German position in a related international law context (Article 11 of the European Convention on Human Rights) and to the judgment of the European Court of Human Rights in the case of Humpert and Others v. Germany. The (V.) Submission will summarize the essential points.

II. Interpretation of Convention No. 87 according to the Vienna Convention on the Law of Treaties

9. In order to answer the question submitted to the Court by the ILO Governing Body whether the right to strike is protected by Convention No. 87, the Convention has to be interpreted. The interpretation must follow the principles laid down in Article 5, 31 et seq. of the Vienna Convention of 23 May 1969 on the Law of Treaties (Vienna Convention).

10. Under the central provision in Article 31 (1) Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. According to Article 31 (2) Vienna Convention, the context to be considered for the interpretation of the treaty includes not only the text of the treaty, including its preamble and annexes, but also any agreements relating to the treaty, which were made between all the parties. Under Article 31 (3) Vienna Convention, account shall be taken of any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty, which establishes the agreement of the state parties regarding its interpretation and any relevant rules of international law applicable in the relations

between the parties. Under Article 32 Vienna Convention, recourse may be had to supplementary means of interpretation, when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

11. In application of the principles of the Vienna Convention, Germany respectfully submits the following comments.

1. The wording of the treaty in the light of its object and purpose

12. **a)** While the **text of Convention No. 87** does not expressly mention the right to strike, the Convention expressly and comprehensively protects the freedom of association and the right to organise according to the wording in Articles 1 to 11. Pursuant to the legal definition in Article 10,

> *"any organisation of workers or of employers for furthering and defending the interests of workers or of employers"*

is protected.

13. The interest of the workers or employers, to which Article 10 refers, lies in collectively regulating the working conditions by the organisations representing them. Therefore, according to the text of the Convention, organisations that aim for the regulation of their members' working conditions are protected.

14. Also, Article 3 (1) of Convention No. 87 sets out that workers' and employers' organisations shall, amongst other things, have the right "to organise their (...) activities".

15. This means that these organisations are in principle free to determine what activities they choose in order to reach the objective of regulating their members' working conditions. Under Article 3 (2) of the Convention, authorities are not allowed to restrict the "lawful exercise" of this freedom.

16. In summary, from Germany's point of view, the text of the Convention sets out that Article 10 in conjunction with Article 3 protects the right of employers' and workers'

organisations to form associations with the aim of regulating working conditions. Organisations are equally protected to determine themselves what lawful activities they want to exercise with this aim.

17. To avoid that these provisions are in practice without effect, the freedom of association must protect the *activities* themselves, i.e. the specific actions and instruments used by trade unions and employers' associations to influence the working conditions in the interest of their members.

18. Accordingly, the first report of the ILO Office to the International Labour Conference on the planned Convention reads as follows:

> *„The draft submitted to the Conference was limited to a guarantee, on the one hand, of the freedom of workers and employers to organise* ***for the collective defence of their occupational interests*** *and, on the other hand, of the freedom of trade associations* ***to pursue their objects*** *by all means not contrary to law or to the regulations enacted for the maintenance of public order."*[2]

19. Without this understanding, i.e. that the protection of the freedom of association does not only comprise the right to associate with specific objectives, but generally also the pursuit of these objectives, the freedom of association would be largely meaningless. In that case, it would be conceivable that on the one hand employers' associations and trade unions would have the right to form associations under Convention No. 87 with the aim to exercise activities to regulate working conditions. But on the other hand, the exercise of these activities would not be protected so that they could be prohibited without violating the Convention. From Germany's viewpoint it is clear that this result is manifestly absurd and also unreasonable.

20. Therefore, pursuant to the wording of the Convention in the light of its object and purpose, those specific actions and instruments used by employers' associations and trade unions to reach these objectives, namely regulating the working conditions in the interest of their members, are generally protected.

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[2] International Labour Organization, ILC, 30th Session, 1947, Freedom of Association and Industrial Relations: Report VII, pp. 16–17. (Emphasis added)

21. Convention No. 87 also protects the right to enter into collective agreements. It is above all through collective agreements that employers' associations and trade unions protect the interests of their members regarding their working conditions.[3]

22. According to Germany, the right of employers' associations and trade unions to enter into collective agreements, which is protected under Convention No. 87, is in turn inextricably linked to the general recognition of the right to industrial action, i.e. on the trade union side to the protection of the right to strike. Without the right to exert pressure through industrial action, the right to conclude collective agreements would be substantially diminished.

23. **b) Article 11 of** the **European Convention on Human Rights** (ECHR) may also be considered in the international legal interpretation of Convention No. 87. Many State parties to Convention No. 87 also ratified the European Convention on Human Rights, which entered into force in 1953. Article 11 ECHR has a similar wording to Article 10 of Convention No. 87:

> *"Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."*

24. In regard to the freedom of association under Article 11 ECHR, it has to be underlined that it also includes the right to enter into collective agreements. [4]

25. In order to protect the right to strike based on the freedom of association set forth in Article 11 ECHR, the European Court of Human Rights stated:

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[3] In this regard, the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) constitutes a supplementary regulation to the Freedom of Association and Protection of the Right to Organise Convention, No. 87.

[4] In Demir and Baykara v. Turkey, the Court reconsidered its case-law to the effect that the right to bargain collectively and to enter into collective agreements did not constitute an inherent element of Article 11 and it was not indispensable for the effective enjoyment of trade union freedom. Having regard to the developments in labour law and to the practice of Contracting States in such matters, it held that "[...] the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention, it being understood that States remained free to organise their system so as, if appropriate, to grant special status to representative trade unions.", see ECtHR, *Demir and Baykara v. Turkey* (no 34503/97), 12 November 2008, paras. 153-154.

„The Court recalls that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action [...]. The grant of a right to strike represents without any doubt one of the most important of these means [...].[5]

26. The right to strike is thus "*[...] clearly protected by Article 11.*"[6]

27. In regard to Article 11 ECHR, the connection between the freedom of association, the right to enter into collective agreements and the right to strike has thus been confirmed in a legally binding manner, though the provision does not mention the right to strike expressly in its text - as is also the case with regard to Convention No. 87. This connection is in particular based on an adequate understanding of the object and purpose of the provision on the freedom of association and, from Germany's viewpoint, it is also transferrable to Convention No. 87.

28. **c)** This interpretation of international law is also reflected in **Germany's national law**. German law also assumes that there is a connection between the freedom of association and the right to enter into collective agreements.

29. The German constitution from 1949, the Basic Law, contains a similar wording regarding the grant of the freedom of association in Article 9 (3) sentence 1 of the Basic Law - as in Article 10 of Convention No. 87. Article 9 (3) sentence 1 of the Basic Law reads:

"The right to form associations to safeguard and improve working and economic conditions is guaranteed to every individual and to all trades, occupations and professions."

30. The protection of the freedom of association under the German Basic Law extends to all coalition-specific practices and includes in particular the right of coalitions to

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5 ECtHR, *Schmidt and Dahlström v. Sweden* (no. 5589/72), 6 February 1967, para. 36.

6 ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (no. 31045/10), 8 April 2014, para 84; ECtHR, *Association of Academics v. Iceland (dec)* (no. 2451/16), 15 May 2018, paras. 24-27, providing an overview of the Court's case-law. In ECtHR, *Hrvatski liječnički sindikat v. Croatia* (no. 36701/09), 27 November 2014, para 59, the Court has referred to a strike as the most powerful instrument available to a trade union to protect the occupational interests of its members.

negotiate about the regulation of working and economic conditions and to enter into collective agreements – in principle without any state interference.[7]

31. The link between the freedom of association and the right to enter into collective agreements is of fundamental importance and has developed over time. From the outset, the forming of trade unions has been linked to the objective of collectively enforcing and regulating working conditions of workers. Therefore, the year 1873, when the first nationwide collective agreement was concluded in Germany (in the book printing industry), marked a historic milestone for the trade union movement.[8]

32. Collective agreements are meant to protect workers, who have a structurally weaker position in individual employment relationships, by means of collective representation of their interests. Thereby, the right to enter into collective agreements is a contribution to securing the individual freedom of contract for workers through collective action. In the words of the Federal Labour Court:

> *"Working conditions shall be negotiated on a collective level as there is a typical imbalance between the employer and the individual worker interfering with or making impossible a negotiation of a contract of employment and the working conditions in private autonomy at the individual rights level".*[9]

33. There is also a clear connection under German national law, confirmed by the Federal Constitutional Court, between the constitutionally guaranteed freedom of association and the right to strike.[10] Again in the words of the Federal Labour Court:

> *"Workers and their trade unions depend on strikes in order to establish a balanced negotiation position. Collective agreements are only becoming a reality if they are, where necessary, obtained by force by trade unions through taking industrial action. Without this option to go on strike,*

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7 See Federal Constitutional Court (BVerfG), decision of 10 September 2004 – 1 BvR 1191/03, para. 27; Federal Labour Court (BAG), decision of 8 December 2010 – 7 AZR 438/09, para. 27.

8 Oetker, in Wiedemann, Tarifvertragsgesetz (Collective Agreements Act), 9th edition 2023, Geschichte des Tarifvertragsgesetzes (History of the Collective Agreements Act), para. 4.

9 Federal Labour Court (BAG), decision of 12 March1984 – 1 AZR 636/82, Neue Zeitschrift für Arbeitsrecht (NZA) 1985, p. 538.

10 Federal Constitutional Court (BVerfG), decision of 2 March 1993 – 1 BvR 1213/85, para 43; Federal Constitutional Court (BVerfG), decision of 10 September 2004 – 1 BvR 1191/03, para 14.

collective bargaining would only signify , collective begging'. Thus, the strike must be possible in our free collective bargaining system to settle conflicts of interest that could otherwise not be solved."[11]

2. Subsequent practice by Germany as a State party

34. As for subsequent practice, the ILO Office compiled extensive findings in its Background Report of 14 September 2023.[12] They back the assumption that the right to strike is protected by Convention No. 87 due to decades of respective state practice. As to Germany's position as a State party to Convention No. 87, reference is made to the statements under **III**. These statements are to be interpreted as an illustration of the subsequent practice by the State party Germany within the meaning of the Vienna Convention.

35. Germany's assessment regarding the interpretation of Convention No. 87 also points to the limits of the right to strike under the Convention.

36. These limits result from the functional relation between the right to enter into a collective agreement and the right to strike. It is Germany's view that industrial action is protected as an instrument to enforce collectively agreed regulations.[13] In Germany's opinion, a fundamental right to strike, unconnected to its functional reference to the right to enter into collective agreements, is therefore not guaranteed by Convention No. 87. This means that strikes to enforce interests that cannot be regulated by collective agreement, are not covered by the right to freedom of association.

37. Another restriction of the right to freedom of association under Convention No. 87 (and hence of the right to strike) can in Germany's view derive from Article 8 (1) of

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[11] Federal Labour Court (BAG), decision of 12 March 1985 – 1 AZR 636/82, Neue Zeitschrift für Arbeitsrecht (NZA) 1985, p. 538.

[12] International Labour Organization, The dispute on the interpretation of Convention No. 87 in relation to the right to strike – Background report, para 45 et seq. (ILO Dossier Vol. 1, Document No. 29, p. 260 et seq).

[13] As for Germany's legal situation, see Federal Constitutional Court (BVerfG), decision of 26 June 1991- 1 BvR 779/85, Neue Zeitschrift für Arbeitsrecht (NZA) 1991, p. 811; Federal Labour Court (BAG), decision of 20 November 2012 - 1 AZR 179/11, Neue Zeitschrift für Arbeitsrecht (NZA) 2013, p. 462.

the Convention, according to which workers and employers and their respective organisations shall "in exercising the rights provided for in this Convention (...) respect the law of the land". At the same time, Article 8 (2) clarifies that "the 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."

38. Article 8 thus outlines a (potentially conflicting) "twofold objective" between the provisions of the Convention and the law of the land, which shall be respected.[14] In this context, it is Germany's view that, in any event, certain restrictions of the freedom of association that are based on conflicting fundamental rights of third parties and on other rights of constitutional rank in the national context are in principle possible.

39. From a German perspective, in particular the traditional principles of the career civil service in Article 33 (5) of the Basic Law, which contain a strike ban for persons in civil service status, must be named in this context. This strike ban for civil servants applies irrespective of the work they perform. It is closely linked to the civil service principle of alimentation, the duty of loyalty, the principle of lifetime employment and the principle that the legal relationship under civil service law, including remuneration, must be regulated by the legislator.

40. While taking these restrictions of the right to strike into consideration in a related international legal context, the European Court of Human Rights found the strike ban on teachers with civil servant status to be in compliance with the European Convention on Human Rights and the freedom of association guaranteed therein (for more details, see under **IV.**).[15]

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[14] See International Labour Organization, ILC, 81st Session, 1994, Report of the CEACR, Report III (4B): General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949, para. 108.

[15] Other states also share Germany's legal interpretation expressed in this context in principle, in order to justify any strike ban applicable in their own respective national legislation, see ECtHR, *Humpert and Others v. Germany* (nos. 59433/18, 59477/18, 59481/18 and 59494/18), 14 December 2023, para 66.

41. It should be noted that the majority of State parties have not recognised an unlimited right to strike, so that such a broad interpretation would contradict the practice of the State parties.

3. Preparatory Work

42. According to Germany, the question of whether ILO Convention No. 87 contains the right to strike must clearly be answered in the affirmative on the basis of Article 31 Vienna Convention alone. Therefore, the condition for the subsidiary application of Article 32 Vienna Convention, which takes the preparatory work of the Convention into account, is not given.

43. Nevertheless, as a precautionary measure, Germany would like to point out that, in its view, the preparatory work of Convention No. 87 excludes by no means the assessment that the right to strike is covered by the instrument.[16] The reason for this is that in the drafting of the Convention, the question was asked whether

> *„it would be desirable to provide that the 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."*[17]

44. In 1948, 14 ILO member states spoke out in favour of including a corresponding paragraph on the right to strike.[18] Only three member states objected; there were no further submissions from other states at the time. From Germany's viewpoint, this means that while the connection between the freedom of association and the right to strike was not explicitly regulated, it was also not explicitly excluded when Convention No. 87 was drafted. Germany is of the view that this is circumstantial evidence that the authors of the Convention saw a close connection between the freedom of

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16 International Labour Organization, The dispute on the interpretation of Convention No. 87 in relation to the right to strike – Background report, para. 35 et seq. (ILO Dossier Vol. 1, Document No. 29, S. 257 ff.).

17 International Labour Organization, ILC, 31st Session, 1948, Freedom of Association and Protection of the Right to Organise: Questionnaire, p. 15.

18 International Labour Organization, ILC, 31st Session, 1948, Freedom of Association and Protection of the Right to Organise: Report VII, p. 67.; The dispute on the interpretation of Convention No. 87 in relation to the right to strike – Background report, para. 36 (ILO Dossier Vol. 1, Document No. 29, p. 258 et seq.).

association and the right to strike and that the right to strike was implicitly covered (see also under **III.** below).

4. Conclusion

45. In conclusion, the question submitted to the Court is to be answered in the affirmative in accordance with the Vienna Convention, even though the right to strike is not mentioned explicitly in Article 10 and Article 3 of Convention No. 87. At the same time, limitations of the right to strike result from its functional relation to the right to enter into collective agreements and from the respective national legislation of the State parties. In Germany, for example, the right to strike may be limited through conflicting fundamental rights of third parties or by other rights of constitutional rank under national law.

III. Germany's position in the ILO

46. From Germany's point of view, the obligations Germany assumed with the ratification of Convention No. 87 under international law, specifically with Article 10 and Article 3, are fully complied with by the national regulations and the guarantee of freedom of association in Article 9 (3) of the Basic Law. At the same time, the protection of freedom of association resulting from the obligations under international law[19] does not extend beyond what is guaranteed under Article 9 (3) of the Basic Law.[20]

47. On the basis of the legal understanding of the functional relation between freedom of association and the right to strike, Germany has always considered the right to strike to be part of the freedom of association protected by Convention No. 87. This follows both from Germany's statements at the ILO Governing Body and at the International Labour Conference and from the reports to the ILO Office under Article 22 of the ILO Constitution.

48. This view of Germany is consistent with the unanimous opinion of the ILO supervisory bodies, which have always assumed that the right to strike is protected by Convention No. 87, but does not enjoy unlimited protection.[21]

49. Germany only expressed doubts with regard to the interpretation of the ILO Committee of Experts on the Application of Conventions and Recommendations of the scope of the right to strike set out in Convention No. 87.

50. **a)** Accordingly, at the 81st International **Labour Conference**, Germany emphasized its

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[19] According to the European Court of Justice (ECJ), these rights expressly include the right to carry out collective action, including the right to strike (ECJ, decision of 11 December 2007, C-438/05, para. 43).

[20] Federal Constitutional Court, decision of 11 July 2017 - 1 BvR 1571/15, para. 206, 209

[21] See International Labour Organization, ILC, 101st Session, 2012, Report of the CEACR, Report III(1B): Giving globalization a human face (General Survey on the fundamental Conventions), para. 117 et seq., in particular para. 127 and 129; and Compilation of the decisions of the Committee on Freedom of Association (2018), para. 828-830.

„general agreement with the Committee of Experts' position on strikes as an indispensable corollary of freedom of association and emphasized moreover that the Committee had explained that this was not an absolute right."[22]

51. Moreover, on this occasion, Germany asked:

"if the authors of the Convention had not considered that the right to strike was a part of freedom of association, why would they have considered it necessary to specify that the recognition of trade union rights for public agents did not prejudge the question of their right to strike?"[23]

52. In a country case dealt with by the Committee on the Application of Standards at the International Labour Conference in 2001, a German government representative reiterated accordingly that the right to strike was

"an essential component of freedom of association, despite the fact that it was not expressly covered under Convention No. 87."[24]

Therefore, the Committee of Experts and the Committee on the Application of Standards were considered to have the right to deal with cases about the right to strike.

53. **b)** In 2015, at the **Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention**, a representative from Germany pointed out a parallel to the national legal situation:

"the right to strike was not explicitly mentioned in the German Constitution. In his country, the right to strike was derived from the jurisprudence of the courts in Germany, which recognized that for collective bargaining purposes, the right to strike was essential for workers as it placed them on an equal footing with employers."[25]

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22 International Labour Organization, ILC, 81st Session, 1994, Record of proceedings, 25/40, para. 144.

23 Ibid., para. 144.

24 International Labour Organization, Individual Case (CAS) - Discussion: 2001, published ILC, 89th session, 2001 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Belarus.

25 International Labour Organization, GB.323/INS/5/Appendix II Final report of the 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 (Geneva, 23–25 February 2015), para. 48 (ILO Dossier Vol. 3, Document No. 107, p. 248).

He further explained that

> *"the right to strike was an essential part of Convention No. 87, and was reflected in his country's national legislation. It was an essential tool to establishing and maintaining negotiations, but was not an absolute right. It should be exercised in accordance with national circumstances, law and practice."*[26]

At the same time, he emphasized the importance of the recognition of the right to strike under Convention No. 87 for ILO's supervisory system:

> *"The CEACR had upheld the right to strike over many years and calling into question this interpretation would result in a challenge to the entire system of standards supervision and its impact in other jurisdictions."*[27]

54. **c)** At the 347th **Governing Body** session in 2023, a representative of Germany explained that

> *"the connection between freedom of association and the right to strike had repeatedly been called into question, limiting the effective monitoring of related ILO standards. That was unacceptable, and he called for the resolution of the matter as soon as possible."*[28]

55. **d)** Germany's legal understanding that the right to strike is inseparably connected with freedom of **association** under Convention No. 87, but is nevertheless not unlimited, has been and still is a main point in **Germany's dialogue with the ILO Committee of Experts**.

56. Germany's **comments** on the Committee of Experts' observations 1993 and 1994 and the observations of the German Trade Union Confederation of 8 February 1994 concerning the enforcement of Convention No. 87 summarize this opinion as follows:

> *"Germany reaffirms once again that the exercise of the right to strike is an essential part of trade union activity and as such is protected by Convention No. 87, even if the right to strike itself is not expressly mentioned in the text of the Convention. However, the absence of specific*

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[26] Ibid., para. 17 (ILO Dossier Vol. 3, Document No. 107, p. 241).

[27] Ibid., para. 17 (ILO Dossier Vol. 3, Document No. 107, p. 241).

[28] International Labour Organization, Minutes of the 347th Session of the Governing Body of the International Labour Office, page 62, para. 259.

provisions on the right to strike in Convention No. 87 cannot mean that the ILO bodies, which are responsible for monitoring compliance with the Convention, have the unrestricted power to profess a detailed understanding of that right as globally binding[29]*."*

57. Germany referred to this comment on several occasions, for example in the 2003 Report under Article 22 of the ILO Constitution.

58. The main point of criticism of the Committee of Experts vis-à-vis Germany with regard to the national implementation of Convention No. 87 has long been the strike ban for civil servants. [30]

59. In this context (for example in Germany's report for the period from 1 July 1988 to 30 June 1990), Germany has repeatedly pointed out that under German law, industrial action is only allowed to achieve objectives that can be regulated by collective agreement and that the working conditions of civil servants are not only regulated by collective agreement but by law.

60. In addition, Germany took the report for the period from 1 July 1990 to 30 June 1992 as an occasion to refer not only to the prohibition of strikes for civil servants but also to the limits of the right to strike in Convention No. 87, stating:

"Convention No 87 does not contain any provisions on industrial action. Therefore, it cannot be reasoned that state parties are obliged to shape their industrial action legislation on individual issues in a specific manner. This statement applies all the more to forms of industrial action that do not correspond to the social traditions of all ILO member states."

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[29] In the meantime, a tripartite agreement on the mandate of the Committee of Experts was reached which, among other things, reads: „*The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by Member States, while cognisant 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.*", as stated most recently in the Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 112th Session, 2024, p. 50, para. 30.

[30] In the first approximately 30 years after ratification, the implementation reports of Germany under Article 22 of the ILO Constitution did not contain any reference to the strike ban for civil servants because, on the basis of the genesis of Convention No 87, Germany assumed that, unlike the right to strike per se, it was not affected by the Convention. See also footnote 23 above.

61. **e)** Not only vis-à-vis the Committee of Experts, but also **vis-à-vis the Committee on Freedom of Association**, the German reports have reflected the view that workers' right to strike is protected by Convention No. 87 but that the opinions and recommendations by the Committee of Experts had no binding legal effect.[31] In a case related to the German strike ban for civil servants, Germany made the following statement in 1993:

> „*The Government does not deny that the right to strike is essential to the freedom of action of trade unions and, in that sense, is implicitly recognized by the Convention, even if the text contains no reference to it. The Government considers, however, that there is no justification for inferring from that Convention a detailed body of law on the right to strike which would be binding on States which have ratified it.*"[32]

62. **f)** Germany maintains its position outlined above that the right to strike, although not expressly regulated, is protected by Convention No. 87. In the context of the ILO, Germany continues to consider at the same time that the right to strike is not granted without limits, but can be limited in accordance with international law with regard to the functional link between the right to strike and the right to conclude collective agreements, and by conflicting fundamental rights of third parties or by other rights of constitutional rank in the national context. Ultimately, a careful examination of the respective national regulations and consideration of the legal interests concerned is necessary in order to determine the incompatibility of the limitations of a right to strike with the Convention. Here, as in other international conventions with regulations on freedom of association, the State parties have a wide margin of appreciation and discretion in the design of the right to strike.

IV. International law context: Article 11 of the European Convention on Human Rights and the case of Humpert and Others v. Germany

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[31] On the mandate of the Committee of Experts which has meanwhile been clarified see footnote 29 above.

[32] International Labour Organization, CFA Case No. 1692 (Germany), Report No. 291, November 1993, para. 217.

63. The legal opinion held by Germany in the ILO on the right to strike corresponds to the interpretation of freedom of association and permissible limitations of the right to strike under the European Convention on Human Rights.

64. The Federal Republic of Germany is a State party to the European Convention on Human Rights (ECHR). Article 11 ECHR protects the freedom of assembly and the freedom of association. Although not explicitly mentioned in the wording of Article 11 ECHR, the right to strike is covered by the norm, as established in the consistent case law of the European Court of Human Rights.[33] With regard to Article 11 ECHR, Germany has always assumed that, in accordance with national law and its position in the ILO, the human right of freedom of association also includes the right to strike.

65. The Humpert case[34] concerning the strike ban for teachers with civil servant status in Germany did not deal with the question of whether Article 11 ECHR guarantees a right to strike. Rather, it had to be clarified whether and if yes, under which conditions the right to strike in Article 11 ECHR could be restricted. In this context, Germany held the position that the right to strike was not an essential element of freedom of association in the sense that restrictions of this right could therefore be justified in principle.[35] The prohibition of strikes for teachers with civil servant status was justified because all in all their status was very advantageous compared with the corresponding conditions for public contractual state employees - in connection with important participation rights in the determination of their employment conditions.

66. Also in the context of the ECHR, this legal understanding does not conflict with the conviction that the right to strike is an important instrument for trade unions to carry out their tasks. Rather, the legal classification as an essential element of freedom of

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33 ECtHR, *Association of Academics v. Iceland (dec)* (no. 2451/16), 15 May 2018, paras. 24-27, providing an overview of the Court's case law; ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (no. 31045/10), 8 April 2014, para. 84 – most recently ECtHR, *Humpert and Others v. Germany* (nos. 59433/18, 59477/18, 59481/18 and 59494/18), 14 December 2023, para. 104.

34 ECtHR, *Humpert and Others v. Germany* (nos. 59433/18, 59477/18, 59481/18 and 59494/18), 14 December 2023.

35 Ibid., para. 89. The German statement on Humpert and Others v. Germany of 18 November 2022 reads: „As a result, while the right to strike is undoubtedly covered by Art. 11 ECHR, it does not belong to the ‚essential elements' referred to in the Court's case law."

association exclusively concerns the question under which conditions the right to strike under Article 11 ECHR may be restricted. The German Federal Constitutional Court had examined and confirmed the prohibition on strikes for civil servants already in 2018. Because international treaties also constitute law that has to be applied by the courts in Germany and the provisions of the German Basic Law must be interpreted in an international law-friendly manner, the Federal Constitutional Court had also dealt intensively with the case law of the European Court of Human Rights on freedom of association under Article 11 ECHR. In the proceedings before the European Court of Human Rights which dealt with the decision of the Federal Constitutional Court, the Grand Chamber of the European Court of Human Rights confirmed in its judgment of 2023 the conformity of the German prohibition of strikes for teachers with civil servant status with Article 11 ECHR.

67. While the right to strike was protected under Article 11 ECHR and an important element of trade union activities, there were also other means for trade unions to protect the occupational interests of their members. [36] Even a complete ban on the right to strike for civil servants could thus be justified if the state was able to justify the necessity of such restrictions.[37] When determining whether restrictions on the right to strike comply with Article 11 of the Convention, the totality of the measures taken by the state concerned in order to secure trade-union freedom has to be considered:[38]

> *"[...] whether a prohibition on strikes affects an essential element of trade-union freedom because it renders that freedom devoid of substance in the circumstances [...] is context-specific and cannot therefore be answered in the abstract or by looking at the prohibition on strikes in isolation. Rather, an assessment of all the circumstances of the case is required, considering the totality of the measures taken by the respondent State to secure trade-union freedom, any alternative means – or rights – granted to trade unions to make their voice heard and to protect their members' occupational interests, and the rights granted to union members to defend their interests. Other aspects specific to the structure of labour relations in the system concerned also need to be taken into account in this assessment, such as whether the working conditions in that system are determined through collective bargaining, as collective bargaining and the right*

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[36] Ibid., paras. 128 et seq., 144.

[37] Ibid., para. 107.

[38] Ibid., para. 108.

to strike are closely linked. The sector concerned and/or the functions performed by the workers concerned may also be of relevance for that assessment.'[39]

68. The European Court of Human Rights thus focused on the specific circumstances of the individual case and on the specific legal status of teachers with civil servant status in Germany and the resulting tasks for trade unions representing civil servants' interests. Civil servants have the right to form and join trade unions and many are represented by trade unions in Germany.[40] The umbrella organisations of civil servants' trade unions have effective rights to participate when legal provisions for the civil service are drawn up.[41] Thus, the representation of civil servants' interests through trade unions in Germany is guaranteed even without the right to strike. Moreover, civil servants in Germany have a right to be provided with "adequate maintenance" for life, including after retirement and in the event of illness which they can enforce by taking legal action. Compared with contractual state employees, civil servants have a higher net pay and an advantageous status in many respects.[42] Furthermore, teachers with civil servant status in Germany can always change their employment status from civil servant to contractual state employee in order to benefit from the right to strike provided for contractual state employees by the respective trade union.[43]

69. The European Court of Human Rights accepted Germany's position that the prohibition on strikes for civil servants had the legitimate purpose of ensuring "good administration".[44] In principle, the right to strike could be restricted in order to protect the rights of third parties and to comply with obligations under constitutional law and other human rights treaties.[45] In the case in question, the restriction of the right to strike of civil servant teachers was legitimate to protect the right to education of

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39 Ibid., para. 109.

40 Ibid., paras. 129 et seq.

41 Ibid., para. 130.

42 Ibid., para. 138.

43 Ibid., paras. 139 et seq.

44 Ibid., para. 136.

45 Ibid., para. 136.

others.[46] The European Court of Human Rights concludes that the prohibition on strikes by civil servants in Germany is a general measure reflecting the balancing of interests.[47]

70. From Germany's point of view, the judgment of the European Court of Human Rights is to be welcomed for various reasons. On the one hand, the European Court of Human Rights underlines the importance of the right to strike in relation to the right to freedom of association. On the other hand, it puts the principle of proportionality at the centre of its considerations concerning the scope of the right to strike. This makes it possible to combine central legal principles with the necessary differentiated and precise consideration of national contexts and in this way to achieve an appropriate decision on the legality of specific strike bans.

71. As the European Court of Human Rights has noted, there is also a ban on strikes for civil servants in five other European countries, although the rules on the employment relationship of civil servants vary in national legal systems.[48] This state practice also suggests that, as under the European Convention on Human Rights, there is also no absolute guarantee of the right to strike under ILO Convention No. 87. Rather, it may be subject to lawful restrictions and a ban on strikes may be justified in individual cases.

72. In the report currently due under Article 22 of the ILO Constitution on the national implementation of Convention No. 87, Germany will respond to the request of the Committee of Experts for information on the outcome of the Humpert and Others v. Germany proceedings.[49]

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46 Ibid., para. 137.

47 Ibid., para. 145.

48 Ibid., para. 66.

49 Freedom of Association and Protection to the Right to Organise Convention, 1948 (No. 87) - Germany -Observation (CEACR) - adopted 2021, published ILC, 110th session, 2022.

V. Submissions

73. In conclusion, Germany respectfully submits that:

(i) The interpretation of Convention No. 87 in accordance with the provisions of the Vienna Convention on the Law of Treaties shows that the right to strike is protected by Convention No. 87 in Articles 10 and 3 as an integral part of freedom of association. Germany is of the opinion that the question submitted to the Court must therefore be answered in the affirmative.

(ii) At the same time, Germany holds the view that the right to strike, which is only implicitly contained in Convention No. 87, is not limitless. This legal understanding corresponds with the intention of the state parties when formulating the Convention and German state practice. Neither have a majority of State parties recognised an unlimited right to strike under the Convention nor is there a corresponding uniform practice of State parties which would be necessary for such an interpretation which would go beyond the wording of the Convention.

(iii) This legal understanding is also consistent with the legal situation in Germany, and it was confirmed by the German Federal Constitutional Court and by the European Court of Human Rights in the context of a detailed analysis regarding the question of whether the prohibition on strikes for civil servants is compatible with the European Convention on Human Rights and other requirements under international law.

Tania v. Uslar-Gleich