



**REFERENCE: ACP/84/056/24**

**INTERNATIONAL COURT OF JUSTICE**

**RIGHT TO STRIKE UNDER THE ILO CONVENTION NO. 87  
(REQUEST FOR ADVISORY OPINION)**

**WRITTEN STATEMENT OF THE  
ORGANISATION OF AFRICAN CARIBBEAN AND PACIFIC STATES  
(OACPS)**

**15 MAY 2024**

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## CHAPTER 1: INTRODUCTION

### A. BACKGROUND TO THE ADVISORY PROCEEDINGS

1. On 10 November 2023, the Governing Body of the International Labour Organization (ILO), at its 349<sup>th</sup> bis (special) session, adopted a Resolution on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (**Convention No. 87** or the **Convention**) with respect to the right to strike, requesting an advisory opinion from the International Court of Justice (ICJ or the **Court**), under Article 37(1) of the ILO Constitution, 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)?<sup>1</sup>

2. There is a dispute within the tripartite structure of the ILO over the interpretation of Convention No. 87 in relation to the right to strike, which has affected the functioning of the supervisory system of the ILO.<sup>2</sup> The request for an urgent referral of this matter to the Court was submitted for the consideration of the ILO Governing Body by the Workers' Group and supported by 36 governments.<sup>3</sup>
3. By letter dated 16 April 2024, the Organisation of African Caribbean and Pacific States (OACPS) requested the Court's permission to submit a written statement in the proceedings and to provide comments on the statements that other participants may submit.
4. By letter dated 26 April 2024, the Registrar of the Court informed that *'the Court has decided, pursuant to Article 66 of the Statute, that the OACPS is likely to be able to furnish information on the question put to the Court.'*

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<sup>1</sup> Resolution Adopted by the Governing Body at its 349th bis (Special) Session on 10 November 2023.

<sup>2</sup> Resolution Adopted by the Governing Body at its 349th bis (Special) Session on 10 November 2023.

<sup>3</sup> ILO, Letter of the Worker Vice-Chairperson of the ILO Governing Body to the ILO Director-General, dated 12 July 2023 [**Document No. 5**] (NB: in this Written Statement, references to 'Document No. ...' are references to the body of relevant documents submitted by the ILO to the Court in relation to the request for advisory opinion and available on the Court's website); ILO, Background report, GB.349bis/INS/1/1, 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, September 2023 [**Document No. 29**].

5. This Written Statement is submitted to the Court within the deadline set by the Order of the President of the Court dated 16 November 2023.
6. The OACPS is an international organization created by the 1975 Georgetown Agreement (see the 1975 Georgetown Agreement, as revised in 2019<sup>4</sup>) to consolidate and strengthen the existing solidarity between member States and to promote improved cooperation between peoples based on their interdependence, complementarity, and mutual interests. It aims to help create conditions that favor the socio-economic development of the member States. The OACPS is the largest formal and structured organization of developing countries. It comprises 79 member States, spanning three continents from the Africa, Caribbean, and Pacific regions, and includes many States that emerged from colonial rule.
7. This Written Statement represents the contribution of the OACPS to the work of the Court. The OACPS strongly supports the international judicial function of the Court, especially its role of clarifying international legal obligations through advisory opinions. This is significant in relation to the question presented by the ILO, as the Court's opinion will enable the effective functioning of the ILO supervisory system.
8. The question is of great interest to the OACPS as an international organization and the individual member States of the OACPS. The OACPS emphasizes the critical role of the right to strike in ensuring equitable labor conditions and environmental protection, thereby advancing a just transition and sustainable development across its member States.
9. The purpose of this Written Statement is to provide information to the Court on the right to strike under Convention No. 87 as a fundamental constituent and a corollary to the right to freedom of association; on the competence of the Committee of Experts on the Application of Conventions and

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<sup>4</sup> Georgetown Agreement on the organisation of the African, Caribbean and Pacific Group of States (ACP), concluded at Georgetown on 6 June 1975, as revised by Decision No .1/CX/19 of the 110th session of the ACP Council of Ministers held in Nairobi, Kenya, on 7 December 2019, and endorsed by the 9<sup>th</sup> Summit of the ACP Heads of State and Government, Nairobi, Kenya, 9–10 December 2019 (**Annex 1**) (NB: Although termed annexes, many documents referred to in the footnotes are legal references. They are referred to as annexes in this Written Statement and in the list of documents placed at the end only to facilitate access to them by the Court, as they are in the public domain. The pen-drive submitted to the Registrar only contains the documents marked as (enclosed) in the list of annexes, which are not publicly accessible).

Recommendations (**CEACR**) to interpret Convention No. 87 as protecting the right to strike, and to specify elements concerning its scope, limits, and conditions for legitimate exercise; and on the critical role of the right to strike in advancing a just transition and sustainable development.

## **B. SUMMARY OF THE OACPS POSITION**

10. This Written Statement is sub-divided into five chapters, followed by a list of documents. **Chapter 1** of the Written Statement establishes that the Court has jurisdiction to entertain the request for advisory opinion and that no compelling reasons call for the Court to exercise its discretionary power not to deliver it. **Chapter 2** clarifies that the right to strike is a fundamental workers' right recognized in international law and implicitly protected in Convention No. 87. **Chapter 3** explains that the CEACR is competent to interpret Convention No. 87. **Chapter 4** provides information on the critical importance of the right to strike for a just transition in OACPS countries. Finally, **Chapter V** concludes summarizing the elements that, in the OACPS' submission, should inform the answer of the Court.
  
11. For the reasons provided in this Written Statement, the OACPS submits that:
  - (a) The Court has jurisdiction to deliver the advisory opinion requested by the ILO in the Resolution adopted by the Governing Body at its 349<sup>th</sup> bis (Special) Session, and there is no compelling reason for the Court to refrain from doing so.
  - (b) The right to strike is protected under Convention No. 87 as a fundamental component and a corollary of the right to freedom of association.
  - (c) The CEACR is competent to interpret Convention No. 87 as protecting the right to strike, which is inherent to the right to freedom of association, and to specify elements concerning the scope, limits, and conditions for the legitimate exercise of the right to strike.
  - (d) The right to strike is a crucial component and plays a critical role in the just transition in OACPS countries, and the Court should recognize and refer to such role in its advisory opinion.

**C. THE COURT HAS JURISDICTION TO RENDER THE REQUESTED ADVISORY OPINION  
AND THERE ARE NO COMPELLING REASONS FOR IT NOT TO DO SO**

12. The OACPS submits that the Court has jurisdiction to deliver the advisory opinion requested by the ILO in the Resolution Adopted by the Governing Body at its 349<sup>th</sup> bis (Special) Session (1), and that there is no compelling reason for the Court to refrain from doing so (2).

**(1) The Court has jurisdiction to deliver the requested advisory opinion**

13. The Court has jurisdiction to deliver the requested advisory opinion. Article 65, paragraph 1, of the Statute of the Court, provides that '*[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request*'. The OACPS submits that the two conditions for the jurisdiction of the Court to render an advisory opinion, pursuant to Article 65 of the Statute of the Court, are satisfied in the present advisory proceedings.
14. First, the request has been made by the ILO, which is a '*body ... authorized by the UN Charter*' to request advisory opinions from the Court. Article 96 of the UN Charter provides that '*specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities*'. Article IX(2) of the 1946 Agreement between the United Nations and the International Labour Organisation provides that '*the General Assembly authorizes the International Labour Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies*'.<sup>5</sup> In 1949, the International Labour Conference authorized the ILO Governing Body to request advisory opinions of the Court.<sup>6</sup> In addition, the ICJ is the only body competent to give authoritative interpretations of ILO Conventions under Article 37(1) of the ILO Constitution, which provides that '*[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent*

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<sup>5</sup> Agreement between the United Nations and the ILO, 1946, article IX [Document No. 2]; Approved by United Nations General Assembly resolution 50(I) of 14 December 1946 [Document No. 3].

<sup>6</sup> 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. 338–339 [Document No. 4].

*Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice’.*

15. Second, the question submitted by the ILO is a ‘*legal question*’ within the meaning of Article 65 of the Statute. In the *Wall* advisory opinion, the Court, referring to its case law in the *Western Sahara* advisory opinion, clarified that a question that is framed in legal terms and raises problems of international law is by its very nature a legal question and is susceptible of a reply based on law.<sup>7</sup> In the *Conditions of Admission of a State to Membership in the United Nations* advisory opinion, the Court explained that ‘*to determine the meaning of a treaty provision ... is a problem of interpretation and consequently a legal question*’.<sup>8</sup>
16. Third, the question is squarely within the scope of activities of the ILO, which is defined primarily by the ILO Constitution. Article 1 of the ILO Constitution provides that the ILO must ‘*promote the objects set forth in the Preamble*’ and in the Declaration concerning the aims and purposes of the International Labour Organisation (**Declaration of Philadelphia**).<sup>9</sup> These objects include advancing social and economic justice by setting international labor standards, including in the form of international conventions, such as Convention No. 87.
17. The Court’s opinion will assist the ILO in resolving an important dispute and providing legal clarity. The CEACR has traditionally interpreted the right to strike as implicit within the right to freedom of association, a principle protected by Convention No. 87. However, this interpretation has been contested by the Employers’ Group, leading to an institutional crisis that has hampered the ILO’s supervisory system. In 2012, the controversy prevented the Workers’ Group and the Employers’ Group from agreeing on the list of individual cases to be examined by the Conference Committee on the Application of Standards (**CAS**).<sup>10</sup> Since 2013, the CAS has ceased to examine cases of application of Convention No. 87 concerning the right to strike. The Court’s opinion will clarify

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<sup>7</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para 37.

<sup>8</sup> *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, p. 61.

<sup>9</sup> Constitution of the ILO, Preamble and Annex, Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia) [**Document No. 118**].

<sup>10</sup> ILO, GB.322/INS/5, The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, October 2014 [**Document No. 34**].

this critical aspect of international labor law, ensuring the effective functioning of the ILO's supervisory system.

**(2) There are no compelling reasons for the Court to decline to deliver the requested advisory opinion**

18. The OACPS submits that there are no compelling reasons justifying the exercise by the Court of its discretionary power not to render an advisory opinion. The OACPS notes that based on the wording of Article 65 of the Statute, which indicates that the Court 'may' render an advisory opinion, the Court stressed that it has the power to decline to deliver an advisory opinion. However, the Court has also emphasized that such power must be exercised only in exceptional circumstances. This is because the Court is mindful that its answer to a request for an advisory opinion '*represents its participation in the activities of the Organization, and, in principle, should not be refused*'.<sup>11</sup>
19. The Court may, therefore, exercise its discretion not to render an advisory opinion only for '*compelling reasons*' when this is necessary to protect the integrity of its judicial function. The Court has explained that '*[t]he discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations*'.<sup>12</sup> The present Court has never exercised this discretionary power.
20. With this important aspect in mind, the case law of the Court suggests that the Court could exercise such discretion only in two circumstances. First, there could be a compelling reason for the Court to decline to deliver an advisory opinion when such a reply '*would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent*'.<sup>13</sup> Second, the Court may exercise such discretion when it does not have all the facts sufficient to render the requested opinion before it. Thus, in the *Western Sahara* advisory opinion, the Court

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<sup>11</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, ICJ Reports 1950, p. 71.

<sup>12</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, para 64.

<sup>13</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, para 85; see also *Western Sahara*, Advisory Opinion, ICJ Reports 1975, para. 33.

stressed that what was decisive in this respect was whether the Court had '*sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character*'.<sup>14</sup>

21. The OACPS maintains that there are no compelling reasons for the Court to decline to exercise its jurisdiction with respect to the advisory opinion requested in the present proceedings. First, the request made to the Court did not arise from a context of specific disputes between States. Rather, the question concerns the ILO as an international organization, its 187 member states, and workers across the world. Second, the request made to the Court concerns a problem of treaty interpretation which presents no evidentiary challenges.
22. Therefore, the OACPS stresses that there are no compelling reasons to decline; to the contrary, the Court's opinion is crucial for the effective functioning of the ILO supervisory system.

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<sup>14</sup> *Western Sahara*, Advisory Opinion, ICJ Reports 1975, para 46.

## CHAPTER II: THE RIGHT TO STRIKE UNDER CONVENTION NO. 87

23. The OACPS submits that the right to strike is a fundamental human right recognized in international law (A); and that, without explicitly mentioning it, Convention No. 87 protects the right to strike as an essential means for workers to promote and defend their interests (B).

### A. THE RIGHT TO STRIKE AS A FUNDAMENTAL WORKERS' RIGHT IN INTERNATIONAL LAW

24. The right to strike under customary international law is reflected in international human rights instruments, in the decisions issued by the UN Human Rights Treaty Bodies, in regional human rights instruments, in the decisions issued by regional human rights bodies, including the European Court of Human Rights (**ECtHR**), the European Committee of Social Rights (**ECSR**), the African Commission on Human and Peoples' Rights, and the Inter-American Court of Human Rights (**IACtHR**), in international trade agreements, in the practice of the UN Human Rights Council, and in other State practice.
25. The International Covenant on Economic, Social and Cultural Rights (**ICESCR**) explicitly recognizes, in Article 8(1)(d), '*[t]he right to strike, provided that it is exercised in conformity with the laws of the particular country*'. As early as 1990, the United Nations Committee on Economic, Social and Cultural Rights explained that the right to strike is considered '*self-executing*' according to '*the great majority of observers*' and is thus not subject to progressive realization.<sup>15</sup> State parties consider the right to strike as fundamental to the ICESCR as a whole, as illustrated by the formal objection of four States to Kuwait's reservation that it '*reserves the right not to apply*' Article 8(1)(d), on the grounds that it was problematic with the object and purpose of the ICESCR.<sup>16</sup>
26. The International Covenant on Civil and Political Rights (**ICCPR**) establishes '*the right to freedom of association*'.<sup>17</sup> The UN Human Rights Committee has

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<sup>15</sup> CESCR, Consideration of Report Submitted by State Party: Luxembourg, E/1991/23 (1990) [129] (**Annex 2**)

<sup>16</sup> Finland, Communication to the UN Secretary-General, 25 July 1997; Germany, Communication to the UN Secretary-General, 10 July 1997; Norway, Communication to the UN Secretary-General, 22 July 1997; Sweden, Communication to the UN Secretary-General, 23 July 1997 in Ben Saul, David Kinley, Jacqueline Mowbray (eds), *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014), Appendix III (**Annex 3**).

<sup>17</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

acknowledged that this right to freedom of association, as recognized by Article 22, entails the right to strike.<sup>18</sup>

27. In 2019, the UN Committee on Economic, Social, and Cultural Rights (CESCR) and the UN Human Rights Committee jointly clarified that:

[T]he right to strike is the corollary to the effective exercise of the freedom to form and join trade unions. Both Committees have sought to protect the right to strike in their review of the implementation by States parties of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.<sup>19</sup>

28. The European Social Charter, Article 6, recognizes '*the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into*'. The European Committee of Social Rights has clarified that '*[t]he right to strike is intrinsically linked to the right to collective bargaining, as it represents the most effective means to achieve a favourable result from a bargaining process*'. The Committee has noted that, without the right to strike, the right to collective bargaining '*becomes void of its very substance*' and that '*restrictions on the right to strike may be acceptable only under specific conditions*'.<sup>20</sup>
29. The European Convention on Human Rights, Article 11, recognizes the right to strike as inherent to the freedom of association, and to the right to form a trade union. The ECtHR has repeatedly held that the right to strike is protected by Article 11.<sup>21</sup>

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<sup>18</sup> HRC, CCPR/C/EST/CO/3 (2010), Consideration of reports submitted by States parties under article 40 of the Covenant, para. 15 [Document No. 303]; HRC, CCPR/C/DOM/CO/6 (2017), Concluding observations on the sixth periodic report of the Dominican Republic, paras 31–32 [Document No. 304]; HRC, CCPR/C/EST/CO/4 (2019), Concluding observations on the fourth periodic report of Estonia, paras 31–32 [Document No. 305].

<sup>19</sup> Joint statement by the Committee on Economic, Social, and Cultural Rights and the Human Rights Committee, E/C.12/66/5-CCPR/C/127/4 (2019) [Document No. 314], para 4.

<sup>20</sup> *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Complaint No. 140/2016, decision on the merits of 22 January 2019, paras 143-133 (Annex 4). The Committee has also clarified that '*the exercise of the right to bargain collectively and the right to collective action, guaranteed by Article 6§§2 and 4 of the Charter, represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter*'. European Committee of Social Rights, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012, Decision on the admissibility and merits of complaint (2012) [Document No. 316], para 109.

<sup>21</sup> ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (2014), paras 26–33, 75–78 and 83–106 [Document No. 319]; ECtHR, *Ognevenko v. Russia* (2018), paras 20–23 and 54–59 [Document No. 320].

30. In the Inter-American System, the Charter of the Organization of American States, in Article 45(c),<sup>22</sup> the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) in Article 8(1)(b),<sup>23</sup> and the Inter-American Charter of Social Guarantees, in Article 27,<sup>24</sup> all explicitly recognize the right to strike. In its Advisory Opinion 27/21, the IACtHR clarified that '*the right to strike is one of the fundamental human rights of workers*'<sup>25</sup> and that it is inherent to the right to freedom of association, recognized by Article 16 of the American Convention on Human Rights.<sup>26</sup> In addition, the IACtHR noted that the right to strike is '*broadly recognized in international corpus juris*', referencing several instruments including ILO Convention No. 87, and that it '*has also been recognized in the national constitutions and laws of OAS members*'. As a result, the IACtHR found the right to strike to be '*a general principle of international law*'.<sup>27</sup>
31. The African Charter on Human and Peoples' Rights (ACHPR) protects the right to freedom of association in its Article 10, with Article 15 safeguarding the right to work under equitable and satisfactory conditions.<sup>28</sup> In its *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, the African Commission on Human and Peoples' Rights explains that the right to work under Article 15 ACHPR obliges States to: '*Ensure the right to freedom of association, including*

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<sup>22</sup> Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 48 UNTS 1952 (OAS Charter).

<sup>23</sup> Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, 1988, article 8 [Document No. 290].

<sup>24</sup> 'Acta Final de la Conferencia de Bogotá – XXIX – Carta Internacional Americana de Garantías Sociales' in *Novena Conferencia Internacional Americana: Actas y documentos*, vol. VI (Bogotá: Ministerio de Relaciones Exteriores de Colombia 1948), p. 239 (Annex 5)

<sup>25</sup> IACtHR, Advisory Opinion OC-27/21, Right to freedom of association, right to collective bargaining and right to strike, and their relation to other rights, with a gender perspective (2021), paras 95–105 [Document No. 323], para 95.

<sup>26</sup> American Convention on Human Rights, 1969, article 16 [Document No. 289].

<sup>27</sup> IACtHR, Advisory Opinion OC-27/21, Right to freedom of association, right to collective bargaining and right to strike, and their relation to other rights, with a gender perspective (2021), paras 95–97 [Document No. 323].

<sup>28</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter).

*the rights to collective bargaining, to strike and other related organizational and trade union rights*'.<sup>29</sup>

32. The status of the right to strike as a fundamental workers' right in international law is further underscored by its inclusion in international trade agreements. For instance, Chapter 23 of the 2019 United States–Mexico–Canada Agreement states that: '*the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike*'.<sup>30</sup> Similarly, the 2014 Southern African Development Community Protocol on Employment and Labour explicitly recognizes the '*right to lawful strike action*'.<sup>31</sup> In turn, supervision of the European Union–South Korea Free Trade Agreement demonstrates an understanding among the parties that the right to strike is protected under the agreement's labor provisions, established in Chapter 13. The EU Domestic Advisory Group (DAG), established under this agreement, urged the EU to begin consultations under Chapter 13 for serious violations of the right to freedom of association, including the right to strike.<sup>32</sup> The EU listed the responses to '*certain peaceful strike actions*' as part of the matters to be addressed when it initiated consultations in 2018.<sup>33</sup>
33. Finally, in his 2016 thematic report to the General Assembly, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, concluded, citing, *inter alia*, the ILO Convention No. 87 (Articles 3, 8 and 10), the ICESCR (Article 8), the ICCPR (Article 22), the European Convention on Human Rights (Article 11), and the American Convention on Human Rights (Article 16), that:

The right to strike has been established in international law for decades, in global and regional instruments, and is also

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<sup>29</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*.

<sup>30</sup> Agreement between the United States of America, the United Mexican States, and Canada, 2018, article 23.3 [Document No. 300].

<sup>31</sup> Southern African Development Community Protocol on Employment and Labour, 2014, article 6 [Document No. 299].

<sup>32</sup> EU DAG, Serious Violations of Chapter 13 of the EU-Korea FTA: Letter to Karel De Gucht, Member of the European Commission DB-REX/2014/D/109 (2014) (Annex 6)

<sup>33</sup> EU, Request for Consultations by the European Union (17 December 2018) (Annex 7).

enshrined in the constitutions of at least 90 countries. The right to strike has, in fact, become customary international law.<sup>34</sup>

34. The Special Rapporteur's conclusion that the right to strike is a customary international law norm is indisputably correct. The relevant State practice is well-documented and abundant. The unanimity and consistency in the ILO's supervisory system on the right to strike for about seven decades, as discussed below, is further evidence.

## B. PROTECTION OF THE RIGHT TO STRIKE UNDER CONVENTION No. 87

35. The OACPS submits that the right to strike is protected by Convention No. 87. In its interpretation of Convention No. 87, the OACPS refers to the rules of interpretation reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT),<sup>35</sup> which are widely recognized to reflect customary international law.<sup>36</sup> Article 31 (1) provides:

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.

36. The interpretation must also include the subsequent practice of the State parties to the treaty, provided it establishes their agreement on the interpretation of the treaty, and must consider any rules of international law applicable in the relations between the parties.<sup>37</sup> In certain circumstances, recourse may also be had to supplementary means of interpretation, such as the *travaux préparatoires* of the treaty.<sup>38</sup>

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<sup>34</sup> UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report on Rights to freedom of peaceful assembly and of association, A/71/385 (2016) [Document No. 315], para 56.

<sup>35</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

<sup>36</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para. 65; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 160; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 94; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, para. 37; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466, para. 99; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045, para. 18; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6, para. 41.

<sup>37</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art 31(3)(b)-(c).

<sup>38</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art 32.

37. The OACPS considers that, although Convention No. 87 does not expressly mention the right to strike, it implicitly protects it as an essential means for workers to promote and defend their interests. This construction is supported by the ordinary meaning of the terms of Convention No. 87, which necessarily implies the right to strike (1); the fact that the right to strike is essential for fulfilling the Convention's object and purpose (2); the subsequent practice of the Parties to the Convention confirming this interpretation (3); and the *travaux préparatoires*, which indicate that the Parties could have expressly excluded the right to strike, but chose not to do so (4).

### (1) Ordinary meaning of the Convention's terms

38. The interpretation of Articles 2, 3, 8, and 10 of Convention No. 87, according to their ordinary meaning, demonstrates that Convention No. 87 necessarily implies a right to strike.<sup>39</sup> Article 2 affirms the right of workers and employers to 'establish' and 'join' organizations of their choosing, 'subject only to the rules of the organisation concerned'.
39. Article 3 explicitly grants workers' and employers' organizations the 'right to draft their constitutions and rules', elect their representatives, manage their 'administration and activities', and formulate 'their programmes'. Article 10's definition of an 'organization' as any group formed to further and defend workers' or employers' interests supports the interpretation that Convention No. 87 necessarily implies a right to strike. Striking, as a quintessential tool for defending workers' interests, is naturally encompassed within the ordinary meaning of the terms 'constitution', 'rules', 'activities', and 'programmes' as employed in Article 3.
40. Drawing on the Oxford English Dictionary (2024), the term 'constitution' is understood as 'the system or body of fundamental principles according to which a nation, state, or body politic is constituted and governed'.<sup>40</sup> Similarly, 'rules' refer to regulations 'framed or adopted by an organization, institution, or other body for governing its conduct and that of its members'.<sup>41</sup> These terms

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<sup>39</sup> Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) [Document No. 120].

<sup>40</sup> Oxford English Dictionary, s.v. 'constitution (n.)', March 2024, available at: <https://doi.org/10.1093/OED/2107816703>

<sup>41</sup> Oxford English Dictionary, s.v. 'rule (n.1)', March 2024, available at <https://doi.org/10.1093/OED/8650595566>

imply broad authority to enact provisions that serve to further and defend the interests of workers and employers, including organizing industrial action.

41. Furthermore, the terms 'activities' and 'programmes' in Article 3 imply a wide operational scope. 'Activities' are generally understood as the actions or engagements of an organization,<sup>42</sup> while 'programmes' refer to a planned series of actions or events.<sup>43</sup> The absence of any specific inclusions or exclusions of particular activities within these terms implies that the Convention protects a comprehensive range of actions, including the right to strike. This interpretation is necessary to avoid rendering Article 3 meaningless. If specific actions such as strikes were excluded due to not being explicitly mentioned, then logically Article 3 would not definitively include any activities.
42. Article 8 establishes the only permissible limitations on these rights, apart from the special case of the armed forces and police outlined in Article 9. It requires that while exercising their rights under the Convention, '*workers and employers and their respective organisations ... shall respect the law of the land*'. However, these laws must not impair the rights guaranteed by the Convention, further reinforcing the broad protective scope that is apparent from the ordinary meaning of its terms.
43. Therefore, interpreting the terms of Convention No. 87 according to their ordinary meaning, it is logical to conclude that the Convention implies the right to strike.

## **(2) Object and purpose of the Convention**

44. The interpretation of Convention No. 87 as protecting the right to strike is the most faithful to its object and purpose. The Convention's object and purpose is to protect freedom of association and the right to organize to improve the conditions of labor and advance peace.
45. Article 31(1) of the VCLT, reflecting customary international law, mandates that the terms of the treaty be construed in its '*context and in the light of its object and purpose*'. Article 31(2) further specifies that context comprises the text,

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<sup>42</sup> Oxford English Dictionary, s.v. 'activity (n.),' September 2023, available at: <https://doi.org/10.1093/OED/3459835268>

<sup>43</sup> Oxford English Dictionary, s.v. 'programme | program (n.),' March 2024, available at: <https://doi.org/10.1093/OED/8131261676>

including its preamble and annexes. The Court's reasoning in the *Oil Platforms* case underscores the importance of a treaty's title in interpreting its context.<sup>44</sup>

46. The Permanent Court of International Justice (PCIJ) clarified that the object and purpose of a treaty encompasses the entire treaty,<sup>45</sup> an understanding confirmed by Article 41(1)(b)(ii) of the VLCT. The Court has resorted to the preamble as an important element in establishing the object and purpose of the treaty.<sup>46</sup>
47. The title of Convention No. 87, '*Freedom of Association and Protection of the Right to Organize Convention*', reflects its primary focus on freedom of association. The Preamble further supports this conclusion by stressing '*freedom of association and protection of the right to organise*', as well as citing the Preamble to the ILO Constitution as declaring "*recognition of the principle of freedom of association*" to be a means of improving conditions of labour and of establishing peace'. The Preamble clearly presents Convention No. 87 as an instrument to protect freedom of association, including the right to organize, as a fundamental means to improve labor conditions and advance peace.
48. A comprehensive reading of the provisions of the Convention is necessary to definitively ascertain its object and purpose. This examination confirms that the object and purpose of Convention No. 87 is to protect freedom of association, including the right to organize, in order to improve the conditions of labour and advance peace. Thus, Article 10 clarifies the objective of workers' organizations: to further and defend the interests of workers. Article 3(2), in turn, strengthens this by prohibiting '*any interference which would restrict ... or impede the lawful exercise*' of the rights to freedom of association recognized in Article 2 and Article 3(1). Furthermore, Article 8(2) provides that national laws must not impair the rights established under the Convention.
49. In this light, freedom of association necessarily includes the right to strike as a fundamental tool for advancing and protecting workers' economic and social interests under Article 3. The right to strike is indispensable for trade unions in the realm of industrial relations, enabling workers to collectively secure fair

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<sup>44</sup> *Oil Platforms* (Preliminary Objection) [1996] ICJ Rep 803, para 47.

<sup>45</sup> *Competence of the ILO to Regulate Agricultural Labour*, PCIJ (1922) Series B, Nos 2 and 3, 23.

<sup>46</sup> *Asylum Case* [1950] ICJ Rep 266, 282; *Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 196; *Sovereignty over Pulau Ligitan and Pulau Sipadan* [2002] ICJ Rep 625, para 51.

employment terms and influence decisions impacting their lives and societal well-being. Given the unequal dynamics in employer-worker relationships, these goals would be highly challenging to attain without the right to strike.

### **(3) Subsequent practice of parties to the Convention**

50. The subsequent practice of the parties to Convention No. 87 confirms that the Convention protects the right to strike, as evidenced by the interpretations by the CEACR and the Committee on Freedom of Association (CFA); widespread acceptance of these views by parties, including through ratification of the Convention by dozens of States after these interpretations were issued; the confirmation by the tripartite constituencies, including workers and employers; and the explicit protection of freedom of association and the right to strike in various human rights instruments ratified by State parties after their ratification of Convention No. 87.
51. Draft Conclusion 12 of the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties states:
  - (2) Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be reflected in, pronouncements of an expert body.
  - (3) A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32.<sup>47</sup>
52. The CEACR and the CFA have consistently affirmed the protection of the right to strike as a fundamental workers' right under Convention No. 87. As early as 1959, the CEACR in its General Survey affirmed that '*prohibition of strikes by workers other than public officials acting in the name of public powers ... may sometimes constitute a considerable restriction of the potential activities of trade unions*' and that such prohibition may run counter to Article 8(2) of the Convention.<sup>48</sup> The Committee has since repeatedly affirmed the right to strike as a fundamental workers' right in its observations to Member States regarding the application of Convention No. 87. For example, in its 1985 Report on the

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<sup>47</sup> International Law Commission, Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries, UN Doc. A/73/10, 2018, Conclusion 12.

<sup>48</sup> ILC, 43rd Session, 1959, Report III (Part IV), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 101–129 [Document No. 232], pp. 114–115.

Application of Conventions and Recommendations in the German Democratic Republic, the CEACR stated:

The Committee takes note of the Government's point of view, in particular of the statement that no provision of the Convention expressly mentions the right to strike, but is bound to point out that it has stressed in paragraphs 199 to 206 of the General Survey that under Article 3 of the Convention workers' organisations should have a number of means of furthering and defending their economic and social interests and that the right to strike is an essential one of these means.<sup>49</sup>

53. The CFA, established in 1951, *'has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests'*.<sup>50</sup> In 1956, the CFA reaffirmed that the right to strike *'is generally regarded as an integral part of the general right of workers and their organisations to defend their economic interests'*.<sup>51</sup> The CFA has explained that *'[t]he right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests'*.<sup>52</sup>
54. The widespread acceptance of these views by parties to the Convention is evidenced by the ratification of Convention No. 87 by 122 of its 158 member states since 1959.<sup>53</sup> This ratification pattern indicates that 122 states ratified

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<sup>49</sup> ILC, 71st Session, 1985, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 147-149 (German Democratic Republic) [Document No. 165], par 3. See also ILC, 79th Session, 1992, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 206-209 (Colombia) [Document No. 166]; ILC, 83rd Session, 1996, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 146-147 (Chad) [Document No. 167]; ILC, 99th Session, 2010, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 56-58 (Australia) [Document No. 168]; ILC, 100th Session, 2011, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 186-188 (United Kingdom) [Document No. 169]; ILC, 102nd Session, 2013, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 156 (Russian Federation) [Document No. 170].

<sup>50</sup> ILO, Compilation of decisions of the Committee on Freedom of Association, sixth edition, 2018, pp. 143-182 [Document No. 282], p. 143.

<sup>51</sup> GB.323/INS/5/Appendix III, 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) (Geneva, 23-25 February 2015), March 2015 [Document No. 108], p. 15.

<sup>52</sup> ILO, Compilation of decisions of the Committee on Freedom of Association, sixth edition, 2018, pp. 143-182 [Document No. 282], p. 143.

<sup>53</sup> ILO, Ratifications of C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), available at: [https://webapps.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312232](https://webapps.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312232)

Convention No. 87 after the CEACR first clarified that it protected the right to strike as an inherent part of the right to freedom of association.

55. Furthermore, the interpretation of the right to strike as protected by Convention No. 87 has been confirmed by the tripartite constituencies of the ILO, including workers and employers. The International Labour Conference, comprising government, workers', and employers' delegates, has repeatedly affirmed in various Resolutions adopted since the 1950s that it considers the right to strike as an essential element of freedom of association.<sup>54</sup> It was only by the end of the 1980s that the Employers' group '*begun to question the validity of certain conclusions of the Committee of Experts*', leading to a polarization of views with the Workers' group which has ultimately come to threaten '*the integrity of the supervisory system*'.<sup>55</sup>
56. Finally, additional subsequent practice confirming the interpretation of Convention No. 87 as protecting the right to strike is provided by the ratification of various human rights instruments that explicitly recognize the right to freedom of association and the right to strike by several state parties after they ratified Convention No. 87. Notably, these include instruments that explicitly recognize the right to strike: the European Social Charter (Article 6), initially adopted in 1961 and revised in 1996; the ICESCR (Article 8), adopted in 1966; and the Protocol of San Salvador (Article 8), adopted in 1988.

#### **(4) The *travaux préparatoires***

57. The primary means of interpretation, including subsequent practice, unequivocally establish that Convention No. 87 protects the right to strike. Therefore, reliance on the preparatory works of Convention No. 87 is unnecessary. Article 32 of the VCLT and customary international law designate preparatory works as a supplementary means of interpretation, to be employed only when the principal methods '*leave the meaning ambiguous or obscure*' or

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<sup>54</sup> See, e.g., ILC, 40th Session, 1957, Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation [Document No. 133]; ILC, 54th Session, 1970, Resolution concerning Trade Union Rights and Their Relation to Civil Liberties [Document No. 136]; ILC, 57th Session, 1972, Resolution concerning the Policy of Colonial Oppression, Racial Discrimination and Violation of Trade Union Rights Pursued by Portugal in Angola, Mozambique and Guinea (Bissau) [Document No. 137].

<sup>55</sup> ILC, 80th Session, 1993, Report of the Committee on the Application of Standards, paras 9–25 [Document No. 100], para 11.

lead to a result that is '*manifestly absurd or unreasonable*'. These conditions are not present in the interpretation of Convention No. 87.

58. Although recourse to the *travaux préparatoires* is not warranted, they further corroborate the protection of the right to strike under Convention No. 87. The preparatory works demonstrate that the drafters considered the right to strike.<sup>56</sup> The deliberate decision not to expressly exclude the right to strike, despite its recognized association with the right to freedom of association, suggests its inclusion within the scope of the Convention. This interpretation is supported by insights from international labour law experts:

In light of the time pressure under which the Committee on Freedom of Association and Industrial Relations operated, its tripartite members indicated that they were united in a strong desire to agree on a text. [...] It appears that the tripartite members of the Committee took the pragmatic view that a right to strike was implied in the right of freedom of association but wished to avoid the quagmire of delineating the exact contours of the right to strike.<sup>57</sup>

59. Thus, the full set of interpretive means provided by Articles 31 and 32 of the Vienna Convention on the Law of Treaties and customary international law converge in the same compelling conclusion: the right to strike is protected under Convention No. 87.

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<sup>56</sup> See, e.g., Memorandum and Draft Resolution submitted by the American Federation of Labor to the Economic and Social Council on the Guarantees for the Exercise and Development of Trade Union Rights, 1947 [Document No. 142], Draft Resolution, Art. I(H).

<sup>57</sup> J Vogt, J Bellace, L Compa, K D Ewing, J Hendy, K Lörcher, T Novitz, *The Right to Strike in International Law* (Hart 2021), p. 167 (Annex 8)

## CHAPTER III: THE CEACR'S COMPETENCE TO INTERPRET CONVENTION NO. 87

### A. SUMMARY OF THE OACPS POSITION

60. The International Labour Conference established the CEACR to examine governments' reports on the measures adopted to give effect to the provisions of ILO Conventions to which they are a party and provide an impartial assessment concerning their application (B). In determining whether States respect the requirements of ILO Conventions, the CEACR has to consider and express its views on the meaning of the provisions of ILO Conventions and determine their legal scope. Therefore, to properly fulfil its mandate, the CEACR must interpret ILO Conventions to determine their meaning and legal scope. Although the CEACR's interpretations lack binding character, they carry great persuasive weight given its impartiality, independence, and expertise (C). The CEACR has maintained consistent views on the right to strike, which most ILO member States and the tripartite constituencies have accepted (D).

### B. THE CEACR'S MANDATE AND WORKING METHODS

61. The work behind the Labour Chapter of the 1919 Peace Treaties that led to the ILO Constitution relied partly on the concept of '*mutual supervision*': ILO member States would be bound by the same ratified ILO Conventions that would prevent unfair competition between countries.<sup>58</sup> States, therefore, were interested in ensuring that other member States implemented the ILO Conventions they had ratified.<sup>59</sup> Article 408 of Part XIII of the Treaty of Versailles, now Article 22 of the ILO Constitution, actioned this concept by requiring that member States report on the measures taken by them to give effect to the provisions of ILO Conventions to which they were a party.<sup>60</sup>
62. Until 1926, the International Labour Conference (ILC) reviewed the reports of member States submitted under Article 408 of Part XIII of the Treaty of

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<sup>58</sup> ILO, Information paper on the history and development of the mandate of the Committee of Experts on the Application of Conventions and Recommendations, February 2013, p. 7 [Document No. 103].

<sup>59</sup> ILO, Information paper on the history and development of the mandate of the Committee of Experts on the Application of Conventions and Recommendations, February 2013, p. 7 [Document No. 103].

<sup>60</sup> Part XIII of the Treaty of Peace of Versailles, 1919 [Document No. 70].

Versailles.<sup>61</sup> In 1926, due to the growing number of reports, the ILC recommended the creation of two committees to aid the conference in reviewing these documents,<sup>62</sup> both of which eventually became the twin pillars of the ILO's supervision system.<sup>63</sup>

63. First, the conference recommended the creation of a committee to meet on an annual basis in order to examine the summaries of the reports submitted by governments to the Director General, which were later submitted to the delegates at the Conference for their views.<sup>64</sup> This committee was named the Conference Committee and is today known as the Conference Committee on the Application of Standards or CAS. Second, the conference requested the Governing Body of the ILO to appoint a technical committee of experts tasked with examining the reports, supplementing them with additional information, and drafting a report based on this material.<sup>65</sup> The committee of experts would later be called the Committee of Experts on the Application of Conventions or CEAC. In 1947, the word 'Recommendations' was appended to its name, reflecting the committee's current designation.
64. The first mandate of the Committee of Experts, as it was then referred to, was defined in the report of the Committee on the examination of annual reports under Article 408 of the Treaty of Versailles, established by the International Labour Conference in 1926.<sup>66</sup> It was stipulated that the Committee's functions

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<sup>61</sup> ILO, Information paper on the history and development of the mandate of the Committee of Experts on the Application of Conventions and Recommendations, February 2013, p. 7 [Document No. 103].

<sup>62</sup> 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, p. 429 [Document No. 73].

<sup>63</sup> Governing Body, Matters arising out of the work of the International Labour Conference Follow-up to the decision adopted by the International Labour Conference on certain matters arising out of the report of the Committee on the Application of Standards, 317th Session, Geneva, 6–28 March 2013, p. 7 para. 19 (Annex 9).

<sup>64</sup> 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, p. 429 [Document No. 73].

<sup>65</sup> 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, p. 429 [Document No. 73]. The exact wording employed by the conference was: 'for the purpose of making the best and fullest use of [the] information [contained in the reports rendered by state members] and of securing such additional data as may be provided for in the forms approved by the Governing Body and found desirable to supplement that already available, and of reporting thereon to the Governing Body, which report the Director, after consultation with the Governing Body, will annex to his summary of the annual reports presented to the Conference under Article 408.'

<sup>66</sup> ILC, 8th Session, 1926, Record of Proceedings, Appendix V: Article 408 of the Treaty of Versailles, pp. 399–408 [Document No. 72]. See also ILO, Information paper on the history and development of the

would include identifying cases where the information supplied appeared inadequate to understand either the general situation or specific States' positions towards ILO Conventions, calling attention to the instances where different countries adopted divergent interpretations of ILO Conventions, and producing a technical report based on governmental submissions addressed to the ILO Director-General.<sup>67</sup> Initially, the Committee comprised eight experts and one substitute member, appointed by the Governing Body.<sup>68</sup> The terms of reference of the CEACR were modified over the years as the workload increased and the needs of the ILO evolved.<sup>69</sup> Importantly, the terms of reference were expanded following the ILO constitutional amendment of 1946 that extended the obligations of governments to submit reports.<sup>70</sup> The Committee of Experts' mandate has remained unchanged since 1947.<sup>71</sup>

65. The current mandate of the CEACR consists of providing an impartial and technical evaluation of the application of international labor standards in ILO member States. In particular, the committee evaluates three kinds of documents:
  - a. The annual reports submitted by member states under Article 22 of the Constitution on the measures taken by them to give effect to the provisions of ILO Conventions to which

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mandate of the Committee of Experts on the Application of Conventions and Recommendations, February 2013, p. 8 para 10 [Document No. 103].

<sup>67</sup> ILC, 8th Session, 1926, Record of Proceedings, Appendix V: Article 408 of the Treaty of Versailles, pp. 399–408 [Document No. 72].

<sup>68</sup> ILO, Information paper on the history and development of the mandate of the Committee of Experts on the Application of Conventions and Recommendations, February 2013, p. 8 para 13 [Document No. 103].

<sup>69</sup> Such needs were identified in different reports and resolutions. See those referenced in ILO, Information paper on the history and development of the mandate of the Committee of Experts on the Application of Conventions and Recommendations, February 2013, pp. 10–11 paras 21–27 [Document No. 103].

<sup>70</sup> Minutes of the 103rd Session of the Governing Body, December 1947, Questions Arising out of the Examination of the Annual Reports on the Application of Conventions and Extension of Terms of Reference of the Committee of Experts, pp. 56–59 [Document No. 74]; Minutes of the 103rd Session of the Governing Body, December 1947, Questions Arising out of the Examination of the Annual Reports on the Application of Conventions and Extension of Terms of Reference of the Committee of Experts, pp. 167–173 [Document No. 75]. The CEACR noted itself that the constitutional amendments had 'widely extended the obligations of Governments to submit reports'. ILO, Information paper on the history and development of the mandate of the Committee of Experts on the Application of Conventions and Recommendations, February 2013, p. 11 para 29 [Document No. 103].

<sup>71</sup> GB.349bis/INS/1/1, 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, September 2023, para 79 [Document No. 29].

they are parties and the information furnished by member states concerning the results of inspection activities;

b. The information and reports concerning Conventions and Recommendations communicated by member states under Article 19 of the ILO Constitution;

c. The information and reports on the measures taken by member states under Article 35 of the ILO Constitution.<sup>72</sup>

66. Nowadays, the CEACR is composed of twenty members, appointed by the Governing Body based on the recommendation of the Director-General for renewable periods of three years.<sup>73</sup> The appointments are made in a personal capacity from impartial experts drawn from all regions of the world, thereby bringing to the Committee direct exposure to various legal, economic, and social systems.<sup>74</sup> The Committee has consistently noted that the principles guiding its work are those of independence, impartiality and objectivity.<sup>75</sup>
67. The Committee organizes its work as follows. It convenes on dates specified by the Governing Body and conducts its proceedings in private, and the documents and deliberations of the meeting are confidential.<sup>76</sup> The Committee assigns initial responsibility to each of its members either for groups of Conventions or subjects.<sup>77</sup> The Committee may also establish specialized working groups when dealing with complex matters.<sup>78</sup> The preliminary conclusions of individual working group committee members are presented to the full Committee as draft observations and specific directives; the adoption of comments is typically guided by consensus.<sup>79</sup>

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<sup>72</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, p. 35 para 60 [Document No. 59].

<sup>73</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, p. 35 para 60 [Document No. 59].

<sup>74</sup> ILC, 108th Session, 2019, Report III (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 2.

<sup>75</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, p. 35 para 60 [Document No. 59].

<sup>76</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, pp. 35–36 para 60 [Document No. 59].

<sup>77</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, pp. 35–36 para 60 [Document No. 59].

<sup>78</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, pp. 35–36 para 60 [Document No. 59].

<sup>79</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, pp. 35–36 para 60 [Document No. 59].

68. The CEACR produces a **general report** that provides an overview of the manner in which it undertakes its work, describes the extent to which member States have fulfilled their constitutional obligations in relation to international labor standards, and draws the attention to issues of general interest arising out of the Committee's work.<sup>80</sup> It also issues **individual observations**, typically reserved for cases of significant or persistent non-compliance, regarding (i) the application of ratified Conventions in member States; (ii) the fulfilment of reporting obligations; and (iii) the submission of Conventions and Recommendations to the competent national authorities.<sup>81</sup> It also produces a **general survey** where it examines the state of the legislation and practice regarding a specific area covered by a given number of Conventions and Recommendations, which covers all member States regardless of whether or not they have ratified the given Conventions.<sup>82</sup> Finally, the CEACR adopts **direct requests**, which consist of further individual comments addressed to governments, and registers **replies** received to the issues raised in a direct request which do not give rise to further comments.<sup>83</sup>
69. The CEACR produces an annual report divided into two volumes. The first volume, referred to as Report III (Part A), consists of two parts: Part I, the General Report, and Part II, containing individual observations.<sup>84</sup> Volume II contains the General Survey (Report III, Part B). The Committee of Experts' annual report is submitted to the Governing Body and subsequently forwarded to the International Labor Conference, usually convened in June each year.<sup>85</sup>

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<sup>80</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, p. 36 para 62 [Document No. 59]; ILC, 111th Session, 2023, Report III (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 37.

<sup>81</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, p. 36 para 62 [Document No. 59]; ILC, 111th Session, 2023, Report III (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 66 para 106.

<sup>82</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, p. 37 para 62 [Document No. 59]; ILC, 111th Session, 2023, Report III (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 3.

<sup>83</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, pp. 36–37 para 62 [Document No. 59].

<sup>84</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, pp. 36–37 [Document No. 59].

<sup>85</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, p. 37 para 63 [Document No. 59].

The comprehensive findings of the CEACR, including direct requests, are then made available on the ILO website.<sup>86</sup>

### C. THE INTERPRETATIVE FUNCTION OF THE CEACR

#### (1) The interpretative function of the CEACR is inherent in its mandate to assess the observance of ILO Conventions

70. The CEACR must interpret ILO Conventions to express its views on their content and meaning and, where appropriate, determine the convention's legal scope in order to properly perform its mandate. The CEACR has maintained this position since 1972 when it recognized that its '*terms of reference do not require it to give interpretations of Conventions*', while at the same time emphasizing that '*to carry out its function of evaluating the implementation of Conventions, [it had] to consider and express its views on the meaning of certain provisions of Conventions*'.<sup>87</sup> It has thus followed a '*functional approach*' to the fulfilment of its role, understanding the examination of the content and meaning of the provisions of the conventions, as '*necessarily an integral part of the function of evaluating and assessing*' their implementation.<sup>88</sup> Such understanding falls squarely in this Court's case law, which as early as 1949 recognized that international organizations '*must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties*'.<sup>89</sup>
71. The CEACR exercises this inherent power only '*where appropriate*' and always acknowledges the International Court of Justice as having the authority to provide definitive interpretations under the ILO Constitution. The CEACR has also established that '*in so far as its views are not contradicted by the International Court of Justice, they are to be considered as valid and generally*

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<sup>86</sup> ILO, Handbook of procedures relating to international labour Conventions and Recommendations, 2019, p. 37 [Document No. 59].

<sup>87</sup> ILC, 63rd Session, 1977, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para 32 [Document No. 98].

<sup>88</sup> ILC, 100th Session, 2011, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, paras 10–12 [Document No. 101].

<sup>89</sup> ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, pp. 182–183.

*recognised*'.<sup>90</sup> Moreover, in exercising its interpretative function, the CEACR follows the rules established in the Vienna Convention of the Law of Treaties. In particular, the CEACR observes '*the textual meaning of the words in light of the Convention's purpose and object as provided for by Article 31 of the Vienna Convention, giving equal consideration to the two authentic languages of ILO Conventions*'.<sup>91</sup> It also gives due regard to Article 32, establishing that recourse to supplementary means of interpretation is permitted to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31 is ambiguous, obscure, or leads to an absurd or unreasonable interpretation.<sup>92</sup>

72. This understanding of the functions of the CEACR is the only one permitting the proper functioning of the ILO, as the International Court of Justice cannot be seized each time an interpretative question on the meaning and legal scope of ILO Conventions arises within the ILO's normal functioning. Indeed, the International Labour Office – the organization's secretariat – occasionally exercises interpretative functions when governments request so, usually before they make the decision to ratify a convention.<sup>93</sup>

## **(2) The interpretative function of the CEACR is recognized by the ILO constituents and bodies**

73. ILO constituents have long acknowledged the interpretative role of the CEACR. As early as 1987, Employer and Workers spokespersons speaking in the name of the large majority of those members, and a number of States rejected a proposal to limit the functions of the CEACR by establishing rules for the exercise of their mandate. Countering the criticism levelled against the interpretive role of the CEACR, the spokespersons for the Employers and Workers members strongly defended such role:

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<sup>90</sup> ILC, 77th Session, 1990, Report of the Committee on the Application of Standards, para 20 [Document No. 77].

<sup>91</sup> ILC, 100th Session, 2011, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, paras 10–12 [Document No. 101].

<sup>92</sup> ILC, 100th Session, 2011, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, paras 10–12 [Document No. 101].

<sup>93</sup> GB.349bis/INS/1/1, 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, September 2023, para 84 [Document No. 29].

'the spokesman for the Employers' members, speaking in the name of the large majority of those members, rejected the argument that the Committee of Experts has gone beyond its terms of reference. The spokesman for the Workers' members, speaking in the name of the large majority of those members, recalled that the Committee of Experts is not a tribunal and does not act like one. He repeated their convictions that the Committee of Experts should remain above the struggle and should retain its autonomy. The Government members of Belgium, France and the Federal Republic of Germany agreed that the Committee of Experts has a technical and not a judicial function. Its report, in which it evaluates the effect given to Conventions from a strictly legal point of view, is a basis for the dialogue which takes place in the Conference Committee. The Government members of Belgium and France recalled that it was because it was impossible for the Conference itself to examine the reports supplied by governments, that the Committee of Experts was created after the adoption of the ILO Constitution, in order to assist the Conference'<sup>94</sup>

74. In 2014, during a consultative process between the Director General with all groups on the functioning of the ILO supervisory system '*consensus seems to have formed that a degree of interpretation is inherent and necessary to the experts' task of assessing the application of ratified Conventions*'.<sup>95</sup> The report further established that '*consultations confirm strong constituent support for the roles and authority of the Conference Committee on the Application of Standards and the Committee of Experts as the crucial and complementary components of the supervisory system*'.<sup>96</sup> Explicit expressions of support by member states have also been manifest in the sessions of the Governing Body, including from the government group and regional representatives.<sup>97</sup>
75. ILO bodies themselves have also embraced the CEACR's interpretative role for the past decades, including the Governing Body, where the three constituencies of the ILO are represented, and the International Labour Office. In 1993, the Governing Body maintained that '*it is clear that the Committee has taken on a more independent role regarding interpretation, as it also has in other fields, without raising objections of principle. This enlarged role is in fact*

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<sup>94</sup> ILC, 73rd Session, 1987, Proceedings, No 24, Report of the Committee on the Application of Conventions and Recommendations, Part One: General Report, para 27 (**Annex 10**)

<sup>95</sup> GB.320/LILS/4, The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, March 2014 para 13 [**Document No. 83**].

<sup>96</sup> GB.320/LILS/4, The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, March 2014 para 24 [**Document No. 83**].

<sup>97</sup> Minutes of the 320th Session of the Governing Body, March 2014, paras 582, 583, 584, 587, 588, 589, 591, 592 [**Document No. 84**].

*a response to the inherent needs of its work*'.<sup>98</sup> Thirty years later, the position has remained unchanged. The Governing Body has recently stated that '[t]he interpretative pronouncements of supervisory bodies are invariably based on the premise that a degree of interpretation is inherent in any function responsible for monitoring compliance' and that the pronouncements of the Committee of Experts, in particular, 'carry considerable moral force due to the stature of their members and the quasi-judicial nature of their function'.<sup>99</sup> The Governing Body has further foregrounded the fact that the CEACR's views and findings have been 'directly invoked by international courts', including the ECtHR, the IACtHR as well as different human rights treaty bodies, National Contact Points for the OECD Guidelines for Multinational Enterprise, and arbitrators.<sup>100</sup>

76. For its part, the International Labour Office has also long noted the parallel development of an interpretation machinery '*to fill the gaps ... which to a certain extent makes it possible to settle day-to-day difficulties without having to go through the complex procedure of requesting an advisory opinion of the Court*'.<sup>101</sup>

### **(3) The interpretative function of the CEACR on the right to strike is accepted by most ILO members**

77. By September 2023, the CEACR had documented numerous country-specific comments on the right to strike within the context of regular supervision and the examination of reports submitted under Article 22 of the Constitution over the past 65 years.<sup>102</sup> The breadth of the CEACR's work in this regard is

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<sup>98</sup> GB.256/SC/2/2, Article 37, paragraph 2, of the Constitution and the interpretation of international labour Conventions, May 1993, para 26 [Document No. 96].

<sup>99</sup> GB.349bis/INS/1/1, 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, September 2023, para 85 [Document No. 29].

<sup>100</sup> GB.349bis/INS/1/1, 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, September 2023, paras 87–88 [Document No. 29].

<sup>101</sup> GB.256/SC/2/2, Article 37, paragraph 2, of the Constitution and the interpretation of international labour Conventions, May 1993, para 10 [Document No. 96].

<sup>102</sup> GB.349bis/INS/1/1, 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, September 2023, para 54 [Document No. 29].

evidenced by its issuance of 75 observations to Member States regarding the exercise of the right to strike in just two years.<sup>103</sup>

78. States have accepted and relied upon the CEACR's opinions and recommendations when implementing this instrument in their national legal system in national legislation, international instruments, and court decisions. Examples include Greece,<sup>104</sup> Japan,<sup>105</sup> Honduras,<sup>106</sup> Philippines,<sup>107</sup> Panama,<sup>108</sup> Bolivia,<sup>109</sup> Egypt,<sup>110</sup> Nicaragua,<sup>111</sup> Guinea,<sup>112</sup> Burkina Faso,<sup>113</sup> Poland,<sup>114</sup> Algeria,<sup>115</sup> Bulgaria,<sup>116</sup> Hungary,<sup>117</sup> Romania,<sup>118</sup> Ukrainian SSR,<sup>119</sup>

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<sup>103</sup> ILC, 110th Session, 2022, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part A), pp. 97–318 (**Annex 11**), and ILC, 111st Session, 2023, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part A), pp. 101–342 (**Annex 12**)

<sup>104</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 29 [**Document No. 68**].

<sup>105</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 30 [**Document No. 68**].

<sup>106</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 30 [**Document No. 68**].

<sup>107</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, pp. 30–31 [**Document No. 68**].

<sup>108</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 31 [**Document No. 68**].

<sup>109</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, pp. 31–32 [**Document No. 68**].

<sup>110</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 32 [**Document No. 68**].

<sup>111</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, pp. 32–33 [**Document No. 68**].

<sup>112</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 33 [**Document No. 68**].

<sup>113</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 34 [**Document No. 68**].

<sup>114</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, pp. 34–35 [**Document No. 68**].

<sup>115</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 35 [**Document No. 68**].

<sup>116</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 35 [**Document No. 68**].

<sup>117</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 35 [**Document No. 68**].

<sup>118</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 36, 45 [**Document No. 68**].

<sup>119</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 36 [**Document No. 68**].

USSR,<sup>120</sup> Canada,<sup>121</sup> Congo,<sup>122</sup> Dominican Republic,<sup>123</sup> Ethiopia,<sup>124</sup>  
Rwanda,<sup>125</sup> Costa Rica,<sup>126</sup> Paraguay,<sup>127</sup> Australia,<sup>128</sup> Azerbaijan,<sup>129</sup> Gabon,<sup>130</sup>  
Latvia,<sup>131</sup> Chad,<sup>132</sup> Namibia,<sup>133</sup> Slovakia,<sup>134</sup> Mozambique,<sup>135</sup> Nigeria,<sup>136</sup> South

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- <sup>120</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 36 [Document No. 68].
- <sup>121</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, pp. 36–37 [Document No. 68].
- <sup>122</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 37 [Document No. 68].
- <sup>123</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 37 [Document No. 68].
- <sup>124</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 37 [Document No. 68].
- <sup>125</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 37 [Document No. 68].
- <sup>126</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 38 [Document No. 68].
- <sup>127</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 38 [Document No. 68].
- <sup>128</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 39 [Document No. 68].
- <sup>129</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 39 [Document No. 68].
- <sup>130</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, pp. 39–40 [Document No. 68].
- <sup>131</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 40, 42 [Document No. 68].
- <sup>132</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, pp. 40–41 [Document No. 68].
- <sup>133</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 41 [Document No. 68].
- <sup>134</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 41, 45 [Document No. 68].
- <sup>135</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 42 [Document No. 68].
- <sup>136</sup> ILO, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, 2003, p. 42 [Document No. 68].

Africa,<sup>137</sup> United Kingdom,<sup>138</sup> Yemen,<sup>139</sup> Estonia,<sup>140</sup> Pakistan,<sup>141</sup> Switzerland,<sup>142</sup> Moldova,<sup>143</sup> Eswatini,<sup>144</sup> Myanmar,<sup>145</sup> and Georgia.<sup>146</sup>

#### D. THE CEACR'S VIEWS ON THE RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

##### (1) The CEACR has maintained a consistent interpretation of the right to strike since 1959

79. In 1959, the CEACR expressed a view on the right to strike within the context of Convention No. 87 for the first time. In commenting on the right of employers' and workers' organizations to organize their activities and to formulate their programs under Article 3(1) of ILO Convention No. 87, the Committee noted that:

**'The prohibition of strikes by workers, excluding public officials acting on behalf of public authorities, may conflict with Article 8, paragraph 2, of Convention No. 87, which states that "the law of the land shall not impair, nor shall it be so applied as to impair, the guarantees provided for" in the Convention, particularly the freedom of action of trade union organizations in safeguarding their occupational interests'.**<sup>147</sup>

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<sup>137</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, pp. 42–43 [Document No. 68].

<sup>138</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 43 [Document No. 68].

<sup>139</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 43 [Document No. 68].

<sup>140</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 44 [Document No. 68].

<sup>141</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 45 [Document No. 68].

<sup>142</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, pp. 45–46 [Document No. 68].

<sup>143</sup> ILO, The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact, 2003, p. 46 [Document No. 68].

<sup>144</sup> ILO, Monitoring compliance with international labour standards – The key role of the ILO Committee of Experts on the application of Conventions and Recommendations, 2019, pp. 44–46 [Document No. 69].

<sup>145</sup> ILO, Monitoring compliance with international labour standards – The key role of the ILO Committee of Experts on the application of Conventions and Recommendations, 2019, pp. 71–74 [Document No. 69].

<sup>146</sup> ILO, Monitoring compliance with international labour standards – The key role of the ILO Committee of Experts on the application of Conventions and Recommendations, 2019, pp. 77–79 [Document No. 69].

<sup>147</sup> ILC, 43rd Session, 1959, Report III (Part IV), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 101–129, para 68 [Document No. 232]. (Emphasis added)

This consideration was discussed by the Conference Committee on the Application of Standards, and none of the tripartite constituents raised objections.<sup>148</sup>

80. In 1973, the CEACR developed this interpretation by commenting that general prohibitions of strikes constituted a '*considerable restriction of the opportunities open to trade unions*' for guarantees protected in Convention No. 87: namely, the right of trade unions to organize their activities enshrined in Article 3 and trade unions' objective of furthering and defending the interests of workers established under Article 10.<sup>149</sup> It recalled its initial position as expressed in 1959, according to which '*Article 8 of the Convention establishes 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 the Convention, including the right of trade unions to organise their activities*'.<sup>150</sup>
81. The CEACR upheld this stance in subsequent general surveys, adding that the right to strike had '*been taken for granted in the report prepared for the first discussion of Convention No. 87*' and that, in the absence of an express provision, the Committee derived a right to strike was from a combined reading of articles of the convention.<sup>151</sup> The right to strike was thus confirmed as an '*intrinsic corollary*' of the right to organize protected by Convention No. 87.<sup>152</sup> By 2012, the CEACR recalled and reaffirmed the understanding of the right to

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<sup>148</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 118.

<sup>149</sup> ILC, 58th Session, 1973, Report III (Part 4B), Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, para 107 [Document No. 233]. This was reiterated a decade later: ILC, 69th Session, 1983, Freedom of Association and Collective Bargaining: General Survey, Report III (Part 4 B), para 205.

<sup>150</sup> ILC, 58th Session, 1973, Report III (Part 4B), Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, para 107 [Document No. 233].

<sup>151</sup> ILC, 81st Session, 1994, Freedom of Association and Collective Bargaining: 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), Report III (Part 4B), paras 142, 145 (Annex 13)

<sup>152</sup> ILC, 81st Session, 1994, Freedom of Association and Collective Bargaining: 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), Report III (Part 4B), para 151 (Annex 13)

strike as rooted in Articles 3 and 10 of Convention No. 87.<sup>153</sup> Moreover, in light of Article 32 of the Vienna Convention of the Law of Treaties, the CEACR further incorporated consideration of the tripartite constituencies '*subsequent practice over a period of 52 years*'.<sup>154</sup>

**(2) The CEACR's interpretation provides comprehensive guidance on the application of the right to strike**

82. The CEACR has developed comprehensive guidance on the right to strike, which also incorporates the principles established by the Committee on Freedom of Association.<sup>155</sup> The general characteristics of the right to strike are as follows: (i) the right holders comprise workers' organizations, namely, trade unions, federations, and confederations; (ii) only limited categories of workers may be denied this right and only limited restrictions may be imposed by law on its exercise; (iii) strikes must be aimed at furthering and defending the economic and social interests of workers and; (iv) the legitimate exercise of the right to strike should not lead to any kind of sanctions as these would be tantamount to acts of anti-union discrimination.<sup>156</sup>
83. In the CEACR's view, any kind of work stoppage, which may include actions like 'go-slow' strikes and 'work-to-rule' actions, is generally regarded as a strike.<sup>157</sup> Restrictions on these actions can only be justified if they cease to be peaceful. Within this framework, a general prohibition of strikes is incompatible with Convention No. 87, although the CEACR recognizes that supervisory bodies accept the prohibition of wildcat strikes.<sup>158</sup> The Committee asserts that

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<sup>153</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 117 (**Annex 14**)

<sup>154</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 118 (**Annex 14**)

<sup>155</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 117 (**Annex 14**)

<sup>156</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 122 (**Annex 14**)

<sup>157</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 126 (**Annex 14**)

<sup>158</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 122 (**Annex 14**)

strikes concerning governmental economic and social policies should not be classified as purely political strikes, which fall outside the scope of the convention.<sup>159</sup> Additionally, sympathy strikes are considered lawful by the CEACR, as long as the initial strike supported by the workers is lawful itself.<sup>160</sup>

84. The right to strike can be limited or even prohibited in three main cases.<sup>161</sup> First, the CEACR considers that specific categories of public servants may generally be excluded from the scope of the convention, in particular, public servants exercising authority in the name of the State.<sup>162</sup> Public sector teachers, postal workers, and railway employees should benefit from the right to strike without being liable to sanctions, even though the maintenance of a minimum service may be envisaged in these sectors.<sup>163</sup> Second, restrictions may also apply to essential services, defined as those '*the interruption of which would endanger the life, personal safety or health of the whole or part of the population*'.<sup>164</sup> This concept is not absolute, and non-essential services may become essential if a strike persists beyond a certain duration or scale.<sup>165</sup> The ILO supervisory system has reviewed numerous cases in which it has determined certain services to be essential while deeming others non-essential.<sup>166</sup> Third, in the CEACR's view, restrictions may also apply in situations of acute national or

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<sup>159</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 124 (**Annex 14**)

<sup>160</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 125 (**Annex 14**)

<sup>161</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 127 (**Annex 14**)

<sup>162</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 129 (**Annex 14**)

<sup>163</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 130 (**Annex 14**)

<sup>164</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 131 (**Annex 14**)

<sup>165</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 131 (**Annex 14**)

<sup>166</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, paras 134–135 (**Annex 14**)

local crisis, albeit for a limited duration and only to the extent necessary to address the situation's demands.<sup>167</sup>

85. Furthermore, the CEACR has provided detailed guidance on the circumstances in which it is acceptable to negotiate minimum service,<sup>168</sup> the circumstances in which workers must be compensated for the deprivation of their right to strike,<sup>169</sup> restrictions on strikes during the term of a collective agreement,<sup>170</sup> prerequisites of strikes (such as exhaustion of prior procedures, cooling off periods, notice, quorum and majorities to call a strike),<sup>171</sup> restrictions applicable to the course of the strike,<sup>172</sup> the imposition of compulsory arbitration to end collective labor disputes,<sup>173</sup> the imposition of sanctions,<sup>174</sup> and the dismissal of for strike action and reinstatement of strikers.<sup>175</sup>
86. As discussed next, such consistent and comprehensive guidance, and the CEACR's interpretive function from which it stems, are important in the context of the just transition of the workforce driven by the need to tackle climate change.

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<sup>167</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 140 (**Annex 14**)

<sup>168</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 136. Further restrictions on negotiated minimum service are identified in paras 137–138 (**Annex 14**)

<sup>169</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 141 (**Annex 14**)

<sup>170</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, paras 142–143 (**Annex 14**)

<sup>171</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, paras 144–148 (**Annex 14**)

<sup>172</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, paras 149–152 (**Annex 14**)

<sup>173</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, paras 153–155 (**Annex 14**)

<sup>174</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, paras 157–160 (**Annex 14**)

<sup>175</sup> ILC, 101st Session, 2012, Report III (Part 1B), Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para 161 (**Annex 14**)

## CHAPTER IV: THE RIGHT TO STRIKE PLAYS A CRITICAL ROLE IN THE JUST TRANSITION IN OACPS COUNTRIES

### A. SUMMARY OF THE OACPS POSITION

87. As set forth herein, the OACPS argues that the right to strike is recognized as a crucial component of the just transition of the workforce in the context of policies to fight climate change. It enables workers to participate in shaping just transition policies (C(1)); collectively negotiate key aspects of the transition (C(2)); advocate for equitable sharing of transition costs and benefits (C(3)); and demand job-creating investments (C(4)). The OACPS argues that this recognition of the right to strike in achieving the goals of the just transition provides important context for interpreting ILO Convention No. 87 as protecting the right to strike. The OACPS further argues that (i) the right to strike is crucial for achieving a just transition in OACPS countries, given the specific challenges they face; and (ii) developed States have a legal obligation to provide financial, technical and other forms of transition support to developing States.

### B. STATES' OBLIGATIONS TO RESPECT AND ENSURE THE RIGHT TO STRIKE ENTAIL INTERNATIONAL ASSISTANCE AND COOPERATION

88. As noted above, the right to strike is generally considered to be '*self-executing*' and therefore not contingent upon progressive realization. The right obliges States to remove legal impediments to the right to strike,<sup>176</sup> adopt legal frameworks expressly recognizing the right to strike,<sup>177</sup> and put in place effective machinery for its implementation.<sup>178</sup> In addition, as for all economic, social and cultural rights, States are required to take steps individually and through international assistance and cooperation, to ensure the realization of the right to strike.<sup>179</sup>

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<sup>176</sup> CESCR, Concluding observations: Egypt, E/C.12/1/Add.44 (23 May 2000), [18] (**Annex 15**)

<sup>177</sup> See e.g. CESCR, Concluding observations: Afghanistan, E/C.12/AFG/CO/2-4 (7 June 2010), [25] (**Annex 16**); CESCR, Concluding observations: Democratic People's Republic of Korea, E/C.12/1/Add.95 (12 December 2003), [16] (**Annex 17**); CESCR, Concluding observations: Sri Lanka, E/C.12/1/Add.24 (16 June 1998) (**Annex 18**).

<sup>178</sup> CESCR, Concluding observations: Paraguay, E/C.12/1/Add.1 (28 May 1996), [25] (**Annex 19**).

<sup>179</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3, art 2(1).

89. The duty to cooperate is a cornerstone of the international legal order. Through Article 56 of the Charter of the United Nations, UN members pledge themselves to take joint and separate action in cooperation with the UN to achieve the objective in Article 55, namely, to promote, amongst other things, '*universal respect for, and observance of, human rights and fundamental freedoms for all*'.<sup>180</sup> Core human rights instruments, including the Universal Declaration of Human Rights<sup>181</sup> and the ICESCR,<sup>182</sup> among others,<sup>183</sup> also make reference to and impose obligations regarding international cooperation. According to the CESCR:

'[I]n accordance with Articles 55 and 56 of the [UN Charter], with well-established principles of international law, and with the provisions of the Covenant itself, **international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States**. It is particularly incumbent upon those States which are in a position to assist others in this regard.'<sup>184</sup> (emphasis added)

90. The duty to cooperate is particularly relevant in the context of climate change. As noted in the preamble of the United Nations Framework Convention on Climate Change (**UNFCCC**), '*the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate response*'.<sup>185</sup> The Paris Agreement also recognizes

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<sup>180</sup> See also Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN Doc A/CONF.157/23, paras. 4, 10, 11, 13, 18, 21, 47, 48 (**Annex 20**); UN General Assembly Resolution 48/141: 'High Commissioner for the promotion and protection of all human rights', 7 January 1994, A/RES/48/141, preambular para. 7 (**Annex 21**).

<sup>181</sup> UN General Assembly Resolution 217 A(III): Universal Declaration of Human Rights, 10 December 1948, art 22 (everyone is entitled to the 'realization, through national effort and international cooperation (...) of the economic, social and cultural rights indispensable for [their] dignity and the free development of [their] personality').

<sup>182</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3, art 2(1) (binds all State parties to take steps '*individually and through international assistance and co-operation, especially economic and technical*', towards the full realisation of the rights recognised in the Covenant); see also art 11(1) (noting the essential importance of international cooperation for the realisation of the right to an adequate standard of living) and art 15(4) (recognising benefits of co-operation in the scientific and cultural fields). By virtue of these provisions, the ICESCR imposes international cooperation obligations on States in connection with all Covenant rights.

<sup>183</sup> See Convention on the Rights of Persons with Disabilities (opened for signature on 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 32, see also arts. 4(2), 37-38; Convention on the Rights of the Child (opened for signature on 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 4, 17, 22(2), 23(4), 24(4), 28(3), 45.

<sup>184</sup> CESCR, General Comment No. 3 (1990) on article 12(1) of the International Covenant on Economic, Social and Cultural Rights, on the nature of States Parties' obligations (14 December 1990) UN Doc E/1991/23, para. 14.

<sup>185</sup> United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, preamble.

the importance of international cooperation in its preamble and operative provisions.<sup>186</sup> The UN Human Rights Council has urged States to ‘*strengthen and implement policies aimed at enhancing international cooperation based on human rights . . . despite the adverse effects of climate change*’.<sup>187</sup>

91. Importantly, the content of States’ international cooperation obligations related to climate change is differentiated, in line with the principles of equity and common but differentiated responsibilities and respected capabilities (CBDRRC). This differentiation aims at correcting historical inequities and, in the context of human rights, ensuring the realization of human rights everywhere.<sup>188</sup> As the CESCR has stated, international cooperation for the realization of economic, social and cultural rights is ‘*particularly incumbent upon those States which are in a position to assist others in this regard*’.<sup>189</sup> Further, the UNFCCC and the Paris Agreement specifically oblige developed States to provide financial, technological and capacity-building support to

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<sup>186</sup> Paris Agreement, 12 December 2015, 3156 UNTS 79, preamble (‘Affirming the importance of education, training, public awareness, public participation, public access to information and cooperation at all levels on the matters addressed in this Agreement,’) and arts. 6(1)-(2) (mitigation), 7(6)-(7) (adaptation), 8(3)-(4) (loss and damage), 10 (2), (6) (technology transfer), 11(3) (capacity building), 14(3) (enhanced action following the global stocktake).

<sup>187</sup> Human Rights Council, Resolution 50/9: Human Rights and Climate Change, UN Doc. A/HRC/RES/50/9 (14 July 2022), para. 11 (Annex 22). See, further, D. Boyd, *Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 8 January 2019, A/HRC/40/55, para. 75 (Annex 23); D. Boyd, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 15 July 2019, UN Doc A/74/161, para. 68 (Annex 24); J. H Knox, *Framework principles on human rights and the environment*, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean healthy and sustainable environment” (24 January 2018) A/HRC/37/59 annex, para. 36, 37, 39 (Annex 25); D. Boyd, *Healthy Biosphere*, Report of the Special Rapporteur on Human Rights and the Environment, A/75/161, para. 74 (Annex 26); Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, *Statement on human rights and climate change*, HRI/2019/1 (14 May 2020), para. 17 (Annex 27).

<sup>188</sup> CESCR, General Comment No. 3 (1990) on article 12(1) of the International Covenant on Economic, Social and Cultural Rights, on the nature of States Parties’ obligations (14 December 1990) UN Doc E/1991/23, para. 13 (Annex 28). See D. Boyd, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 15 July 2019, UN Doc A/74/161 (Annex 24), para. 68; D. Boyd, *Healthy Biosphere*, Report of the Special Rapporteur on Human Rights and the Environment, A/75/161 (Annex 26), para. 74. See also M. Wewerinke-Singh, “Pandemics, Planetary Health and Human Rights: Rethinking the Duty to Cooperate in the Face of Compound Global Crises” (2021) 24(1) *Max Planck Yearbook of United Nations Law (Online)* 399, pp. 413, 419 (Annex 29).

<sup>189</sup> CESCR, General comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant), E/1991/23, para. 14 (Annex 30).

developing States,<sup>190</sup> while respecting and protecting human rights in the process.<sup>191</sup>

### **C. THE RIGHT TO STRIKE IS A RECOGNIZED COMPONENT OF THE JUST TRANSITION**

92. Human rights experts have highlighted the importance of safeguarding the right to strike as part of a just transition to low-carbon societies.<sup>192</sup> This recognition of the right to strike in the just transition is important context—in this case, subsequent agreement and practice<sup>193</sup>—which supports the conclusion that the right to strike is protected under ILO Convention No. 87.
93. As set forth below, the right to strike enables the realization of core components of the just transition, including worker participation in policy-making, collective negotiation of transition measures, advocacy for equitable burden sharing, and demands for job-creating investments.

#### **(1) The right to strike enables worker participation in just transition policy-making**

94. The right to strike is essential for ensuring effective worker participation in just transition policy-making. As the UN Special Rapporteur on the rights to freedom of peaceful assembly and association has emphasized, the right to strike provides workers with '*fundamental tools*' to '*engage with big business and government on a more equal footing*' in shaping policies that affect them.<sup>194</sup> This is crucial in OACPS countries, where fiscal constraints and limited resources can marginalize worker voices in transition planning.<sup>195</sup>
95. The right to strike empowers workers to influence broad macro-economic, industrial, and social policies relevant to the just transition. As commentators have pointed out, the right to strike prevents mere '*collective begging*' and

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<sup>190</sup> United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, art. 4; Paris Agreement, 12 December 2015, 3156 UNTS 79, art 9.

<sup>191</sup> Paris Agreement, 12 December 2015, 3156 UNTS 79, preamble.

<sup>192</sup> Maina Kiai, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association' (14 September 2016) UN Doc. A/71/385 para 54 (**Annex 31**).

<sup>193</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art 31(3).

<sup>194</sup> Maina Kiai, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association' (14 September 2016) UN Doc. A/71/385 para 54 (**Annex 31**).

<sup>195</sup> S. Black, et al. 'Fiscal Implications of Global Decarbonization', International Monetary Fund 2024, p. 21 (**Annex 32**).

instead enables workers to have meaningful influence in policy design.<sup>196</sup> Legal restrictions on who can join unions, the permissible subject matter of collective bargaining, and the right to strike itself can undermine workers' ability to shape the transition. Protecting a robust right to strike is therefore essential.

96. Worker participation in the just transition is also part of the public participation demanded by the Paris Agreement,<sup>197</sup> and is enabled and catalyzed by the right to strike. Enabling a just transition requires the '*existence of a vibrant and dynamic civil society*' and thus recognition and protection of the right to conduct strikes.<sup>198</sup> As noted by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, '*The ability of individuals to mobilize, organize and connect and to contribute to shaping public opinion and decision making without fear ... is essential to the production of effective climate action and just transitions.*'<sup>199</sup>

## **(2) The right to strike enables collective negotiation of just transition measures**

97. The right to strike is crucial for enabling workers to collectively negotiate the terms of the just transition with employers. Guidelines released by the International Labour Organization in 2015 regarding the just transition emphasize, effective social dialogue, including collective bargaining, is a key pillar of the just transition. The right to strike provides workers with the leverage necessary to compel employers to the bargaining table and agree to just transition measures.
98. In OACPS countries, where workers often face precarious employment conditions and power imbalances vis-a-vis employers, the right to strike is critical for ensuring effective collective bargaining on just transition issues. Absent a credible strike threat, collective bargaining is unlikely to be effective.

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<sup>196</sup> TA Novitz, 'A just transition for labour: How to enable collective voice from the world of work' (2023) 177/178 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 55, section IV (methods of voice) (Annex 33)

<sup>197</sup> See, e.g., Paris Agreement, 12 December 2015, 3156 UNTS 79, art 6(8)(b), art 7, art 11(2), art 12.

<sup>198</sup> Clément Nyaletsossi Voule, Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice, report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 23 July 2021, UN Doc A/76/222 para 74 (Annex 34).

<sup>199</sup> Clément Nyaletsossi Voule, Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice, report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 23 July 2021, UN Doc A/76/222 para 8 (Annex 34).

Protecting the right to strike is therefore essential for realizing the vision of industrial democracy and worker participation that underpins the just transition. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has accordingly recommended that States '*ensure that all workers are guaranteed the right to associate, including the right to strike, and to bargain collectively at all levels, including over matters related to climate change and just transitions*'.<sup>200</sup>

99. The ILO's 2015 Guidelines on Just Transition stress that policies related to a just transition framework should include '*the effective exercise of the right to organize and bargain collectively*'.<sup>201</sup> Annex 1 of these guidelines refers to Convention No. 87 as relevant to the just transition.<sup>202</sup> In light of the ILO bodies' longstanding recognition of the right to strike as a corollary of the rights expressly protected under Convention No 87, it is clear that the right to strike must be considered an inherent part of a just transition framework.

### **(3) The right to strike enables advocacy for equitable burden-sharing**

100. The right to strike enables workers to advocate for equitable sharing of the costs and benefits of the just transition. The importance of equitable burden sharing has been recognized in international climate agreements, including the Paris Agreement.<sup>203</sup> States Parties to the UNFCCC have reaffirmed this need for equitable burden sharing in the Glasgow Climate Pact of 2021, which calls upon States Parties to ensure that such just transitions are implemented in a way to '*promote sustainable development and eradication of poverty, and the creation of decent work and quality jobs*'.<sup>204</sup>
101. In OACPS countries, the right to strike is a crucial tool for workers to demand equitable transition policies. Many OACPS economies are heavily dependent

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<sup>200</sup> Clément Nyaletsossi Voule, Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice, report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 23 July 2021, UN Doc A/76/222 para 90(g) (Annex 34).

<sup>201</sup> ILO, 'Guidelines for a just transition towards environmentally sustainable economies and societies for all' (2015) para 13(e) (Annex 35).

<sup>202</sup> ILO, 'Guidelines for a just transition towards environmentally sustainable economies and societies for all' (2015) Annex 1 A (Annex 35).

<sup>203</sup> Paris Agreement, 12 December 2015, 3156 UNTS 79, preamble ('Taking into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities).

<sup>204</sup> Decision 1/CMA.3: Glasgow Climate Pact, 8 March 2022, UN Doc. FCCC/PA/CMA/2021/10/Add.1, para 85 (Annex 36).

on carbon-intensive sectors, making the costs of the transition particularly acute. The right to strike allows workers to advocate for social protection, re-training, and other measures to ensure they are not left behind in the shift to a low-carbon economy. As the UN Special Rapporteur on the rights of Indigenous peoples has emphasized, the just transition requires active efforts to ensure that *'those who are most affected by environmental harm do not bear the costs of the transition and that they participate in the formation of policy solutions.'*<sup>205</sup> And the UN Special rapporteur on extreme poverty has highlighted that all workers must be protected from the impacts on their livelihoods associated with the ecological transformation demanded by the just transition.<sup>206</sup> For many worker communities such as migrants, the effective recognition of workers' rights, including the right to strike, serves to strengthen their position and reduce the risk of marginalization and exploitation.<sup>207</sup>

102. The recognition of the need for decent work and quality jobs as part of the Glasgow Climate Pact, as well as the recognized need to protect vulnerable worker communities, is important context in interpreting ILO Convention 87 and supports an explicit acknowledgment of the right to strike under ILO Convention 87.

#### **(4) The right to strike enables demands for job-creating investments**

103. Finally, the right to strike is essential for enabling workers to demand job-creating investments in the just transition. The scale of investments needed for the transition is enormous. The International Energy Agency (IEA) estimates that annual clean energy investments in developing countries need to expand by *'more than seven times, to above USD 1 trillion, in order to put the world on track to reach net-zero emissions by 2050'*.<sup>208</sup> Mobilizing such investments will

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<sup>205</sup> José Francisco Calí Tzay, *Green financing – a just transition to protect the rights of Indigenous Peoples*, Report of the Special Rapporteur on the human rights of Indigenous Peoples, 21 July 2023 UN Doc. A/HRC/54/31 para 6 (**Annex 37**)

<sup>206</sup> Olivier de Schutter, *The “just transition” in the economic recovery: eradicating poverty within planetary boundaries*, Interim Report of the Special Rapporteur on extreme poverty and human rights, 7 October 2020 UN Doc. A/75/181/Rev.1 para 56 (**Annex 38**)

<sup>207</sup> François Crépeau, *Labour exploitation of migrants*, Report of the Special Rapporteur on the human rights of migrants, 3 April 2014, UN Doc A/HRC/26/35 para 45 (**Annex 39**)

<sup>208</sup> IEA, *'Financing Clean Energy Transitions in Emerging and Developing Economies'* (2021), Executive Summary (**Annex 40**).

be especially challenging in OACPS countries, which face urgent development needs and already confront a crisis of debt and limited fiscal space.

104. The right to strike allows workers to shape these investment flows and ensure they support decent job creation. As the Special Rapporteur on the rights to freedom of peaceful assembly and of association notes, *'restrictions on workers' rights to organize and bargain collectively, including through strikes, are particularly severe within the context of foreign investments'*.<sup>209</sup> Protecting a robust right to strike is crucial for enabling workers in OACPS countries to demand that the unprecedented investments in the just transition benefit local communities and workers. Absent the right to strike, there is a risk that just transition investments will be shaped solely by the interests of foreign corporations and investors, not the needs of workers in OACPS countries.

#### **D. OBLIGATIONS OF INTERNATIONAL COOPERATION AND ASSISTANCE RELATED TO THE RIGHT TO STRIKE**

105. As noted in the preceding sections, OACPS countries face significant challenges in transitioning to a low-carbon future while realizing human rights as part of this process.<sup>210</sup> These include fiscal and financial constraints, foreign debt, dependence on carbon-intensive sectors,<sup>211</sup> rapidly growing energy demand, and challenges in mobilizing finance for clean energy projects.<sup>212</sup> According to the IPCC, adoption of low-emission technologies *'lags in most developing countries, particularly least developed ones, due in part to weaker enabling conditions, including limited finance, technology development and transfer, and capacity'*.<sup>213</sup> Financial resources to deploy low-emission

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<sup>209</sup> Clément Nyaletsossi Voule, Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice, report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 23 July 2021, UN Doc A/76/222, para 46 (Annex 34).

<sup>210</sup> S. Black, et al. 'Fiscal Implications of Global Decarbonization', International Monetary Fund 2024, p. 21 (Annex 32).

<sup>211</sup> A. Heras, J. Gupta, 'Fossil fuels, stranded assets, and the energy transition in the Global South: A systematic literature review' (2023) 15(1) *WIREs Climate Change* e866 p. 7 (Annex 41)

<sup>212</sup> IEA, 'Financing Clean Energy Transitions in Emerging and Developing Economies' (2021), Executive Summary (Annex 40).

<sup>213</sup> IPCC, '2022: Summary for Policymakers' in Shukla et al (eds), *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022) para B.4.2 (Annex 42)

technologies are currently concentrated in developed countries.<sup>214</sup> The COVID-19 crisis and related policy responses globally have exacerbated these inequities, on account of lower fiscal revenues, increased borrowing costs, and lack of fiscal leeway. Continued reliance on fossil fuels also means that developing countries could face additional negative economic consequences from fossil fuel assets becoming '*stranded*', with potential negative consequences for the realization of economic and social rights.<sup>215</sup>

106. Developing countries, particularly least developed countries, already face '*daunting*' development challenges including '*soaring debt, export marginalization, energy poverty and climate vulnerability*'.<sup>216</sup> The World Bank notes that, '*many developing countries are dealing with shrinking growth prospects, weakening investment, and surging debt*', trends that are '*reversing hard-won development gains*' and which have '*particularly negative impacts on women and girls, poor and vulnerable people, and other marginalized communities*'.<sup>217</sup> Developing countries face a '*mounting debt crisis*', with total debt at the highest level in 50 years, with extreme risks of debt distress on account of '*rising interest rates, depreciating currencies, and slowing global growth*'.<sup>218</sup> Worsening climate impacts could lead to additional upward pressures on food and headline inflation,<sup>219</sup> which in turn will place pressure on developed States to maintain high-interest rate policies—the same policies that are exacerbating this debt crisis in developing States. This '*higher for longer*' interest rate environment has a detrimental effect on the green transition<sup>220</sup> and will add further challenges to such a transition in developing countries. With respect to adaptation, there is now a giant funding gap that must be filled. In some developing countries, annual needs for adaptation could exceed 1 per

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<sup>214</sup> IPCC, '2022: Summary for Policymakers' in Shukla et al (eds), *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022) para E.4.3 (Annex 42).

<sup>215</sup> Paul Akiwumi, 'Least developed countries cannot afford to strand their assets, given their development challenges' (26 November 2021, UNCTAD) (Annex 43).

<sup>216</sup> UNCTAD, 'Four key challenges facing least developed countries' (4 April 2022) (Annex 44).

<sup>217</sup> World Bank, *A New Era in Development*. Annual Report 2023, p. 8 (Annex 45)

<sup>218</sup> World Bank, *A New Era in Development*. Annual Report 2023, p. 10 (Annex 45)

<sup>219</sup> M. Kotz et al, 'Global warming and heat extremes to enhance inflationary pressures' (2024) 5 *Communications Earth & Environment* 116 (Annex 46)

<sup>220</sup> European Commission (DG-International Policies, Economic Governance and EMU Scrutiny Unit (EGOV)), 'Climate change considerations in monetary policy implementation' (November 2023) p. 14 (Annex 47)

cent of GDP. For small island nations exposed to tropical cyclones and rising seas, these adaptation costs could go up to 20 per cent of GDP.<sup>221</sup>

107. In the light of these challenges, developed States have a clear obligation to provide financial, technological, and capacity-building support to developing States for the just transition, as established under the UNFCCC and the Paris Agreement. Crucially, in providing this much-needed support, developed States must fully respect and protect the right to strike. As noted, restrictions on the right to strike are often most severe in the context of foreign investments - a troubling pattern undermining the equity and inclusiveness of the just transition in OACPS countries. To ensure that the investments needed for the transition benefit workers and communities, not just foreign investors, States must regulate private actors within their jurisdiction or under their control so as to ensure the right to strike of workers globally. They must refrain from any actions that would directly or indirectly restrict freedom of association, collective bargaining, or industrial action in developing States. Further, all States must proactively promote the full exercise of these rights in the context of just transition investments and projects.
108. The transboundary nature of climate change and environmental degradation necessitates not only North-South cooperation among States, but also transnational solidarity among workers and trade unions. As scholars highlight, '*coordinated bargaining across corporate subsidiaries supported, for example, by sympathy strikes and even transnational cross-border action*' will be essential for addressing these challenges equitably.<sup>222</sup> Developed States must therefore refrain from any measures that would impede such transnational exercises of the right to strike.
109. In sum, the right to strike creates obligations of international cooperation and assistance in the just transition. By giving effect to these obligations, States can ensure that the transition to a low carbon economy is truly inclusive and equitable or, in other words, 'just'. At the same time, realizing the full potential of the right to strike for the just transition will require enabling its exercise in

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<sup>221</sup> Kristalina Georgieva, Vitor Gaspar, and Ceyla Pazarbasioglu, 'Poor and Vulnerable Countries Need Support to Adapt to Climate Change' (23 March 2022, *International Monetary Fund*) (Annex 48)

<sup>222</sup> TA Novitz, 'A just transition for labour: How to enable collective voice from the world of work' (2023) 177/178 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 55, Introduction (Annex 33)

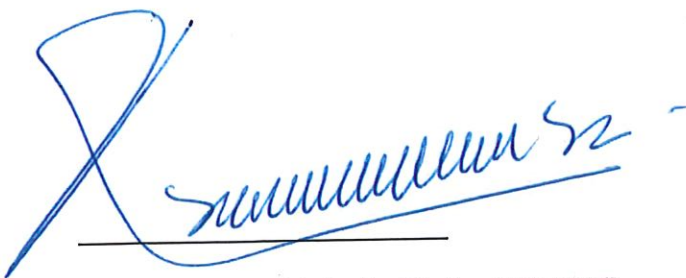
transnational solidarity. Developed States' obligations thus extend to protecting the right to strike not only within their own territories, but in its fullest scope under international labour law.

## CHAPTER VI: CONCLUSIONS

110. For the reasons provided in this Written Statement, the OACPS makes the following submissions:

- (a) The Court has jurisdiction to deliver the advisory opinion requested by the ILO in the Resolution adopted by the Governing Body at its 349<sup>th</sup> bis (Special) Session, and that there is no compelling reason for the Court to refrain from doing so.
- (b) The right to strike is protected under Convention No. 87 as a fundamental component and a corollary of the right to freedom of association.
- (c) The CEACR is competent to interpret Convention No. 87 as protecting the right to strike, which is inherent to the right to freedom of association, and to specify elements concerning the scope, limits, and conditions for the legitimate exercise of the right to strike.
- (d) The right to strike is a crucial component and plays a critical role in the just transition in OACPS countries, and the Court should recognize and refer to such role in its advisory opinion.

Respectfully submitted,



**H.E. Georges Rebelo Pinto CHIKOTI**  
**Secretary-General**  
**Organisation of African Caribbean and Pacific States (OACPS)**

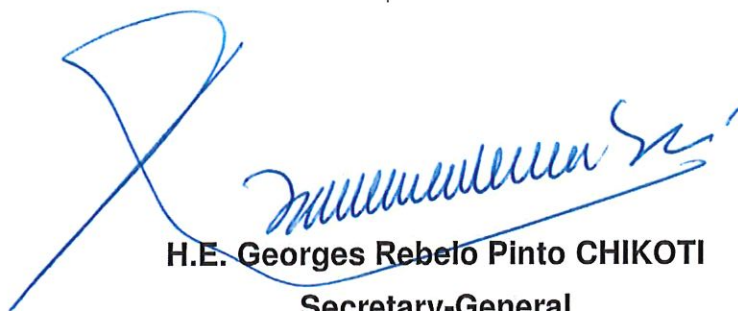
15 May 2024

**Certification**

I certify that the copies of documents annexed to this Written Statement are true copies of the original documents referred to.

15 May 2024

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**H.E. Georges Rebelo Pinto CHIKOTI  
Secretary-General**

**Organisation of African Caribbean and Pacific States (OACPS)**

## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
CAS	Conference Committee on the Application of Standards
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CESCR	Committee on Economic, Social, and Cultural Rights
CFA	Committee on Freedom of Association
CBDRRRC	Principle of equity and common but differentiated responsibilities and respected capabilities
Convention No. 87 or Convention	Freedom of Association and Protection of the Right to Organise Convention, 1948
Declaration of Philadelphia	Declaration concerning the aims and purposes of the International Labour Organisation
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ or the Court	International Court of Justice
IEA	International Energy Agency
ILO	International Labour Organization
OACPS	Organisation of African Caribbean and Pacific States
OECD	Organisation for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
UDHR	Universal Declaration of Human Rights
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties

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