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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

(REQUEST FOR ADVISORY OPINION)

WRITTEN STATEMENT OF THE SWISS CONFEDERATION

6 May 2024

[Translation by the Registry]

I. INTRODUCTION

1. On 10 November 2023, the Governing Body of the International Labour Organization (the "Governing Body") adopted a resolution at its 349th *bis* (special) session, by which it decided, in accordance with Article 37, paragraph 1, of the Constitution of the International Labour Organization[1] (the "ILO") and Article IX, paragraph 2, of the Agreement between the United Nations and the ILO[2], and pursuant to Article 65, paragraph 1, of the Statute of the International Court of Justice (the "Court"), to request an advisory opinion of the Court on the following question: "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)[3]?"

2. By an Order of 16 November 2023[4], the Court decided that "the International Labour Organization and the States parties to the Freedom of Association and Protection of the Right to Organise Convention (No. 87) are considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion".

3. The Court fixed 16 May 2024 as the time-limit within which written statements may be presented to it.

4. In the same Order of 16 November, the Court also decided 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 . . . are also considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion".

5. Switzerland has ratified the Freedom of Association and Protection of the Right to Organise Convention (No. 87) ("Convention No. 87"). It wishes to avail itself of this opportunity and hereby presents to the Court, within the said time-limit and in due form, the following considerations.

II. PRELIMINARY CONSIDERATIONS

A. Brief summary of Switzerland's position

6. In 1973, at the 58th session of the International Labour Conference (the "ILC"), Switzerland declared that Convention No. 87 did not cover the right to strike[5]. This declaration was taken up by the Federal Council in 1974, when it proposed that the Swiss parliament ratify Convention No. 87,

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[1] Constitution of the International Labour Organization, Document No. 1 of the collection of documents submitted by the ILO [Document No. 1].

[2] Agreement between the United Nations and the International Labour Organization, 20 Dec. 1946, Official Bulletin, Vol. XXIX, No. 6 [Document No. 2].

[3] Resolution adopted by the Governing Body at its 349th *bis* (special) session, 10 Nov. 2023.

[4] *Right To Strike Under ILO Convention No. 87*, Order of 16 Nov. 2023, I.C.J. Reports 2023.

[5] International Labour Conference, 58th session, 1973, record of proceedings, p. 544, para. 27.

while pointing out that it in no way concerned the right to strike[6]. Switzerland is of the view that an interpretation that changes the meaning, purpose and scope of this Convention is unacceptable.

7. The question whether Convention No. 87 protects the right to organize has been debated for over thirty years within the ILO. In 2012, this dispute culminated in an institutional crisis that hampered the functioning of the ILO's supervisory system. In the face of this impasse, Switzerland engaged in a two-year mediation process among international social partners.

8. Tripartism and social dialogue are vital in Switzerland's view, which has always stressed the importance of finding a long-term solution, based on peaceful tripartite dialogue. It should thus be possible not only to find an immediate solution but also to resolve certain underlying issues.

9. As mentioned in its position paper to the ILO (Annex 1), Switzerland finds the wording of the question submitted to the Court regrettable, since it will not enable the ILO or its constituents to find a way out of this deadlock.

B. Jurisdiction of the Court

10. In its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court identified three conditions that must be satisfied in order to found its jurisdiction to render an advisory opinion at the request of an international organization:

(i) the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the Court;

(ii) the opinion requested must be on a legal question;

(iii) this question must be one arising within the scope of the activities of the requesting agency[7].

11. In these proceedings, in accordance with Article 96, paragraph 2, of the United Nations Charter and Article IX, paragraph 2, of the Agreement between the United Nations and the ILO, the ILO is authorized by the General Assembly to request advisory opinions from the Court on legal questions that arise within the scope of its activities, other than questions concerning the mutual relationships of the ILO and the United Nations or other specialized agencies.

12. Article IX, paragraph 3, of the Agreement between the United Nations and the ILO states that the request may be addressed to the Court by the Conference, or by the Governing Body acting in pursuance of an authorization by the Conference. The said Agreement was approved by the United Nations General Assembly on 14 December 1946 (resolution 50 (I))[8].

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[6] FF 1974 I 1577.

[7] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 71-72.

[8] United Nations General Assembly resolution 50 (I), Agreements with Specialized Agencies, 14 Dec. 1946 [Document No. 3].

13. On 27 June 1949, at its 32nd session, the ILC adopted the resolution concerning requests for advisory opinions from the Court[9]. By this resolution, the ILC authorized the Governing Body to request advisory opinions from the Court on legal questions arising within the activities of the ILO. The Governing Body is therefore an agency duly authorized to submit such a request.

14. The question submitted is framed in terms of law and arises within the activities of the requesting agency.

15. The Court therefore has jurisdiction to give an advisory opinion in response to the request of the Governing Body.

C. Propriety of the exercise of jurisdiction

16. According to Article 65, paragraph 1, of the Statute of the Court, "[t]he Court *may* give an advisory opinion" (emphasis added). The Court thus has discretion to decide whether it wishes to give the advisory opinion requested of it: "[t]he fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it"[10]. This discretion serves to protect the integrity of the Court's judicial function. It is, however, limited. Only compelling reasons may lead the Court to refuse a request for an opinion falling within its jurisdiction[11].

17. There is no "compelling reason" in these proceedings for the Court to refuse to give an opinion.

III. Meaning and scope of the question put to the Court

18. The Governing Body of the ILO asks the Court whether the right to strike of workers and their organizations is protected under the Freedom of Association and Protection of the Right to Organise Convention (No. 87).

19. Switzerland would like to clarify here the meaning and scope of the question put to the Court. The aim of this analysis is to ensure that the tripartite constituents of the ILO (government, employer and worker representatives) receive a complete and effective response that will enable them to break the deadlock they have been in for over thirty years now.

20. For the reasons set out in this chapter, Switzerland considers that a limited interpretation of the question put to the Court would not enable the ILO to find a lasting solution. Switzerland therefore invites the Court to interpret the question in such a way that its judicial function may be best fulfilled.

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[9] ILC, 32nd session, 1949, Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions, *Official Bulletin*, Vol. XXXII, 1949, pp. 362-363 [Document No. 4].

[10] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 113, para. 63.

[11] *Ibid.*, para. 64.

A. Practice of the Court as regards the framing of a question

21. The Court has on several occasions pronounced on the framing of a question submitted to it. The Court has thus stated that it must:

> "ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for consideration. Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting Organization. The Court will therefore begin by setting out the pertinent elements of fact and of law which, in its view, constitute the context in which the meaning and implications of the first question posed in the request have to be ascertained"[12].

22. In the case cited above, the Court interpreted the terms of the question, as follows:

> "if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request . . . For this reason, the Court could not adequately discharge the obligation incumbent upon it in the present case if, in replying to the request, it did not take into consideration all the pertinent legal issues involved in the matter to which the questions are addressed"[13].

23. The Court has also had occasion to interpret the terms of a question in order to identify "the real meaning"[14] of the requesting organization, when the question:

(i) was "not adequately formulated", did not reflect "the legal questions really in issue", "was unclear or vague"[15] or was formulated in too narrow terms[16];

(ii) was "at once infelicitously expressed and vague" and when different documents cast doubt on whether the question as framed "really corresponds to the intentions of the Committee in seising the Court"[17].

B. Terms of the question submitted to the Court

24. In this instance, in accordance with its jurisprudence, there are two specific grounds that should lead the Court to interpret the question submitted to it:

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[12] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 76, para. 10.

[13] *Ibid.*, para. 35.

[14] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 349, para. 47.

[15] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 423, para. 50.

[16] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 26.

[17] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46.

(i) having been formulated in too narrow terms, the question does not reflect "the legal questions really in issue";

(ii) the question does not reflect the intentions of the constituents of the ILO.

25. In order to analyse the question submitted to the Court in these proceedings, a brief recapitulation of the facts is necessary.

26. Back in 1989, the Employers' group questioned the interpretation of Convention No. 87 given by the Committee of Experts on the Application of Conventions and Recommendations (the "CEACR") and contested its competence to interpret ILO conventions.

27. The dispute gradually intensified, culminating in a major institutional crisis in 2012. The Conference Committee on the Application of Standards (the "CAS") was, for the first time, unable to perform its supervisory functions.

28. Faced with this impasse, Switzerland initiated a mediation process among international social partners with regard to the interpretation of ILO standards and the entire supervisory system. In late 2013, the social partners brought this mediation to an end, just as it was close to a successful conclusion, because they wished to discuss the matter within the Governing Body.

29. In 2014, the International Labour Office (the "Office")[18] submitted a document setting out the possible modalities, scope and costs of action under Article 37, paragraphs 1 and 2, of the ILO Constitution[19].

30. In this document, the Office recalled:

> "There are clearly two questions that dominate the relevant discussions: (1) the substantive question as to whether the Convention concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87), can be interpreted as protecting the right to strike; and (2) whether the Committee of Experts' mandate gives it the authority to make such interpretations and, if so, whether such interpretations can go beyond general principles by specifying certain details regarding the application of the principle. It would appear that both of those questions need to be answered to settle the current dispute and create the legal certainty necessary for the supervisory system to fully function again"[20].

31. It proposed submitting the following two questions to the Court:

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[18] The International Labour Office is the permanent secretariat of the International Labour Organization. It is the focal point for the International Labour Organization's overall activities, which it prepares under the scrutiny of the Governing Body and under the leadership of the Director-General.

[19] Governing Body ("GB"), 322nd session, 2014, The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, GB.332/INS/5 [Document No. 34].

[20] *Ibid.*, para. 49.

"(1) 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)?

(2) Was the Committee of Experts on the Application of Conventions and Recommendations of the ILO competent to: *(a)* determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); and *(b)* in examining the application of that Convention, specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?"[21]

32. The precise terms of these two questions were reproduced by the Workers' group in 2023 in its request for a discussion regarding their submission to the Court[22], and by the Office in the draft resolution referring the questions to the Court[23].

33. This draft resolution was submitted to the Governing Body. The amendment to this draft resolution, which sought to refer the first question to the Court and delete the second question, was adopted by a vote in the Governing Body (33 votes in favour, 21 against, 2 abstentions).

34. As can be seen from the foregoing, the interpretation dispute is not limited to the sole question of the interpretation of Convention No. 87.

35. In dropping the second question, the ILO constituents also failed to submit to the Court their queries concerning, first, the fact that no ILO instrument mentions the right to strike and, second, the modalities for the exercise of the right to strike.

36. Regarding the first ground identified above, the Court is faced with the same situation as it was in its Advisory Opinion on the *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, namely that "it might be possible to give a reply to the question on its own terms, but the reply would not appear to resolve the questions really in issue"[24].

37. Although it may be possible to reply to the question, knowing whether the right to strike of workers and their organizations is protected under Convention No. 87 does not clarify the modalities for the exercise of that right. And that is where the questions really in issue lie.

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[21] *Ibid.*

[22] Letter of the Worker Vice-Chairperson of the ILO Governing Body to the ILO Director-General, dated 12 July 2023 [Document No. 5].

[23] GB, 349th *bis* Session, 2023, Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37 (1) of the Constitution — Office background report, Sept. 2023, GB.349bis/INS/1/1 [Document No. 29], ("GB.349bis/INS/1/1"), Annex 1.

[24] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 349, para. 47.

38. Since the question put to the Court does not reflect "the legal questions really in issue" and is formulated in too narrow terms, the Court should therefore deal with the broader question[25].

39. Regarding the second ground, it can be seen from the timeline above that the substantive terms of the question were never discussed or negotiated, either by all the tripartite constituents of the ILO through the ILC or even by the Governing Body.

40. The decision to refer the question to the Court was taken on 10 November 2023 after a vote by the Governing Body alone. This procedure was based on the 1949 Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions[26]. At the time, the ILO had 62 member States, whereas today it has 187. In 1949, the Governing Body was therefore far more representative of its members.

41. This is particularly regrettable since the Governing Body's request concerns all States parties to Convention No. 87 and all ILO Member States. This convention is regarded as fundamental within the ILO and embodies a fundamental principle and right (cf. below, paragraphs 69-72) that all Member States must respect, promote and uphold. Not all the tripartite constituents were therefore able to negotiate this question. Tripartism as a whole was not fully taken into account and the potential for negotiation was not sufficiently exploited.

42. For these reasons, the question submitted to the Court should be interpreted as relating not only to whether the right to strike is protected under Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise, but also and above all to whether it is within the competence of:

(a) national legislators;

(b) tripartite legislators of the International Labour Conference (ILC);

(c) ILO supervisory bodies; and/or

(d) an internal tribunal (Art. 37, para. 2, of the ILO Constitution) to make a binding decision on the content and modalities for the exercise of, and possible limits to, the right to strike, given that these elements are not addressed in the existing body of international law.

43. The Court would thus bring out "the real meaning"[27] of the Governing Body.

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[25] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 26.

[26] ILC, 32nd session, 1949, Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions, *Official Bulletin*, Vol. XXXII, 1949, pp. 362-363 [Document No. 4].

[27] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 349, para. 47.

IV. CONVENTION NO. 87 AND THE RIGHT TO STRIKE

A. Applicable rules of interpretation

44. In addition to Articles 31 to 33 of the Vienna Convention on the Law of Treaties (the "VCLT"), which set out the main rules of interpretation of international treaties, the VCLT's Article 5 reservation clause provides that the rules of interpretation mentioned apply without prejudice to any specific rules, practices or procedures applicable to treaties adopted within international organizations.

45. In the case of the ILO, such specificities arise from its tripartite structure and the role of the social partners in standard-setting. Employers' and workers' delegates can, in the same way as governments, propose amendments and their votes carry the same weight as government votes.

46. This specific feature explains, for example, why reservations to the conventions are rejected during ratification. This is of particular relevance to the debate on the interpretation of ILO conventions.

47. The Office has emphasized that "[t]he role played by tripartism in the negotiation, adoption and application of international labour Conventions is therefore an important factor that has to be taken into account in their interpretation"[28].

48. Thus, the ILO's tripartism is a specific practice ascribing particular importance to the preparatory work in the interpretation of the legislative corpus of the ILO[29].

B. Interpretation of Convention No. 87

(i) Ordinary meaning

49. First of all, it is necessary to ascertain, in good faith, the ordinary meaning of the terms used in Articles 3 and 10 of Convention No. 87, in their context and in the light of its object and purpose.

50. It is not possible to infer the existence of a right to strike from the ordinary meaning of the words "activities" and "programmes" (Article 3 of Convention No. 87). The preamble to Convention No. 87 sets out its object and purpose, namely to codify the freedom of association and protection of the right to organize in the broader context of promoting labour conditions and maintaining peace.

51. Nor is the term "strike" mentioned in either the preamble to the ILO Constitution or in the Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia)[30] annexed to the Constitution.

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[28] ILO, Non-paper on the interpretation of international labour Conventions, 2010 [Document No. 97], para. 15.

[29] *Ibid.*, para. 23.

[30] ILO Constitution, preamble and annex, Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia) [Document No. 118].

52. In a broader context, it may be noted that ILO standards are adopted by a two-thirds majority vote of the ILO constituents. They are formulated in such a way as to be sufficiently flexible to take account of differences in the culture, history, legal systems and level of development of each country, and contain so-called flexibility clauses. Article 19, paragraph 8, of the ILO Constitution states that in no case should the adoption of a standard-setting instrument of the ILO be deemed to affect laws or practices which ensure more favourable conditions to workers.

53. It may be concluded from the foregoing and from the fact that reservations are inadmissible that ILO standards reflect universally recognized principles.

54. It is clear from the analysis of the ordinary meaning of the terms used in Convention No. 87, in their context and in the light of the object and purpose of Convention No. 87, that it does not cover the right to strike.

(ii) Subsequent agreement and practice

55. A subsequent agreement as an authentic means of interpretation under Article 31, paragraph 3 *(a)*, of the VCLT is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions[31]. In the present case, no agreement has been reached between the signatory States to Convention No. 87 regarding the application of its provisions.

56. A subsequent practice as an authentic means of interpretation under Article 31, paragraph 3 *(b)*, of the VCLT consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty[32].

57. A subsequent practice as a supplementary means of interpretation under Article 32 of the VCLT consists of conduct by one or more parties in the application of the treaty, after its conclusion[33].

58. Further to numerous protests from the Employers' group and certain States, at its 322nd session in November 2014 the Governing Body decided to hold a tripartite meeting on Convention No. 87 on the right to strike and the modalities and practices of strike action at the national level.

59. The Government group presented a joint statement at this meeting, in which it noted that

> "the right to strike, albeit part of the fundamental principles and rights at work of the ILO, is not an absolute right. The scope and conditions of this right are regulated at

[31] Report of the International Law Commission, 2018, 70th session, Supplement No. 10, A/73/10, ("A/73/10"), Conclusion 4, para. 1.

[32] *Ibid.*, para. 2.

[33] *Ibid*., para. 3.

national level. The document presented by the Office describes the multi-faceted regulations that States have adopted to frame the right to strike"[34].

60. In this joint statement, governments recognize the competence of States to regulate the scope and conditions of the right to strike.

61. The work of the International Law Commission on subsequent agreements and subsequent practice in relation to the interpretation of treaties sheds some light on the matter. In one of its conclusions, it notes that

> "[a] pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 *(b)*, accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body"[35].

62. The conclusions on subsequent agreements and subsequent practice do not apply to bodies that have the status of an organ of an international organization. Nor do they address the relevance of the practice of international organizations with regard to the application of the rules of interpretation of the VCLT. The conclusions nevertheless provide important guidelines, since they can be applied *mutatis mutandis* to the pronouncements of independent expert bodies that have the status of international organizations[36], as noted by the rapporteur of the International Law Commission:

> "A pronouncement of an expert body under a human rights treaty cannot, as such, constitute subsequent practice under article 31 (3) *(b)*, since that provision requires that a subsequent practice in the application of the treaty establishes the agreement of the parties. . . . Pronouncements of expert bodies may, however, reflect or give rise to a subsequent agreement or a subsequent practice by the parties themselves which establish their agreement regarding the interpretation of the treaty under article 31 (3) *(a)* or *(b)*"[37].

63. The CEACR is an expert body that has the status of organ of the ILO. It is composed of 20 legal experts appointed by the Governing Body for a three-year term. They sit as individuals rather than representatives of their State. The decisions adopted by the CEACR therefore do not constitute a form of practice by States acting collectively in that framework[38]. Comments by the CEACR are made in the form of "observations" or "direct requests", which are communicated directly to the governments concerned.

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[34] GB, 323rd Session, 2015, The Standards Initiative — Appendix I, Outcome 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, GB.323/INS/5/Appendix I [Document No. 106], ("GB.323/INS/5/Appendix I"), para. 5.

[35] A/73/10, Conclusion 13, para. [2].

[36] A/73/10, pp. 113 *et seq.*

[37] Georg Nolte, Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, A/CN.4/694, paras. 41-42.

[38] *Ibid.*, para. 11.

64. Further to heated discussions about the CEACR, the body clarified its mandate as follows:

> "The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant 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. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions."[39]

65. The CEACR's comments are thus non-binding. The conduct of States in applying the CEACR's comments may, however, legitimize its comments and give rise to subsequent practice within the meaning of the VCLT.

66. It is therefore necessary to analyse the conduct of States in relation to the comments of the CEACR on the application of Convention No. 87.

67. Within the ILO, statements concerning the application of Convention No. 87 differ from one State to another. Back in 1973, for example, Switzerland and Japan explicitly stated that, in their view, the right to strike was not covered by Convention No. 87[40]. Other States have also contested the CEACR's interpretation[41]. Furthermore, in only 12 out of the 157 signatory States have national courts applied the CEACR's comments on Convention No. 87 and the right to strike[42]. There is thus no subsequent State practice in applying Convention No. 87 in respect of this question.

68. The Committee on Freedom of Association (the "CFA") was, for its part, set up to examine complaints concerning possible violations of the principles of freedom of association. Its mandate

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[39] ILC, 103rd Session, 2014, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 1-11 [Document No. 85], para. 31.

[40] ILC, 58th Session, 1973, Record of Proceedings, p. 590, paras. 26 *et seq*.

[41] Venezuela, Morocco, Colombia (GB, Minutes of the 253rd Session, GB.253/PV(Rev); German Democratic Republic (ILC, 72nd Session, 1986, Record of Proceedings, paras. 31-35).

[42] IOE, 2023, Comments to the background report prepared by the Office titled "Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37 (1) of the Constitution" [Document No. 23], FN 41: "Namely Botswana, Brazil, Burkina Faso, Canada, Colombia, European Court of Human Rights, Fiji, Kenya, Nigeria, Peru, Russian Federation, Senegal and South Africa."

consists in determining whether given legislation or State practice complies with the principles of freedom of association or collective bargaining[43].

69. Freedom of association and the effective recognition of the right of collective bargaining is a fundamental principle and right, in accordance with the ILO Declaration on Fundamental Principles and Rights at Work (1998), as amended in 2022[44].

70. Initially adopted in 1998, this Declaration sets out the principles and rights contained in the ILO Constitution and in the Declaration of Philadelphia. It states that all Members are under an obligation to respect, promote and realize, in good faith and in accordance with the Constitution, fundamental principles and rights at work.

71. The fundamental conventions state the fundamental principles and rights, but the obligation to respect, promote and realize them is independent of ratification of any given fundamental convention.

72. This obligation stems from the organization's desire to remain mindful that the realization of the fundamental principles is a work in progress should be encouraged and supported even when ratification is impossible, whether for technical reasons that can sometimes be minor or, in some cases, because of major political problems.

73. The distinction between the fundamental right and principle of freedom of association, on the one hand, and Convention No. 87, on the other, is crucial, because the nature of States' obligations are different. In their joint statement, for example, governments recognized that the right to strike was a corollary of the fundamental right and principle of freedom of association but did not mention Convention No. 87[45].

74. The CFA thus has a mandate to assess violations of general principles of freedom of association. The recommendations of the CFA are not binding. They are addressed solely to governments and cannot be imposed on legislators or judicial authorities. As regards an analysis of the subsequent practice of States in applying Convention No. 87, it would therefore be difficult to infer any such practice from the conduct of States in relation to the CFA's recommendations.

75. There is consequently no subsequent agreement or practice that can serve as an authentic or supplementary means in the application of Convention No. 87 which recognizes the right to strike under the Convention.

(iii) Preparatory work

76. The preparatory work of Convention No. 87 is relevant for its interpretation, in reference to Articles 32 and 5 of the VCLT. In 1947, during its 30th session, the ILC adopted a resolution on

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[43] ILO, Compendium of rules applicable to the Governing Body of the International Labour Office, Annex II, Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association [Document No. [90]], para. 14.

[44] Declaration on Fundamental Principles and Rights at Work (1998), as amended in 2022 [Document No. 128].

[45] GB.323/INS/5/Appendix I, para. 4.

the freedom of association and the protection of the right to organize and bargain collectively, and decided to include freedom of association and protection of the right to organize in the agenda of its 31st session for consideration under the single-discussion procedure. The resolution makes no mention of the right to strike[46].

77. In the standard-setting single-discussion procedure which led to the establishment of Convention No. 87, the questionnaire for States 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"[47].

78. In response to this question, India declared that "it should be made clear that the recognition of the right of association of public officials in no way implies any recognition, directly or indirectly, of the right of such officials to strike"[48]. The Netherlands did not want the right to strike to be included in the Convention[49]. Norway stated that "the question of the right to strike must be kept strictly apart from the question of freedom of association. . . . the right to strike . . . has no bearing on the question of freedom of association"[50]. Sweden[51] and Pakistan[52] gave similar responses.

79. Based on the views of the constituents, the Office observed that "[s]everal governments . . . have . . . emphasised, justifiably it would appear, that the proposed Convention relates only to the freedom of association and not to the right to strike"[53].

80. The Office concluded that it was preferable not to include a provision on the right to strike in the draft Convention concerning freedom of association[54]. Moreover, it was also stated in the Office's report that Convention No. 87 was intended to codify general principles relating to the freedom of association rather than establish a detailed regulatory framework[55].

81. Furthermore, the discussions that took place during the drafting of Convention No. 87 did not address the right to strike and the draft Convention was adopted with no substantive changes. Only the Government of Portugal recalled that several governments, including itself, had stated in

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[46] ILC, 30th Session, 1947, Resolution concerning the Agenda of the 1948 Session of the International Labour Conference [Document No.153].

[47] ILC, 31st Session, 1948, Questionnaire, Freedom of Association and Protection of the Right to Organise [Document No. 157].

[48] ILC, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise [Document No. 158], p. 19.

[49] *Ibid.*, p. 20.

[50] ILC, 31st Session, 1948, Report VII (Supplement), Freedom of Association and Protection of the Right to Organise [Document No. 159], p. 11 *et seq*.

[51] ILC, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise [Document No. 158], p. 20.

[52] ILC, 31st Session, 1948, Report VII (Supplement), Freedom of Association and Protection of the Right to Organise [Document No. 159], p. 12.

[53] ILC, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise [Document No. 158], p. 87.

[54] *Ibid*.

[55] ILC, 30th Session, 1947, Report VII, Freedom of Association and Industrial Relations [Document No. 147], p. 16 *et seq*.

their replies to the questionnaire that the text of the Convention should not imply that public officials are granted the right to strike[56].

82. It is clear from the analysis of the preparatory work that the ILO's tripartite body did not intend to include the right to strike in Convention No. 87.

C. Right to strike

83. It is clear from the preceding chapter that Convention No. 87 does not cover the right to strike. However, this conclusion will not offer the ILO or its constituents a way out of the current impasse.

84. Since the right to strike is recognized as a corollary of the fundamental right and principle of freedom of association, it is necessary to analyse the different practices and statements relating to it before raising the question of competence for defining the modalities thereof.

(i) Practice of Switzerland

85. The right to strike is explicitly regulated by Swiss law and has constitutional status. It is enshrined in Article 28 of the Swiss Constitution.

86. According to the jurisprudence of the Swiss Federal Supreme Court, a strike is the collective refusal to perform work in order to obtain specific working conditions from an employer. This right is subject to four conditions: the strike must relate to labour relations; must comply with the duty to maintain harmonious industrial relations; must respect the principle of proportionality and be supported by a workers' organization that can conclude a collective employment contract.

87. Switzerland attaches particular importance to social dialogue and the freedom of association. In Switzerland there is a duty to maintain harmonious industrial relations[57]. This is a fundamental obligation in the Swiss social order.

88. The duty to maintain harmonious industrial relations is limited to parties to a collective contract. In such situations, it promotes solutions found through collective bargaining and encourages conflict resolution through negotiation and conciliation. In general, Swiss law gives precedence to negotiation and conciliation, and strikes should only be the last resort.

89. The practice of Switzerland concerning the right to strike is set out in detail in the comments of the Swiss Government on the dispute relating to the interpretation of the Freedom of Association and Protection of the Right to Organise Convention (No. 87) appended to this written statement (Annex 1).

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[56] GB, 323th Session, 2015, The Standards Initiative, Background document for 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 (revised), GB.323/INS/5/Appendix III [Document No. 108], ("GB.323/INS/5/Appendix III"), para. 11.

[57] Article 357*a*, para. 2, of the Swiss Code of Obligations (RS 220).

(ii) Practice of other States

90. In GB.323/INS/5/Appendix III, the Office sets out the legal framework and practice of Member States in respect of strike action at the national level[58].

91. At least 97 ILO Member States have an explicit protection of strike action in their national constitutions[59]. More than 150 countries regulate the modalities of strike action in their general legislation and some 50 countries have adopted specific legislative measures in this regard[60].

92. Each Member State regulates in its own way the legal protection, scope, restrictions, modalities and course of strike action. For example, Algeria, Australia, Benin and Chile provide that strike action may be prohibited on the grounds of its possible economic consequences. In other countries (Philippines, Senegal and Swaziland), reference is made to the prejudice caused to public order or to the general or national interest for the prohibition of strikes[61].

93. There are thus as many ways of regulating the right to strike as there are States. It cannot be concluded, therefore, that there is an absolute right to strike based on the mere fact that the right to strike is protected in many States.

(iii) Practice of the European Court of Human Rights

94. The European Court of Human Rights ("ECtHR") has also recognized the non-absolute nature of the right to strike[62].

95. The right to strike is protected by Article 11 of the European Convention on Human Rights, although, according to the ECtHR, it is does not constitute an essential element of trade-union freedom[63].

96. When it examines restrictions on the right to strike, the ECtHR considers all the circumstances of the case. In so doing, it takes account, in particular, of all the means available to the trade unions concerned of protecting the occupational interests of their members[64]. For example, in the judgment in the case of *Humpert and Others* v. *Germany*, the ECtHR found that there were sufficient institutional safeguards to enable civil servants to effectively defend their occupational

[58] GB.323/INS/5/Appendix III.

[59] *Ibid.*, para. 61.

[60] *Ibid.*, para. 63.

[61] *Ibid.*, para. 90.

[62] ECtHR, Judgment of 21 April 2009, *Enerji Yapi-Yol Sen* v. *Türkiye*, Application No. 68959/01, para. 32.

[63] ECtHR, Judgment of 8 April 2014, *National Union of Rail, Maritime and Transport Workers* v. *United Kingdom*, Application No. 31045/10, para. 84.

[64] ECtHR, decision of 27 June 2002, *Federation of Offshore Workers* v. *Norway*, Application No. 38190/97.

interests[65]. Thus, in that instance, the respondent State did not exceed its margin of appreciation and the measures taken were proportionate to the important legitimate aims pursued[66].

97. The ECtHR analysed in the judgment the measures taken to enable workers to defend their interests and recalled that the State has a margin of appreciation in determining the modalities of that right in light of certain specific circumstances and legitimate interests[67]. A State's appreciation is, however, limited by the fact that trade-union freedom must not be rendered devoid of substance and by the obligation to ensure that workers can defend their interests.

98. Regulation of the right to strike is a State prerogative. It is for national lawmakers to determine the detailed rules for its application, its limits and modalities based on the national context.

(iv) Statements to the ILO

99. In its joint statement of March 2015, the Government group declared that "the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO"[68]. Nevertheless, this right is not absolute[69].

100. Morocco[70], Japan[71], Turkey[72], Angola[73], as well as the Workers'[74] and Employers'[75] spokespersons also asserted that the right to strike is not absolute.

101. For example, the CFA was the first to recognize the right to strike as a legitimate means of defending workers' interests and as a corollary of freedom of association and the right to collective organization. As mentioned in paragraphs 70 and 71, this principle applies to all members of the ILO, irrespective of whether they have ratified the convention or conventions that are the subject of this principle. That being said, the CFA has also noted that the conditions for the legitimate exercise of the right to strike must be reasonable and must not place a substantial limitation on the means of action open to trade union organizations; that it is not an infringement of freedom of association to make a strike declaration subject to a conciliation procedure, provided recourse to conciliation is not compulsory and does not, in practice, prevent the calling of a strike; and that a decision to suspend a strike for a reasonable period to allow the parties to seek a negotiated solution through mediation or conciliation efforts does not constitute a violation of the principles of freedom of association[76]. All

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[65] ECtHR, Judgment of 14 Dec. 2023, *Humpert and Others* v. *Germany,* Applications Nos. 59433/18, 59477/18 and 59481/18, para. 144.

[66] *Ibid.*, para. 147.

[67] *Ibid.*, para. 142.

[68] GB.323/INS/5/Appendix I, para. 4.

[69] *Ibid.*, para. 5.

[70] GB, 253rd Session, 1992, Minutes, GB. 253/PV(Rev.), pp. I/12- I/13.

[71] GB, 349th*bis* Session, 2023, Minutes, GB.349*bis*/PV, para. 95.

[72] GB, 349th*ter* Session, 2023 Minutes, GB.349*ter*/PV, para. 23.

[73] GB, 322nd Session, 2014, Minutes, GB.323/PV, para. 70.

[74] GB, 347th Session, 2023, Minutes, GB.347/PV(Rev.), para. 238.

[75] *Ibid.*, para. 283.

[76] CFA, Compilation of decisions, Section 10 "Right to strike", No. 789 , 793 and 794 (available at https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70001:0::NO:::»).

the above also points to the fact that the CFA does not consider the right to strike to be an absolute right.

102. The CEACR has also stated that it does not consider the right to strike to be absolute[77].

V. ORGANS COMPETENT TO DEFINE THE MODALITIES OF THE RIGHT TO STRIKE

103. As can be seen from the analysis in the preceding chapter, Convention No. 87 does not cover the right to strike and defining the modalities of that right is a State prerogative. The Member States, like the CFA, recognize the right to strike as a corollary of the fundamental principle and right of freedom of association and the right of collective organization. This right cannot be rendered devoid of meaning and Switzerland prioritizes the search for solutions through social dialogue and encourages conflict resolution through negotiation and conciliation. The tripartite constituents do not, however, recognize this right as being protected by Convention No. 87.

104. This distinction is important, because the right to strike as a corollary of the right and principle of freedom of association, as recognized by the CFA, is a prohibition to prohibit the right to strike. The right to strike as defined by the CEACR as a right protected by Convention No. 87 is an extended right, whose violation can lead to sanctions, including economic ones, under the constituent treaty. Thus, by incorporating the principles developed by the CFA in its observations, general surveys and direct requests, the CEACR has changed their nature.

105. It therefore remains to be determined whether the ILO's supervisory bodies were competent to define the modalities of the right to strike or whether this falls within the competence of another ILO body, such as the ILC or an internal tribunal established under Article 37, paragraph 2, of its Constitution. It is indeed in respect of this point that Switzerland seeks the Court's guidance.

A. The supervisory bodies of the ILO

(i) The Committee on Freedom of Association

106. The CFA was set up in 1951 to examine complaints of violations of the principle of freedom of association. It is a tripartite organ of the Governing Body that is composed of nine members and nine deputies, and has an independent chairperson, all of whom act in their personal capacities.

107. The mandate of the CFA is to determine whether, in practice, a piece of legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant convention[78]. It does not, however, have a mandate to assess the application of those conventions. If a State has ratified the relevant conventions on freedom of association, the CFA can refer the legislative aspects of a case to the CEACR.

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[77] ILC, 81st Session, 1994, Report III (Part 4B), Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, pp. 63-81 [Document No. 235], para. 151.

[78] ILO, Compendium of rules applicable to the Governing Body of the International Labour Office, Annex II [Document No. 88], para. 14.

108. The CFA is tasked with examining complaints of specific violations of principles of freedom of association, even if the State concerned has not ratified the relevant conventions. If the CFA decides that a case is admissible, it asks the government concerned to respond to the claims. Once it has examined the response, it analyses the positions of the parties and sets out recommendations on how to remedy the situation complained of.

109. From a legal perspective, the CFA's recommendations have no binding force on the governments they are addressed to. They invariably call for dialogue and co-operation. They are not legally binding and there is no provision for sanctions in case of non-compliance.

110. The CFA assesses specific claims regarding compliance with principles of freedom of association. Its mandate does not allow it to determine the application of Convention No. 87 or draw conclusions on the general situation of trade unions or employers in a given country.

111. The CFA's recommendations are to be understood as an invitation or as suggestions made to governments to take all measures to comply with international law. Under Article 37 of the ILO Constitution, only the Court (paragraph 1) or an internal tribunal (paragraph 2) is empowered to give interpretations of international labour standards. Thus, the CFA does not have a mandate to interpret Convention No. 87 or to define the modalities of the right to strike in general.

(ii) The Committee of Experts on the Application of Convention and Recommendations

112. The CEACR was established in 1926 by a resolution of the ILC. Under this resolution, the purpose of the CEACR was to support and advise the ILC and its Committee on the Application of Standards[79].

113. In 1977, the CEACR confirmed that "[i]ts function is to determine whether the requirements of a given Convention are being met, whatever the economic and social conditions existing in a given country" and recalled that "[t]he Committee's terms of reference do not require it to give interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution"[80].

114. On its 60th anniversary, in 1987, the CEACR noted that its task consisted in indicating the extent to which the law and practice of each State was in conformity with the terms of ratified conventions and the obligations they had undertaken under the ILO Constitution[81].

115. In 2014, the CEACR clarified its mandate (cf. paragraph 64 above). The CEACR "undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing

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[79] ILC, 8th Session, 1926, Record of Proceedings, Appendix VII: Resolution concerning the methods by which the Conference can make use of the reports submitted under Article 408 of the Treaty of Versailles [Document No. 73], p. 429.

[80] ILC, 63rd Session, 1977, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations [Document No. 98], paras. 31 *et seq.*

[81] ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its Dynamic and impact, 2003, pp. 1-18 [Document No. 68], p. 18.

so, it must determine the legal scope, content and meaning of the provisions of the Conventions". This clarification was supported by the tripartite constituents[82].

116. It is clear from the mandate of the CEACR that its mission is to provide "an impartial and technical analysis" of how the conventions are applied by Member States. Its observations are not binding, and it does not have a mandate to interpret the conventions.

117. Although the CEACR may be led to offer opinions on the scope and significance of standards when examining their implementation, it is not within the CEACR's competence to interpret the standards. When the CEACR finds cases of different interpretations, it is invited to draw the attention of the ILC to such cases[83].

118. Under Article 37 of the ILO Constitution, only the Court (paragraph 1) or an internal tribunal (paragraph 2) can provide interpretations of international labour standards.

119. From its beginnings, moreover, the ILO's regular supervisory system has always been based on two types of examination: on the one hand, a technical examination involving certain guarantees of impartiality and independence, and, on the other, an examination by a body of the ILO's supreme political organ (the Conference Committee on the Application of Standards (CAS))[84].

120. The CAS is set up under Article 7 of the Standings Orders of the Conference. It is tripartite and composed of representatives of governments, employers and workers.

121. The observations of the CEACR are only a starting-point for the discussions of the CAS and are not binding upon it, since the facts to be assessed are quite often broadened or modified by additional and new information.

122. The ILO's regular supervisory system is based on transparent and continuous dialogue between the CEACR and the CAS. This dialogue is invaluable for ensuring a proper and balanced functioning of the ILO standards system[85]. The CEACR is not seised publicly as an arbiter of the various interpretations that are possible through adversarial proceedings[86]; it serves the CAS.

123. The CEACR does not, therefore, have a mandate to create new rights or new obligations, or to interpret a standard in order to shape the contours of existing rights and obligations. It is thus

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[82] ILC, 104th Session, 2015, Report III (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 24.

[83] ILC, 8th Session, 1926, Record of Proceedings, Appendix V: Article 408 of the Treaty of Versailles, pp. 393-408 [Document No. 72], p. 401.

[84] ILO, Monitoring compliance with international labour standards — The key role of the ILO Committee of Experts on the Application of Conventions and Recommendations, 2019 [Document No. 69], p. 13.

[85] ILC, 104th session, 2015, Report III (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 8.

[86] GB, 256th Session, 1993, Article 37, paragraph 2, of the Constitution and the Interpretation of International Labour Conventions, GB/256/SC/2/2 [Document No. 96], para. 28.

not competent to define the modalities of the right to strike, irrespective of the Court's response to the question whether Convention No. 87 protects the right to strike.

B. The International Labour Conference

124. The ILC is the tripartite legislator and decision-making organ of the ILO. It is also a forum for discussion of social and labour issues, adopts the ILO's budget and elects the Governing Body.

125. The ILC draws up international labour standards in accordance with a well-defined procedure. Once the needs for an instrument have been identified by the Standards Review Mechanism Tripartite Working Group and approved by the Governing Body, the Office drafts a report on legislation and practice, along with a questionnaire on the contents of a potential instrument. The Office analyses the comments of governments, employers and workers, and proposes conclusions, which are first discussed at the ILC. The Office then prepares a third report containing a summary of the discussion and a draft instrument. Then, based on the constituents' comments on this report, the Office prepares a revised version of the draft instrument, which is debated in a second discussion at the ILC before being adopted by a two-thirds majority vote[87].

126. In assessing the application of the conventions by Member States, the CAS, composed of tripartite constituents, sets out conclusions inviting governments to take specific measures to resolve any problems or to agree to a monitoring mission or technical assistance from the ILO.

127. All the Member States and employers' and workers' delegates from major national organizations are represented at the ILC. The tripartite members of the ILC therefore constitute the most representative legislative and political organ of the ILO.

128. The ILC's mandate is above all to develop standards at the suggestion of the Governing Body. It does not have competence to interpret the ILO conventions but can decide to create legislative instruments.

C. The judges of an internal tribunal set up under Article 37, paragraph 2, of the ILO Constitution

129. In 1946, a new constitutional possibility was created when the second paragraph of Article 37 was drafted.

130. Article 37, paragraph 2, of the Constitution provides that:

> "Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the

[87] In this respect: ILO, 2019, Rules of the Game: An introduction to the standards-related work of the International Labour Organization [Document No. 60], pp. 20 *et seq*.

> Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference."

131. Switzerland has always been in favour of establishing an internal ILO tribunal, even before discussions on the interpretation of Convention No. 87 began. Most questions of interpretation of the ILO conventions concern the very essence of tripartism. Creating a tribunal whose rules would be determined by a tripartite organ (the Governing Body) would ensure a balanced tripartite dialogue.

132. As it recalled in a letter to the Director-General dated 10 August 2023, Switzerland regrets that an *ad hoc* internal tribunal has not been set up to settle questions of interpretation in a tripartite manner[88].

133. The creation of a tribunal, the modalities of which would be determined by the tripartite constituents, has the advantage of providing greater flexibility, ensuring uniformity of interpretation and taking account of specific features of the ILO by giving full consideration to the tripartite process for adopting the conventions.

134. What is more, such a tribunal would enable the tripartite constituents to make an active contribution to the development of a body of interpretation on standards and its integration into the overall system of the supervision of standards[89].

135. The establishment of an internal tribunal would therefore be desirable in order to reflect adequately the specificities of ILO conventions, in the interests of overall consistency within the organization.

VI. CONCLUSION

136. It is clear from the above analysis that Convention No. 87 does not cover the right to strike, as Switzerland asserted back in 1973.

137. This right is, however, a corollary of the freedom of association and it falls to national legislators, the ILO or an internal tribunal (Article 37, paragraph 2, of the ILO Constitution) to define the modalities thereof.

138. Switzerland therefore invites the Court to determine which of these organs (national legislator, ILO and/or an internal tribunal) may define the modalities of the right to strike.

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[88] Letter of the Swiss Federal Councillor and Head of the Federal Department of Economic Affairs, Education and Research to the ILO Director-General, dated 6 September 2023 [Document No. 15].

[89] GB.344/INS/5, para. 46.

139. By this determination, the Court will provide the necessary clarity that the ILO needs to find a way out of the impasse that has prevailed for more than thirty years.

Berne, 6 May 2024

(Signed) Franz Xaver PERREZ,

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Directorate of Public International Law
Federal Department of Foreign Affairs
Swiss Confederation.

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