Interpretation of the ILO Freedom of Association and the Protection of the Right to Organise Convention, 1948 (No. 87) with respect to the right to strike

Request for advisory opinion

Written Statement

International Labour Office
May 2024

INTERNATIONAL LABOUR CONFERENCE
CONFÉRENCE INTERNATIONALE DU TRAVAIL

CONVENTION (No. 87) CONCERNING FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE.

The General Conference of the International Labour Organisation,

Having been convened at San Francisco by the Governing Body of the International Labour Office, and having met in its Thirty-first Session on 17 June 1948;

Having decided to adopt, in the form of a Convention, certain proposals concerning freedom of association and protection of the right to organise, which is the seventh item on the agenda of the session;

Considering that the Preamble to the Constitution of the International Labour Organisation declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour and of establishing peace;

Considering that the Declaration of Philadelphia reaffirms that "freedom of expression and of association are essential to sustained progress";

... the International ... its Thirtieth ... the

IN FAITH WHEREOF we have appended our signatures this *thirty-first* day of *August* 1948.

CONVENTION (N° 87) CONCERNANT LA LIBERTÉ SYNDICALE ET LA PROTECTION DU DROIT SYNDICAL.

La Conférence générale de l'Organisation internationale du Travail,

Convoquée à San-Francisco par le Conseil d'administration du Bureau international du Travail, et s'y étant réunie le 17 juin 1948, en sa trente et unième session,

Après avoir décidé d'adopter sous forme d'une convention diverses propositions relatives à la liberté syndicale et la protection du droit syndical, question qui constitue le septième point à l'ordre du jour de la session,

Considérant que le Préambule de la Constitution de l'Organisation internationale du Travail énonce, parmi les moyens susceptibles d'améliorer la condition des travailleurs et d'assurer la paix, « l'affirmation du principe de la liberté syndicale » ;

Considérant que la Déclaration de Philadelphie a proclamé de nouveau que « la liberté d'expression et d'association est une condition indispensable d'un progrès soutenu » ;

Considérant que la Conférence internationale du Travail, à sa trentième session, a adopté à l'unanimité les principes qui doivent être à la base de la réglementation internationale ;

... la ... que l'Assemblée générale ... à sa deuxième ses- ... principes et a ...

EN FOI DE QUOI ont apposé leurs signatures, ce *trente et unième* jour ~~de~~ *d'août* 1948.

The President of the Conference,
Le Président de la Conférence,

Justin Godart

The Director-General of the International Labour Office,
Le Directeur général du Bureau international du Travail,

Edward J. Phelan

Each Member ... Organisation ...

Interpretation of the ILO Freedom of Association and the Protection of the Right to Organise Convention, 1948 (No. 87) with respect to the right to strike

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Abbreviations

ASPAG	Asia and Pacific group
EU	European Union
GRULAC	Group of Latin American and Caribbean countries
ICJ	International Court of Justice
ILC	International Labour Conference
ILO	International Labour Organization
IMEC	Group of industrialized and market economy countries
IOE	International Organisation of Employers
ITUC	International Trade Union Confederation
PCIJ	Permanent Court of International Justice

Contents

Abbreviations ii

Introduction 1

A. General considerations 2

B. The role of the Office 3

C. Structure of the Written Statement 5

PART I. The request for an advisory opinion 7

A. Referral process 7

B. Earlier debates and the quest for legal certainty 12

C. Jurisdiction and discretion 19

1. Jurisdiction 19
2. Judicial propriety 20

D. The legal effect of the Court's opinion 25

1. Article 37(1) is explicit and unambiguous 25
2. Article 37(1) is a dispute settlement clause 26
3. The binding effect of ICJ decisions under article 37(1) has long been recognized by tripartite constituents 27
4. The ICJ has consistently recognized that a treaty may attribute binding effect to advisory opinions 28
5. Legal doctrine and scholarly writings affirm that ICJ advisory opinions have the same intrinsic legal value as judgments 29

E. Participation of international employers' and workers' organizations in the advisory proceedings 31

PART II. The ILO system of standards 35

A. Adoption of standards 36

B. Supervision of standards 38

1. Regular supervision 38
2. Special procedures 40

C. Interpretation of standards 45

1. ILO bodies engaged in interpretation of standards 45
2. Means of interpretation of ILO standards 53

PART III. Freedom of association, Convention No. 87 and the right to strike . . . 61

A. ILO normative texts relating to freedom of association . . . 61

B. Convention No. 87: Origins, context and adoption . . . 64

1. Early attempts at a comprehensive standard on freedom of association . . . 64

2. The negotiating history of Convention No. 87 . . . 66

C. Comments of the ILO supervisory bodies in relation to Convention No. 87 and the right to strike . . . 71

1. Committee of Experts on the Application of Conventions and Recommendations . . . 72

2. Committee on Freedom of Association . . . 77

3. Commissions of Inquiry . . . 80

4. Committee on the Application of Standards . . . 81

5. Complementarity and synergy among the supervisory organs . . . 82

PART IV. International recognition of the right to strike . . . 85

A. International human rights instruments and jurisprudence of human rights courts . . . 85

1. Global instruments . . . 85

2. Regional instruments . . . 87

B. Bilateral free trade/labour agreements . . . 91

C. Decisions of national courts . . . 92

Conclusions . . . 95

List of Annexes . . . 99

▶ Introduction

1. The International Labour Office ("the Office") hereby submits this Written Statement, in accordance with the Order of the International Court of Justice (ICJ) of 16 November 2023, to provide information on the question submitted to the Court by the resolution adopted by the Governing Body of the International Labour Office on 10 November 2023.

2. This is the first time that the International Labour Organization (ILO) has requested an advisory opinion from the ICJ under article 37(1) of the ILO Constitution, which stipulates that "[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice".

3. The ILO requested an advisory opinion from the predecessor to the ICJ, the Permanent Court of International Justice (PCIJ), on six occasions, the last of which was in 1932. The fact that a considerable amount of time has elapsed since the ILO's last request for an advisory opinion does not mean that no questions relating to the interpretation of international labour Conventions have arisen in the past 90 years, but rather that there have not been any disagreements of an intensity and duration comparable to that of the current dispute.

4. The dispute under consideration concerns the interpretation of one of the core ILO Conventions,[1] the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and in particular whether the right of trade unions to take industrial action in the form of a work stoppage/strike is covered by the provisions of that Convention.[2]

5. The dispute revolves around, and stems from, the consistent view taken by the supervisory organs of the ILO, especially the Committee of Experts on the Application of Conventions and Recommendations, that the right to strike is an intrinsic corollary to the right to freedom of association and that, as such, it is recognized and protected by Convention No. 87. For over 30 years, one of the Organization's constituent groups has firmly challenged the Committee's authority to interpret Conventions, and more specifically, the validity and legal weight of the comments of the Committee on the application of Convention No. 87. The group in question considers that the Committee's comments purport to regulate the modalities and conditions of exercise of the right to strike, but that these modalities and conditions may not be regulated internationally under the guise of interpretation.

[1] The ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference on 19 June 1998, recognized the following eight Conventions as fundamental in that they give expression to the core principles and rights set out in the ILO Constitution: the Forced Labour Convention, 1930 (No. 29); the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Equal Remuneration Convention, 1951 (No. 100); the Abolition of Forced Labour Convention, 1957 (No. 105); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Minimum Age Convention, 1973 (No. 138); and the Worst Forms of Child Labour Convention, 1999 (No. 182). By a resolution adopted on 10 June 2022, the Conference amended the 1998 Declaration and recognized two further Conventions as fundamental: the Occupational Safety and Health Convention, 1981 (No. 155), and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

[2] As defined by the Committee on Freedom of Association, "[g]enerally, a strike is a temporary work stoppage (or slowdown) wilfully effected by one or more groups of workers with a view to enforcing or resisting demands or expressing grievances, or supporting other workers in their demands or grievances" (**Document No. 282**, para. 783).

6. The long-standing dispute has had a negative impact on the functioning of the ILO supervisory system and, more broadly, on the credibility and resonance of the system of standards as a whole. In its resolution of 10 November 2023 referring the matter to the Court, the Governing Body noted the "persistent disagreement", the fact that it was "seriously concerned about the implications" and "the necessity of resolving the dispute consistent with the Constitution of the ILO", and decided, in accordance with article 37(1) of the Constitution, to "request the International Court of Justice to render urgently an advisory opinion".

A. General considerations

7. At the outset, the Office considers it important to place the referral request in its historical context. In reviewing the six occasions on which the ILO, at the time *in statu nascendi,* had recourse to the PCIJ, the Office wishes to underscore the critical importance that the Court's guidance had for the institutional development of the Organization. In all six cases, the Court provided clear, authoritative and forward-looking answers that have had a lasting effect.

8. The advisory opinion concerning the *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference* – the first advisory opinion rendered by the PCIJ, just six months after its inaugural sitting – provided authoritative guidance on the method and criteria for determining the representativeness of workers' and employers' organizations. It has been consistently referred to by the Credentials Committee of the International Labour Conference ever since.

9. The advisory opinion concerning the *Free City of Danzig and International Labour Organization* clarified the constituent elements of statehood and recognized the decisive importance of the power to ratify and effectively implement international labour Conventions.

10. The advisory opinions concerning the *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer* and the *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture,* based on a dynamic interpretation of the ILO Constitution, shed light on the meaning of "labour" and broadened the scope of the ILO's normative mandate beyond the regulation of workers' working conditions, while the advisory opinion concerning the *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* reaffirmed that the limits of the Organization's sphere of activity were not fixed with rigidity.

11. Not only was the ILO the first institution to bring a matter before the World Court, but it is also the specialized agency of the United Nations that has thus far had recourse to the Court most frequently. Those early advisory proceedings made a distinct contribution to the interpretation of key concepts of the ILO Constitution and, moreover, recognized unreservedly the unique tripartite nature of the ILO by attributing due weight to the role and functions of non-governmental constituents. Thus, the Order of 16 November 2023 by which the Court invited the six international employers' and workers' organizations enjoying general consultative status at the ILO to participate in the written proceedings confirms the Court's continued flexible and considerate practice in this regard.

12. By way of a preliminary remark, the Office believes that it is important to indicate what is expected from the current proceedings. The Office understands that the reason for the referral request is the lack of legal certainty around the interpretation of Convention No. 87 and the negative impact that this has had on the credibility of the ILO's system of standards. Consequently, the Court's authoritative determination will end the current discord and restore the harmonious functioning of, and trust in, the ILO's normative machinery.

13. The Court's determination will be all the more impactful as the question goes to the heart of freedom of association, an enabling human right that not only permeates the entire fabric of international labour standards but is also a primal aspect of a multitude of international human rights instruments. It can hardly be overstated that the Court's pronouncement will therefore have a resounding effect on international human rights law in general, given that the working methods of numerous supervisory bodies are modelled on the ILO's Committee of independent experts. As the teleological, or dynamic, interpretation of Convention No. 87 with respect to the right to strike draws upon the views of the ILO Committee of Experts, the Committee on Freedom of Association and other supervisory bodies, the Court's dictum on the soundness and/or legal validity of such interpretation will undoubtedly have repercussions beyond the confines of the ILO supervisory system.

14. Despite the considerable time that has elapsed since its last referral request in 1932, the ILO has never lost sight of the opportunity for judicial settlement afforded by article 37 of its Constitution. The Organization has given serious consideration to referring important legal questions to the Court on a number of occasions over the past 25 years without, however, reaching a conclusion.

15. By submitting to the ICJ the question of whether the right to strike is protected under Convention No. 87, the ILO is reaffirming its commitment to a judicial settlement of legal disputes, placing its full confidence in the Court as the principal judicial organ of the United Nations system and recalling the intrinsic value of article 37 as a cornerstone of the Organization's constitutional architecture.

B. The role of the Office

16. Throughout the process that led to the referral to the ICJ, the question often arose as to the role of the Office – the secretariat of the Organization – and the principles that should govern its action. As the custodian of the institutional memory of the Organization, the Office is best placed to provide documented information on all institutional, historical and legal aspects of the dispute. At the same time, depending on whether such information may be perceived as lending support to the position of one group or the other, the Office may attract criticism for lacking objectivity and its independence may be directly challenged. Under these circumstances, the Office wishes to clarify the parameters within which it intends to exercise its institutional responsibility and to provide all information it considers relevant and likely to throw light on the question put to the Court, in accordance with the Court's Order of 16 November 2023.

17. In a document submitted to the Governing Body in March 2023 (**Document No. 40**, para. 26), the Office explained that it had an obligation to remain neutral and impartial in the event that the Governing Body considered a referral request, and that it would be imperative that the Office refrain from taking any action that could be deemed to help either side in an interpretation dispute. Specifically, it noted that the comprehensive file, or dossier, to be submitted to the Court would have to be prepared under the sole responsibility of the Director-General and would not be submitted to the constituent groups for review, and also that the Office could not be expected to provide any material assistance, legal counsel or financial support to any of the groups or Members that may be involved in the Court proceedings. Furthermore, the Office indicated that its participation in the proceedings could only aim at providing accurate information or explanations of a factual nature, for instance regarding the historical context, constitutional theory, organizational structure and standard-setting processes and practices.

18. Experience has shown that the role of the Office in the context of this dispute is a sensitive matter and that there is a need for caution. Indeed, the subject of the representation role and responsibilities of the Office and its Director-General with regard to proceedings before the World Court was raised in the early years of the Organization. In a 1921 Governing Body

discussion, for instance, it was observed that "[i]t appeared evident that when the Governing Body decided to transmit a complaint to the Court (under Article 411) the least it could do was to supply the Court with full information", and the Director was asked "to remain strictly impartial and only to intervene with the utmost prudence".[3] In 1922, the British Government submitted a memorandum on the conditions under which the Office should be furnishing information to the Court, in which it proposed, *inter alia*, that "all statements made to the Court by the Office should be in writing previously approved by the Governing Body" and that "in the event of disagreement on the part of a member of the Governing Body [...] the Court should be informed of the disagreement".[4] In the course of the Governing body discussion, a distinction was drawn between proceedings arising from complaints concerning non-observance of Conventions, in which the utmost prudence should be observed by the Office towards Members, and advisory proceedings, in which the Office should have full liberty to express opinions, with the necessary deference towards any affected parties.[5]

19. In the context of the advisory proceedings on the *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, a member of the Governing Body wrote directly to the President of the Court on 17 June 1922, criticizing the lack of objectivity of the memorandum submitted by the ILO Director and requesting the Court to consider it as the expression of the Director's personal views.[6]

20. Moreover, it is worth recalling the written statement submitted by the Office during the proceedings concerning the *Interpretation of the Convention of 1919 concerning the Employment of Women during the Night*, which read in part: "Le Bureau international du Travail s'est efforcé, dans le présent mémoire, de rapporter aussi exactement que possible les faits et les arguments relatifs à la question soumise à la Cour. Il ne lui appartient pas de formuler une conclusion dans un sens ou dans l'autre."[7]

21. In an oral statement concerning the same proceedings, Edward Phelan, representing the then Director of the ILO, noted:

> The International Labour Office has already submitted to you a written statement, the object of which is to place before the Court, as impartially as possible, all the elements of the problem submitted for solution. It is in the same objective spirit that I desire to make a few remarks to-day.
>
> The International Labour Office has always approached this question without preconceived ideas and has abstained from upholding *a priori* any particular thesis. It notes the existence of differing interpretations of the Convention concerning the employment of women during the night; it deplores these differences of interpretation, and it appears before the Court with the one object of facilitating the adoption of a solution of the problem which is legally satisfactory.[8]

22. During the recent referral process, the impartiality of the Office was openly called into doubt. In particular, one constituent group considered that the Office lacked objectivity and that it supported the referral to the ICJ (**Document No. 23**, p. 3, and **Document No. 31**, paras 13, 20). The Director-General responded to those criticisms by a circular letter of 23 November 2023 addressed to all members of the Governing Body (**Annex No. 1**), in which he assured them that

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3 Minutes of the 6th Session of the Governing Body, January 1921, p. 8.

4 Minutes of the 12th Session of the Governing Body, April 1922, p. 183.

5 Minutes of the 14th Session of the Governing Body, October 1922, pp. 426, 438–441.

6 PCIJ, Series C, Acts and Documents relating to Judgments and Advisory Opinions given by the Court / Pleadings, Oral Arguments and Documents, Documents relating to Advisory Opinion No. 2, pp. 494–495.

7 PCIJ, Series C, Acts and documents relating to Judgments and Advisory Opinions given by the Court / Pleadings, Oral Arguments and Documents, Documents of the Written Proceedings, p. 180.

8 PCIJ, Series C, Acts and documents relating to Judgments and Advisory Opinions given by the Court / Pleadings, Oral Arguments and Documents, Public Sittings and Pleadings, p. 208.

"the Secretariat will continue to service the executive organs of the Organization with unfailing commitment and sense of responsibility, at the highest professional and ethical standards".

23. Under the circumstances, the Office wishes to clarify its understanding of its role and responsibilities in the context of the present written proceedings. The Office considers that it would be inappropriate for it to take any position or to comment on the positions taken by Member States or the six non-governmental organizations regarding the question put to the Court. This is what deference to the Court and also respect towards the ILO's tripartite constituency commands. Accordingly, the Office only elaborates on the factual information contained in the dossier with a view to facilitating the comprehension of the ILO's structural and institutional specificities. The Office would venture to suggest that in so doing, it might act as a form of expert witness, especially as regards matters under its custodianship, such as archived materials and other information pertaining to the institutional memory of the house. Moreover, the Office firmly believes that the duty of impartiality does not prevent it from expressing views on questions of general institutional interest that have no direct bearing on the question put to the Court. For instance, the Office is of the strong view that it has the discretion – not to say an obligation – to present its view on doctrinal issues of constitutional theory and practice, especially when this is aimed at demonstrating the consistency of ILO rules and practices. Accordingly, this Written Statement has been prepared for the sole purpose of facilitating the Court's task, while maintaining the highest standards of objectivity, independence and integrity.

C. Structure of the Written Statement

24. This Written Statement is divided into four parts. The first (which corresponds to Part I of the dossier, Documents Nos 1–53) contextualizes the interpretation dispute and provides a timeline of the events that led to the decision of the ILO Governing Body to refer the matter to the Court. It also looks into the question of jurisdiction and judicial propriety in the light of the relevant jurisprudence of the Court and addresses the legal effect of the advisory opinion in accordance with the constitutional theory and practice of the ILO.

25. The second part of the Written Statement (which corresponds to Part II of the dossier, Documents Nos 54–117) describes the ILO's system of standards, in particular the institutional processes – whether codified in statutory rules or developed through consistent practice – that underpin the adoption of international labour standards, the supervision of their application and their interpretation.

26. The third part (which corresponds to Part III of the dossier, Documents Nos 118–282) focuses on Convention No. 87 as the ILO's "Magna Carta" on freedom of association and workers' right to organize, including its negotiating history and the manner in which its provisions have been interpreted over the years by the various supervisory organs, with special reference to the right to strike and the modalities of exercising that right.

27. The fourth part (which corresponds to Part IV of the dossier, Documents Nos 283–342) contains an overview of various sources, such as treaties, judicial decisions and comments of expert bodies, that address the right to strike as part of broader international human rights law.

28. The Written Statement closes with conclusions outlining the considered views of the Office on the context and process of the referral and the main institutional aspects of the matter brought before the Court.

29. In preparing the Written Statement, the Office considered it relevant and useful to submit additional documents for the Court's ease of reference. The 45 annexes have been compiled separately.

▶ PART I. The request for an advisory opinion

A. Referral process

30. The present advisory proceedings emanate from a request from the Workers' group in July 2023 that the Organization refer an interpretation dispute to the ICJ for decision in accordance with article 37(1) of the Constitution. The Workers' group had announced its intention to request the Director-General to put to the Governing Body the matter of invoking article 37(1) and formally requesting the Court to rule on the question of whether the right to strike is protected under Convention No. 87 in March 2023 at the end of an inconclusive Governing Body discussion of a draft procedural framework for the referral of interpretation disputes (**Document No. 41**, para. 345).

31. The process that culminated in the adoption of the Governing Body's resolution of 10 November 2023 referring the matter to the ICJ for an advisory opinion is outlined below.

32. By a letter dated 12 July 2023 (**Document No. 5**) addressed to the Director-General, the Worker Vice-Chairperson of the Governing Body formally requested that the long-standing dispute over the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike be referred urgently to the International Court of Justice for decision, in accordance with article 37(1) of the ILO Constitution. To this end, the Worker Vice-Chairperson requested the Office to take all necessary steps to place an item on the agenda of the 349th Session of the Governing Body (October–November 2023), for discussion and decision, regarding the request to the International Court of Justice for an advisory opinion, and also requested the Office to prepare a comprehensive report to facilitate an informed decision by the Governing Body at that session.

33. In the days and weeks following receipt of the Worker Vice-Chairperson's letter, the Director-General received similar letters on behalf of the Governments of the Member States of the European Union and Iceland and Norway, and from the Governments of Angola, Argentina, Barbados, Brazil, Colombia, Ecuador and South Africa (**Documents Nos 6–9, 11–14**) requesting that the matter be discussed urgently at the next session of the Governing Body with a view to deciding on whether to refer it to the International Court of Justice for an advisory opinion. Echoing the request of the Workers' group, the aforementioned Governments asked the Office to prepare and circulate ahead of the Governing Body's discussion a background report with all the necessary elements and to bring their letters to the attention of all constituents of the Organization.

34. By circular letter dated 17 July 2023, the Director-General informed all Member States of the referral requests that had thus far been received and indicated that, pending confirmation by the Officers of the Governing Body, the Office was looking into all necessary arrangements, including preparing a comprehensive report to be circulated well in advance of the next Governing Body session (**Annex No. 2**).

35. The referral requests were transmitted to the Officers of the Governing Body for confirmation that the matter would be discussed at the 349th Session, on the understanding that the tripartite screening group should subsequently be convened to agree on any necessary adjustments to the agenda (**Annex No. 3**). In transmitting the letters to the Officers, the Office clarified that, as the request at hand related to the implementation of a constitutional procedure, it should be directly and immediately transmitted to the Governing Body for its consideration and that

the Officers and the other members of the screening group had no authority to block or delay the transmission of the request to the Governing Body. It also clarified that any substantive objections to the referral in general, or to the questions to be put to the Court in particular, could and should be raised during the Governing Body discussion, and not at the level of the Officers, whose only task at that stage was to confirm that the matter would be discussed at the next Governing Body session.

36. By letter dated 2 August 2023 (**Document No. 10**) addressed to the Director-General, the Employer Vice-Chairperson of the Governing Body expressed her group's opposition to the requests and made reference to paragraph 3.1.3 of the Standing Orders of the Governing Body, which requires consultations with the tripartite screening group before the provisional agenda is updated. Accordingly, the Employer Vice-Chairperson requested the Director-General to place an item on the agenda of the 350th Session (March 2024) regarding proposals on further steps to ensure legal certainty on the interpretation of the "right to strike" in the context of Convention No. 87. She also asked the Office to prepare a note that examined in detail all possible proposals to resolve the existing interpretation issue through social dialogue within the framework of established ILO procedures and rules. In his reply dated 3 August 2023, the Director-General indicated that since the proposal of the Employers' group did not invoke a constitutional procedure but rather sought to add a new item to the agenda of the March 2024 Governing Body session, it would need, as per standard practice, to be considered by the screening group when it reviewed the provisional agenda of that session (**Annex No. 4**).

37. By circular letter dated 4 August 2023, the Director-General informed all Member States of one additional referral request, of the letter of 2 August from the Employer Vice-Chairperson and of a Note by the Office dated 13 July 2023 containing legal clarifications on the procedure to be followed (**Annex No. 5**).

38. The Officers held two meetings, on 2 and 9 August 2023, regarding the process. At the second meeting, the attention of the Officers was drawn to the fact that the conditions of article 7(8) of the Constitution for the holding of a special session of the Governing Body had been met, thus rendering any continued discussion about process unnecessary, since in essence, the referral request related to the implementation of a constitutional procedure set out in article 37(1) and, therefore, the Officers had no authority to withhold or delay its transmission to the Governing Body for examination and decision. At the same meeting, the Chairperson received a letter dated 9 August 2023 signed by the 14 regular Worker members of the Governing Body requesting him to convene a special meeting in accordance with paragraph 3.2.2 of the Standing Orders in the event that the Officers were unable to reach agreement (**Annex No. 6**).

39. In light of these considerations, it was determined that a special meeting would be held in late autumn in conjunction with the 349th Session of the Governing Body, in accordance with the original request of the Workers' group and of a number of governments that an additional item be included on the agenda of that session.[9]

40. By circular letter dated 10 August 2023, the Director-General informed all Member States of two additional referral requests and of the decision taken at the end of the second Officers' meeting to hold a special meeting in late autumn, in conjunction with the 349th Session of the Governing Body, regarding the referral request of the Workers' group and of a number of governments (**Annex No. 7**). The Director-General further indicated that the Office's comprehensive report to facilitate the forthcoming Governing Body discussion was expected to be circulated to all Member States by 8 September and that any comments received by 6 October would be summarized and made available ahead of the special meeting.

[9] Confirmation was subsequently sought and received from those governments that their requests should be understood as referring to an urgent Governing Body discussion, regardless of the specific format this discussion might take for procedural reasons.

41. Between 25 August and 15 September, the Office received identical letters from eight national employers' organizations drawing its attention to the failure of their respective governments to undertake tripartite consultations, as required under the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), with respect to the referral request addressed to the ILO, and requesting that the Director-General intervene urgently to remind the respective governments of the need to comply with their obligations under that Convention (**Annex No. 8**). The Office forwarded copies of those communications to the governments concerned, with the indication that, in accordance with established practice, the observations of the employers' organizations, as well as any comments that the governments might wish to make on the matters raised in those observations, would be brought to the attention of the Committee of Experts at its next session (November–December 2023). One of those employers' organizations subsequently withdrew its communication.

42. By email dated 20 August 2023, the Secretary-General of the International Organisation of Employers transmitted a "Note on procedural matters regarding the inclusion of an urgent item in the agenda of the Governing Body" (**Annex No. 9**). The Note detailed the Employers' group's position as follows:

(a) placing an urgent item on the agenda can only be done through the screening group and therefore the screening group procedure should not be bypassed;

(b) article 37 matters cannot be treated in the same way as representations under article 24 and complaints under article 26;

(c) article 7(8) of the Constitution on special sessions is not applicable to article 37(1) matters, and in any case there is no real urgency or necessity for a special meeting;

(d) convening a special meeting under paragraph 3.2.2. of the Standing Orders is not justified or appropriate, and in any case there must be agreement on the agenda of that special session by the screening group;

(e) the past referrals under article 37(1) are so different that they are not at all comparable.

43. On 29 August 2023, the Office provided its reply (**Annex No. 10**) and clarified the following points:

(a) the authority of the Officers and of the tripartite screening group is limited in relation to the implementation of constitutional procedures;

(b) the compulsory holding of a special meeting under article 7(8) of the Constitution and paragraph 3.2.2 of the Standing Orders is self-triggered and the only condition to which it is subject is the minimum number of members submitting the request;

(c) the six referrals to the Permanent Court of International Justice are relevant and could unquestionably be considered to serve as precedents.

The Office concluded by indicating that the applicable legal framework had been scrupulously observed, that the compulsory holding of a special meeting had been confirmed by the Officers on the basis of article 7(8) of the Constitution since the threshold of 16 regular members making such a request had been attained, and that the Chairperson was bound to convene a special meeting since the 14 regular Worker members had made a written request to that effect, as provided for in paragraph 3.2.2 of the Standing Orders. In this connection, the Office had prepared two Notes on the origin and evolution of the rules relating to special meetings of the Governing Body and relevant practice (**Documents Nos 18, 19**).

44. By circular letter dated 31 August 2023 (**Annex No. 11**), the Director-General transmitted to all ILO Member States the background report prepared by the Office to facilitate the deliberations of the Governing Body, together with an invitation to submit comments by 6 October 2023 after consulting the most representative employers' and workers' organizations. The report described the origins and scope of the dispute and the legal and procedural aspects of a possible referral

to the ICJ for an advisory opinion to enable the tripartite constituents to make an informed decision. It focused on the two key aspects of the dispute – the interpretation of Convention No. 87 and the mandate of the Committee of Experts – without seeking to provide substantive answers, assess the merits of the opposing views, or express any views on the advisability of a referral to the Court.

45. By circular letter dated 12 September 2023 (**Annex No. 12**), the Director-General informed all Member States of two additional referral requests, and of a communication received from the Government of the Swiss Confederation in which the latter recalled its position with regard to the possible referral of the dispute concerning Convention No. 87 to the ICJ, namely that the International Labour Conference should approve the referral and the question or questions to be put to the Court, that the relevant discussions should be open to all Member States, and that the States parties to Convention No. 87 should be involved in the discussions concerning the question or questions to be put to the Court. Moreover, the Swiss Government requested that the Officers of the Governing Body schedule a discussion at the Governing Body in the form of a Committee of the Whole.

46. At a meeting held on 13 September 2023, the tripartite screening group decided that the special meeting would be held on 10 November 2023, immediately after the closure of the 349th Session, with only one item on its agenda: *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*.

47. At this meeting of the screening group, the Employer Vice-Chairperson of the Governing Body handed the Chairperson of the Governing Body a letter dated 12 September and signed by the 14 regular members of the Employers' group (**Document No. 16**) requesting a special meeting under paragraph 3.2.2 of the Standing Orders of Governing Body on the urgent inclusion of a standard-setting item on the right to strike on the agenda of the 112th Session (June 2024) of the International Labour Conference. The purpose of the special meeting would be to pave the way for the adoption of a Protocol to Convention No. 87 on the right to strike, or on industrial action more broadly, which would authoritatively determine the scope and limits of the right to strike in the context of Convention No. 87 and would thus settle the ongoing dispute.

48. By circular letter dated 15 September 2023 (**Annex No. 13**), the Director-General informed all Member States that the 349th *bis* (Special) Session of the Governing Body would be held on 10 November 2023 to discuss the referral request of the Workers' group and of 36 governments, and also that a request had been received from the 14 regular Employer members of the Governing Body for a special meeting for the urgent inclusion of a standard-setting item on the right to strike on the agenda of the following year's session of the Conference.

49. By circular letters of 26 and 29 September 2023 (**Annex No. 14**), the Director-General informed all Member States that following the request of 14 regular remembers of the Employers' group, which had in the meantime received the support of the Government of Türkiye, the screening group had decided that a second special meeting of the Governing Body, referenced 349th *ter* (Special) Session, would be held on 11 November, with one agenda item: *Action to be taken on the request of the Employers' group to urgently place a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*.

50. By further circular letters of 11 October and 2 November 2023 (**Annex No. 15**), the Director-General informed all Member States of the preparations for the holding of the 349th *ter* (Special) Session, including the creation of a dedicated web page and the publication of an Office background report. He also indicated that, at its ordinary 349th Session, the Governing Body had decided that the two special sessions would be held, in part, as a Committee of the

Whole and had approved practical arrangements to that effect.[10] Concretely, it had been decided that during the morning sitting of each special session, the Governing Body would hold an exchange of views with the full participation of governments not represented on the Governing Body, which would be entitled to make no more than one statement of a maximum of three minutes, whereas in the afternoon sitting, the Governing Body would meet in plenary and the sitting would begin with an oral report by the Chairperson on the exchange of views held in the Committee of the Whole (**Documents Nos 27, 28**).

51. In preparation for the two special sessions, the Office made available two background reports, GB.349*bis*/INS/1/1 (**Document No. 29**) on *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 ILO Constitution* and GB.349*ter*/INS/1 (**Document No. 32**) on *Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*. The Office also prepared and posted on the dedicated web page three Notes, on the legal effect of advisory opinions (**Document No. 20**), on the legal basis for requesting an advisory opinion (**Document No. 21**) and on selected ICJ jurisprudence relating to advisory proceedings.

52. On 6 October 2023, the International Organisation of Employers (IOE) and the International Trade Union Confederation (ITUC) submitted comments on the background report the Office had prepared for the purposes of the 349th *bis* (Special) Session (**Documents Nos 23, 24**). In addition, the Office received communications from 10 governments, 14 national employers' organizations and 101 national workers' organizations on the proposed referral. A summary of those comments was made available on 13 October 2023 (**Document No. 30**).

53. On 24 and 27 October 2023 respectively, the IOE and the ITUC submitted comments on the background report the Office had prepared for the purposes of the 349th *ter* (Special) Session (**Documents Nos 25, 26**). In addition, comments were received from 3 governments, 31 national employers' organizations and 73 national workers' organizations regarding the proposed standard-setting on the right to strike.

54. The 349th *bis* (Special) Session held on 10 November 2023 gave rise to a heated debate. The sitting of the Committee of the Whole involved 35 speakers, including 12 governments not represented on the Governing Body. In the words of the Chairperson of the Governing Body, "there seem[ed] to exist convergence on the diagnosis but not on the cure [as] [t]he exchange of views [had] brought to the forefront the diversity and divergence of views in this matter" (**Document No. 31**, para. 70).

55. The outcome of the discussion was that the Governing Body adopted, by 33 votes in favour, 21 votes against and 2 abstentions, a resolution requesting the International Court of Justice to render urgently an advisory opinion under article 65 of the Court's Statute 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)?

56. The Governing Body's decision had a direct impact on the 349th *ter* (Special) Session held on 11 November 2023 to discuss the proposed standard-setting on the right to strike. The Committee of the Whole segment of that special session involved a total of 11 speakers. In summarizing the views expressed during the Committee of the Whole, the Chairperson of the Governing Body noted that "[a] significant number of governments was of the view that, following the decision

[10] Under article 4.3 of its Standing Orders, "[t]he Governing Body may decide to meet as a Committee of the Whole in order to hold an exchange of views, in which representatives of governments that are not represented on the Governing Body may, in the manner determined by it, be given the opportunity to express their views with respect to matters concerning their own situation".

to refer the dispute on the right to strike to the ICJ for an advisory opinion, it was premature to discuss the question of placing a standard-setting item on the agenda of the Conference" (**Document No. 33**, para. 36). Many constituents expressed a similar view during the plenary sitting and noted that follow-up action could only be considered after the ICJ had issued its opinion (**Document No. 33**, paras 52, 61–62, 77, 93).

57. The outcome of that discussion was that the Governing Body decided that it would not place a standard-setting item on the right to strike on the agenda of the following year's session of the International Labour Conference and that, after having received the advisory opinion of the International Court of Justice, it would consider appropriate follow-up action.

58. By circular letter dated 13 November 2023 (**Annex No. 16**), the Director-General informed all Member States of the outcomes of the two special sessions of the Governing Body.

59. On the same day, the Director-General wrote to the President of the International Court of Justice transmitting certified copies of the Governing Body resolution and informing her that, pursuant to article 65(2) of the Statute of the Court, the Office was preparing a dossier containing all relevant documents (**Annex No. 17**).

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60. On the basis of the events highlighted above, the Office respectfully submits that the Court should take due account of the procedural rigour with which the Office handled the referral request of July 2023 and supported the ensuing deliberations of the ILO constituents through to the decision of November 2023 to refer the matter to the Court.

61. The Office firmly believes that the process through which the constitutional procedure set out in article 37(1) was activated and managed by the ILO's Governing Body is legally sound and institutionally coherent. In particular, the special session and the Committee of the Whole format lent the deliberations and decision-making on the referral the gravitas and visibility commensurate with the importance of the subject matter.

62. The ILO's seventh referral to the World Court, but first-ever to the ICJ, is of historical importance for the Organization in that it places renewed confidence in the principal judicial organ of the United Nations and reaffirms the relevance of the ILO's constitutional design for the resolution of interpretation disputes.

B. Earlier debates and the quest for legal certainty

63. The possibility of referring the dispute concerning the right to strike to the ICJ has been actively considered at the ILO since 2014. It resulted from an institutional crisis in 2012, which crystallized the view that the divide within the house over the right to strike and the scope of the interpretative functions of the supervisory organs was not only profound but probably unbridgeable. Yet, the tripartite constituents opted for continued dialogue, including through a newly established mechanism for reviewing international labour standards. However, many recognized that an authoritative settlement of the legal dispute could only be obtained through third-party intervention, such as the judicial procedures provided for in article 37 of the Constitution.

64. The ten-year-long institutional debate over the preferred course of action for resolving the dispute, focusing especially on the need to promote legal certainty, is summarized below.

65. The 2012 session of the International Labour Conference marked a turning point with regard to the persistent disagreement over the Committee of Experts' interpretation of Convention No. 87 in relation to the right to strike. For the first time since the establishment of the Conference Committee on the Application of Standards, the Employers' and Workers' groups could not agree on the list of cases of non-compliance to be examined by the Committee. The Employer members objected in the strongest terms to the interpretation by the Committee of Experts of Convention No. 87 and the right to strike in its General Survey of 2012, and indicated that "their views and actions in all areas of ILO action relating to the Convention and the right to strike would be materially influenced".[11] Accordingly, without any clarification regarding the mandate of the Committee of Experts with respect to the General Survey, "they could not accept the supervision of Convention No. 87 cases that included interpretations by the Committee of Experts regarding the right to strike".[12] However, the Workers' group considered that this was not acceptable,[13] and as a result, the Committee on the Application of Standards ended its work without discussing any cases of non-compliance.[14]

66. At its session of November–December 2012, and in view of the direct challenge to its authority and the Employers' group's request that the report of the Committee of Experts should include a "disclaimer" or "caveat" regarding the right to strike, the Committee of Experts presented its views regarding its mandate. The Committee considered, in particular, that monitoring the application of Conventions "logically and inevitably requires an assessment, which in turn involves a degree of interpretation of both the national legislation and the text of the Convention", and that therefore, a disclaimer was not necessary, as it "would interfere in important respects with its independence".[15]

67. At the June 2013 session of the Conference, a note was inserted in the conclusions of all individual cases examined by the Committee on the Application of Standards in relation to the application of Convention No. 87 indicating: "The Committee did not address the right to strike in this case as the Employers do not agree that there is a right to strike recognized in Convention No. 87."[16]

68. At its session of November–December 2013, the Committee of Experts discussed again the question of a "disclaimer" or "caveat" and decided to insert the following paragraph, which expresses the Committee's understanding of its role and mandate and which has since become a standard paragraph of its annual report:

> Mandate
>
> The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must

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[11] ILC, 101st Session, 2012, Record of Proceedings, Provisional Record 19, Part I, para. 82.

[12] Ibid., para. 150.

[13] Ibid., para. 171.

[14] On the institutional crisis of 2012, see, among others: J R Bellace, "The ILO and the right to strike", *International Labour Review,* vol. 153, 2014, pp. 29-70; K D Ewing, "Myth and Reality of the Right to Strike as a 'Fundamental Labour Right'", *International Journal of Comparative Labour Law and Industrial Relations,* vol. 29, 2013, pp. 145–166; P Mackay, "The Right to Strike: Commentary", *New Zealand Journal of Employment Relations,* vol. 38, 2014, pp. 58–70; F Maupain, "The ILO supervisory system: A model in crisis?", *International Organizations Law Review,* vol. 10, 2013, pp. 117–165; L Swepston, "Crisis in the ILO Supervisory System: Dispute over the Right to Strike", *International Journal of Comparative Law and Industrial Relations,* vol. 29, 2013, pp. 199–218.

[15] ILC, 102nd Session, 2013, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III(Part 1A), paras 33–36.

[16] ILC, 102nd Session, 2013, Record of Proceedings, Provisional Record 16, Part I, para. 210.

> determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions.[17]

69. At its 320th Session (March 2014), the Governing Body "welcomed the clear statement by the Committee of Experts of its mandate as expressed in the Committee's 2014 report".[18] At the same time, the Governing Body "deemed it necessary to give further consideration to options to address a dispute or question that may arise with respect to the interpretation of a Convention" and to that end "requested the Director-General to prepare a document for its 322nd Session (November 2014) in setting out the possible modalities, scope and costs of action under article 37(1) and (2) of the ILO Constitution to address a dispute or question that may arise in relation to the interpretation of an ILO Convention".[19]

70. At the June 2014 session of the Conference, the Committee on the Application of Standards was unable to adopt conclusions in 19 individual cases due to the disagreement over the question of the right to strike.[20]

71. At its October–November 2014 session, the Governing Body had before it a document (**Document No. 34**) setting out detailed information on the advisory jurisdiction of the ICJ, the initiation and conduct of proceedings, including the participation of non-governmental organizations, and past ILO practice.[21] During the discussion (**Document No. 35**), the Worker spokesperson indicated that his group "had reached the inescapable conclusion that referral of the interpretation dispute to the International Court of Justice (ICJ) for an advisory opinion, as a matter of urgency, was the necessary way forward if the ILO supervisory system was to remain relevant and continue to function".[22] However, the Employer members did not support a referral to the Court and favoured a resolution through tripartite discussions, as it "was more efficient time-wise, and was also far cheaper, more inclusive and more flexible than a referral to the ICJ, which would be a clear acknowledgment not only that tripartism and social dialogue had failed but also that social dialogue had not even been given a chance to resolve the dispute".[23] Among the Governments, the group of Latin American and Caribbean countries (GRULAC), the group of industrialized market economy countries (IMEC) and the European Union (EU) and its Member

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17 ILC, 103rd Session, 2014, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III(Part 1A), para. 31. In the context of the traditional exchange of views between the Committee of Experts and the two Vice-Chairpersons of the Committee on the Application of Standards, the Worker Vice-Chairperson stated that "having recourse to article 37(1) of the ILO Constitution [...] remained possible, and was perhaps inevitable. In fact, article 37(1) would be the only option"; ibid., para. 22.

18 GB.320/PV, para. 596(b).

19 Ibid., paras 596(c), 597(a).

20 ILC, 103rd Session, 2014, Record of Proceedings, Provisional Record 13, Part I, paras 201–219.

21 GB.322/INS/5. In fact, this was the second time the Governing Body had examined the conditions and modalities of potential recourse to the possibilities set out in article 37 of the Constitution to resolve a question or dispute relating to the interpretation of an international labour Convention. The first discussion took place at the 256th Session (May 1993) of the Governing Body and was based on a paper (**Document No. 96**) that focused on article 37(2) and whether an in-house tribunal could offer a useful addition to the existing machinery; see GB.256/SC/2/2. The Office document did not give rise to a detailed discussion and Governing Body members generally felt that the creation of a tribunal under article 37(2) required further consideration; see GB.256/11/22, paras 10–15; and GB.256/PV(Rev.), pp. VI/3–VI/4.

22 GB.322/PV, para. 50.

23 Ibid., para. 58.

States supported the proposed referral to the International Court of Justice, while the Asia and Pacific group (ASPAG) preferred tripartite discussions and the Africa group was of the view that recourse to the International Court of Justice should be a last resort.[24]

72. Against this background, the Governing Body decided to convene a tripartite meeting in February 2015, which would report to it at its March 2015 session, on the question of Convention No. 87 in relation to the right to strike and the modalities and practices of strike action at the national level, and that on the basis of the outcome of this meeting the Governing Body would then decide "on the necessity or not for a request to the International Court of Justice to render an urgent advisory opinion concerning the interpretation of [Convention No. 87] in relation to the right to strike".[25]

73. The meeting took place from 23 to 25 February 2015. At the meeting, the Workers' and Employers' groups presented a joint statement concerning a package of measures to find a possible way out of the existing deadlock in the supervisory system.[26] This joint statement acknowledged that the right to take industrial action by workers and employers in support of their legitimate industrial interests is recognized by the constituents of the ILO. The two groups went on to recognize the mandate of the Committee of Experts as defined in paragraph 29 of its report of 2015 and agree on essential elements of the working methods of the Committee on the Application of Standards (adoption of the list and of conclusions). The joint statement did not include specific follow-up on the question of Convention No. 87 in relation to the right to strike. The Government group issued two statements. In the first, it expressed its common position on the right to strike, recognizing that "the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO" and that "without protecting a right to strike, freedom of association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized". It also noted, however, that the right to strike "is not an absolute right [and] the scope and conditions of this right are regulated at the national level". In its second statement, the Government group acknowledged the joint statement of the Employers' and Workers' groups and called for a comprehensive discussion at the following session of the Governing Body.[27]

74. The three statements were presented to the Governing Body at its March 2015 session as constituting the outcome of the tripartite meeting (**Document No. 36**). In the ensuing discussion (**Document No. 37**), the Employer members reiterated their view that the "right to strike" was not recognized in Convention No. 87, and that the joint statement was considered as a commitment to continue to work together to strengthen the supervisory system despite the differences of views. The Worker members confirmed that the joint statement was only intended to allow the ILO to resume the supervision of standards. In the light of the outcome of the tripartite meeting, the Governing Body decided "not to pursue for the time being any action in accordance with article 37 of the Constitution to address the interpretation question concerning Convention No. 87 in relation to the right to strike",[28] and made a number of other decisions in relation to the supervisory system and the establishment of the Standards Review Mechanism.

75. In March 2017, a work plan for the strengthening of the supervisory system was launched as one of the two components of the Standards Initiative. The work plan included consideration of further steps to ensure legal certainty under action 2.3 of the Standards Initiative,[29] as a follow-up to the Governing Body's decision at its 323rd Session (March 2015) not to pursue for

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[24] Ibid., paras 64, 70, 78, 82.

[25] Ibid., para. 209(1), (2).

[26] GB.323/INS/5(Add.); GB.323/INS/5/Appendix I, Annex I.

[27] GB.323/INS/5/Appendix I, Annex II and Annex III.

[28] GB.323/PV, paras 51, 52, 84(b).

[29] GB.329/INS/5(Add.)(Rev.); GB.329/PV, paras 95–148.

the time being any action under article 37 of the Constitution to address the interpretation question of Convention No. 87 in relation to the right to strike. On 13 March 2017, the Employers' and Workers' groups released a *Joint Position on the ILO Supervisory Mechanism* in which they observed that "divergent views and disputes about the interpretation of Conventions continue to be a reality".[30]

76. Discussions on the legal certainty component of the work plan on the strengthening of the supervisory system were first held during the 335th Session (March 2019) of the Governing Body and reflected a general agreement on the need to ensure legal certainty in standards-related matters, and in particular as regards the settlement of disputes on the interpretation of international labour standards.[31] Accordingly, the Governing Body decided "to hold informal consultations in January 2020 and, to facilitate that tripartite exchange of views, requested the Office to prepare a paper on the elements and conditions for the operation of an independent body under article 37(2) and of any other consensus-based options, as well as the article 37(1) procedure".[32]

77. In January 2020, the Office facilitated the tripartite exchange of views on further steps to ensure legal certainty based on a Note which provided clarifications on the meaning of legal certainty, and its implications as regards the interpretation of Conventions. The tripartite exchange of views placed emphasis on two main considerations: first, that article 37 provided the only constitutionally based mechanism guaranteeing legal certainty in matters of interpretation of Conventions, and second, that the current constitutional order of the Organization established an obligation for its tripartite constituents to refer any question or dispute relating to the interpretation of Conventions to the International Court of Justice or, possibly, to an in-house tribunal.

78. The document that the Office had originally prepared for the 338th Session (March 2020) of the Governing Body further elaborated on the principle of legal certainty and the possibilities afforded by article 37, and suggested that the discussions should be guided by the following parameters: first, a difference or dispute about the scope and meaning of provisions of Conventions is a legal question and as such calls for a legal answer to be obtained through legal means; second, the mechanisms provided for in article 37 are the only methods that can guarantee legal certainty since legal interpretation ultimately takes the form of a definitive, non-appealable judicial pronouncement; third, under article 37(1) the resolution of interpretation disputes falls within the advisory function of the ICJ, which is a well-tested, highly reputed and cost-free procedure; and fourth, not taking action in respect of interpretation disputes in conformity with constitutional prescriptions creates the misconception that legal means of settlement of those disputes are either unavailable or have failed (**Document No. 38**, para. 66).

79. Due to the interruption of official meetings on account of the COVID-19 pandemic, the document was finally brought before the Governing Body two years later, at its 344th Session (March 2022).[33]

80. During the Governing Body discussion, the Employer spokesperson, while recognizing the importance of legal certainty, took the view that "[t]aking any decisions on the use of the options under article 37 of the ILO Constitution seemed premature. […] It was doubtful that recourse to the options under article 37 could achieve legal certainty, as it was unclear how external and judicial bodies could possibly develop a solution that would be widely accepted by ILO

[30] GB.329/PV, p. 194.

[31] GB.335/PV, paras 240, 243–244, 248.

[32] Ibid., para. 304(g).

[33] GB.344/INS/5. The document also addressed the role of consensus-based modalities, and in this context, clarified that "consensus-based modalities can only be explored as a modality to either: (i) attempt reconciling diverging views through tripartite discussion prior to referral of the matter for interpretation to the ICJ or an internal tribunal; or (ii) to follow-up on the advisory opinion of the ICJ or the award of an internal tribunal."

constituents on such a complex matter" (**Document No. 39**, para. 139). The Worker spokesperson stated that "[t]he current situation was no longer acceptable [...]. The only way provided for in the ILO Constitution for the Organization to ensure legal certainty and decisive determinations in matters of interpretation of Conventions was through the application of article 37" (**Document No. 39**, para. 144). On the Government benches, the representative of IMEC expressed the view that "[t]he option of recourse to the International Court of Justice under article 37(1) appeared to have merit"; the representative of the EU and its Member States commented that "[i]n 2014, the EU and its Member States had been prepared to support the option to seek an advisory opinion on the interpretation of Convention No. 87 from the International Court of Justice, and maintained the opinion that continued disputes on legal interpretation required recourse to the Court"; whereas the Africa group "called for further tripartite discussions to enable the constituents to examine the advantages and disadvantages of both of the options presented to the Governing Body" (**Document No. 39**, paras 151–153).

81. In the decision that it took at that session, the Governing Body reaffirmed that "settling disputes relating to the interpretation of international labour Conventions in accordance with article 37 of the ILO Constitution is fundamental for the effective supervision of international labour standards" and requested the Office to prepare, for its 347th Session (March 2023), "proposals on a procedural framework for the referral of questions or disputes regarding the interpretation of international labour Conventions to the International Court of Justice for decision in accordance with article 37(1)" (**Document No. 39**, para. 201).

82. In response to the Governing Body's request and following a series of informal consultations in November–December 2022 and in January–February 2023, the Office drew up a draft procedural framework (**Document No. 40**) as a simple, clear and ready-to-use methodology for examining a referral request under article 37(1) and taking relevant decisions. As explained in the introductory note, the proposed framework provided "a set of practical modalities that the tripartite constituents [would] commit to applying in good faith with a view to facilitating a sound, efficient and time-bound referral process to the advisory jurisdiction of the International Court of Justice when needed". The procedural framework was devised on the basis of key considerations such as: (i) the overriding character of the constitutional prescription of article 37 and criticality of legal certainty for the credibility of the ILO as a standard-setting organization; (ii) finality and stability in matters of interpretation through recourse to judicial means meeting the highest standards of legal expertise, integrity and independence; and (iii) the appropriateness of referring serious and persistent interpretation disputes to the principal judicial organ of the United Nations. During informal consultations, constituents had expressed the view that "a procedural framework should: (i) remain as close as possible to the letter and the spirit of article 37(1); (ii) avoid introducing working arrangements that would run counter to the Constitution and might generate complexity; and (iii) ensure inclusive discussion and informed and time-bound decisions at all stages" (**Document No. 40**, paras 14–15).

83. The ensuing discussion revealed a marked diversity of positions. The Employer spokesperson, while reiterating that the "core issue underlying discussions was the interpretation by the Committee of Experts [...] of the right to strike in the context of [Convention No. 87]", called for further consultations and consensus-building as "[i]t would be preferable to seek internal solutions that received wide support from the constituents" (**Document No. 41**, paras 229–232). The Worker spokesperson broadly supported the proposed procedural framework, with the following caveats: (a) in terms of the level of support for triggering a referral discussion in the Governing Body, any threshold should be indicative, as under the existing legal framework there were no limits on the number of members or groups that could raise a matter of interpretation; (b) in terms of time frame, it was essential to ensure that Governing Body decisions were not delayed indefinitely; and (c) the Governing Body had full competence to take referral decisions based on the mandate given to it by the Conference in 1949 and opening up the Governing Body's decision-making authority to all Member States would set the wrong precedent and call its position into question; however, the group could consider allowing the Conference to validate

the Governing Body's decision as a limited exercise on a case-by-case basis (**Document No. 41**, paras 239–241).

84. Among the Governments, the representative of the Africa group pointed to the need for an inclusive discussion when filtering, analysing and debating referral requests, and indicated that any decision should be approved by a resolution of the International Labour Conference. The representative of GRULAC supported a simple, transparent and equitable procedure under article 37(1), which would provide stability without creating additional provisions; the establishment of a time frame for Governing Body discussions; and the approval by the Conference of any referral of the dispute to the ICJ. The representative of IMEC supported the establishment of a framework for action under article 37(1). The representative of the EU and its Member States stated that the ICJ was well placed to examine the dispute and called for the Governing Body to refer the dispute to it without delay. The representative speaking on behalf of the majority of ASPAG expressed the view that article 37 was a last resort and should only be used with caution, while noting that the proposed procedural framework did not address some major concerns; that the Conference was a more suitable forum for discussing the referral of any dispute to the ICJ; that any follow-up action relating to an advisory opinion should also be determined by the Conference; and that, given the binding nature of an ICJ advisory opinion, a referral decision should be made by consensus, not majority vote. Several representatives speaking on behalf of individual Governments drew attention to the fact that the adoption of a procedural framework was not a precondition to making a request for an advisory opinion, whereas others favoured continued discussion towards achieving a consensus-based decision (**Document No. 41**, paras 244–267).

85. Given the divergent views, a vote was announced but ultimately not conducted, since a motion to adjourn the debate on the agenda item was moved and adopted in the interim (**Document No. 41**, paras 326, 343). Following the decision to defer the consideration of a procedural framework *sine die*, the Worker spokesperson, recalling that "any Member of the Organization could raise an issue of interpretation" and noting that "[o]ne specific issue of interpretation had been waiting long enough", announced that her group was considering submitting a request to the Director-General in the coming months to put the issue before the Governing Body at its 349th Session (**Document No. 41**, para. 345).

* * *

86. In conclusion, the Office respectfully submits that the ILO's internal institutional debates subsequent to the crisis of 2012 have enabled the tripartite constituents to take cognizance of the nature and extent of the disagreement over the interpretation of Convention No. 87 in relation to the right to strike, and also the need for a clear legal solution. The legal and procedural aspects of the possibilities afforded by article 37 of the ILO Constitution have been elucidated on numerous occasions. The focus on legal certainty as a pillar of the efforts to strengthen the supervisory system has given new impetus to the prospect of a judicial settlement through an authoritative pronouncement of the Court consistent with the Organization's constituent instrument.

87. The Office trusts that there is value in reviewing the institutional debate of the last ten years for at least two reasons: first, it promotes better understanding of the origins of the controversy and sheds light on the question on which the Court's legal assistance is sought; and second, it demonstrates that the legal dispute has essentially not mutated over time and remains today as entrenched but clearly delineated as it was some 12 years ago. What may have matured over time are the confidence that the advisory jurisdiction of the ICJ is an integral part of the ILO's constitutional framework and the sense of urgency in obtaining a definitive solution to the interpretation dispute.

C. Jurisdiction and discretion

88. By way of established practice in its advisory proceedings, the Court draws a distinction between jurisdiction and discretion. Thus, the Court examines, first, whether there is a valid jurisdictional basis on which to proceed and, second, whether there are any compelling reasons that might lead the Court to decline to give an advisory opinion.

89. As was stated in the advisory opinion concerning the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*:

> When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it (ICJ Reports 2010, para. 17).

90. To date, the Court has never declined to render an opinion on considerations of judicial propriety, as it has considered its duty to provide legal guidance to the requesting organ, and in doing so, facilitate the work of UN system organizations.

91. As the Court put it in the advisory opinion concerning the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*:

> The Court is […] mindful of the fact 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". […] Thus, the consistent jurisprudence of the Court is that only "compelling reasons" may lead the Court to refuse its opinion in response to a request falling within its jurisdiction (ICJ Reports 2019, para. 65).

1. Jurisdiction

92. Insofar as *jurisdiction* is concerned, it is recalled that under article 96(2) of the Charter of the United Nations and article 65(1) of the Statute of the Court, specialized agencies authorized by the UN General Assembly may request advisory opinions of the Court on legal questions arising within the scope of their activities. These provisions define the jurisdiction of the Court *ratione personae* and *ratione materiae*.

93. As the Court indicated in its advisory opinion concerning the *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*:

> It is […] a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ (ICJ Reports 1982, para. 21).

94. In the present case, the question to the Court was submitted by the ILO Governing Body, which under article IX, paragraph 3, of the Agreement between the United Nations and the International Labour Organization of 1946 (**Document No. 2**) is specifically authorized to address such requests to the Court when acting in pursuance of an authorization by the International Labour Conference. Indeed, by resolution dated 27 June 1949 (**Document No. 4**), the International Labour Conference "authorize[d] the Governing Body of the International Labour Office to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the International Labour Organisation other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies".

95. With respect to the legal nature of the question submitted to the Court, there may be little doubt that the question of whether Convention No. 87 may be interpreted as covering the right to strike is – to quote the Court's dictum in the advisory opinion concerning the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* – "framed in terms of law [...] and rais[es] problems of international law and [is] by [its] very nature susceptible of a reply based on law" (ICJ Reports 2010, para. 25). More broadly, questions of textual or teleological interpretation of treaties in accordance with applicable rules of international customary law are legal questions *par excellence*.

96. As to whether the controversy over the interpretation of Convention No. 87 that led to the request for an advisory opinion arose within the scope of ILO activities, it will be recalled that it is linked to the monitoring of the application of the Convention by the ILO's supervisory organs, notably the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards. As the system of supervision of the application of international labour Conventions by ratifying countries lies at the heart of the ILO's mandate, it follows that the question put to the Court has a close and direct bearing on the activities of the Organization within the meaning of article 96 of the UN Charter and article 65 of the Statute of the Court.

97. To paraphrase the advisory opinion concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (ICJ Reports 1996, paras 25–26), the ILO's competence to oversee and control the implementation of international labour Conventions adopted in accordance with the relevant provisions of its own Constitution falls within the scope of the "principle of speciality", such that questions relating to freedom of association and the supervision of international labour standards are within the "sectorial powers" with which the Organization has been invested within the UN system.

98. In conclusion, the Office respectfully submits that the Court possesses jurisdiction to the extent that the request emanates from a duly authorized organ, namely the ILO Governing Body, and concerns a legal question of interpretation of ILO Convention No. 87 arising within the scope of the regular supervision of the application of that Convention by the States parties to it.

2. Judicial propriety

99. Regarding the Court's *discretion*, or in other words whether there would be any imperative reason to justify the Court declining to issue an advisory opinion even though it possesses jurisdiction, it is recalled that as a matter of established jurisprudence, the Court has "the duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function" and to this effect, it "examine[s] in detail and in the light of its jurisprudence each of the arguments presented to it in this regard" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 45).

100. Accordingly, the Office will briefly comment on a number of concerns – or rather, preliminary objections in all but name – that were raised prior to and during the Governing Body discussions that led to the adoption of the referral request and that relate to the appropriateness or advisability of the referral.

101. Some constituents voiced their opposition to the process that was followed for convening the special session of the Governing Body (**Document No. 31**, para. 13) and also objected to the fact that the request of the Workers' group was not submitted to the tripartite screening group that is responsible for setting the agenda of the Governing Body (**Annex No. 9**).

102. The Office provided detailed explanations (**Documents Nos 18, 19**) on the scope of article 3.2.2 of the Standing Orders of the Governing Body, which requires the Chairperson of the Governing Body to convene a special meeting upon receiving a written request to that effect signed by 16 regular members of the Government group, or 12 regular members of the Employers' group or 12 regular members of the Workers' group. The Office also explained why the implementation of the procedure set out in article 37(1) of the Constitution – just like the implementation of other constitutional procedures such as the procedures governing representations and complaints under articles 24 and 26 respectively – is not subject to the prior examination, and even less to the prior authorization, of the screening group or of the Officers of the Governing Body (**Annex No. 3**).

103. From a procedural perspective, reservations were expressed on three additional grounds: first, that the referral decision should only be taken after all opportunities for a consensus-based solution through social dialogue had been exhausted; second, that the delegation of authority granted to the Governing Body was outdated and a referral decision would therefore lack democratic legitimacy unless taken by the International Labour Conference; and third, that as a matter of principle, the decision on such an important matter should not be taken by a vote.

104. The argument of the prior exhaustion of "internal" means was voiced by several constituents. For instance, the Government representative of Cameroon maintained that "[r]eferral to the ICJ should be a measure of last resort once all internal avenues for tripartite dialogue had been exhausted, and would thus be a premature move at the present juncture" (**Document No. 31**, para. 50). In the same vein, the Government representative of the Islamic Republic of Iran, speaking on behalf of a majority of ASPAG countries, said that "internal solutions [...] should be prioritized and exhausted before referrals were made to the ICJ" (**Document No. 31**, para. 83).[34]

105. In response to those arguments, the Workers' group spokesperson refuted that prior exhaustion of other means of dispute resolution is a legal requirement, since "[n]othing in the Constitution suggested that all other avenues must be exhausted before a referral to the ICJ; in any case, the issue had been under discussion for many years already" (**Document No. 31**, para. 108). Likewise, the Government representative of Argentina noted that filing a request for an advisory opinion with the ICJ "was permitted under the ILO Constitution, which took precedence over all other normative or procedural provisions" (**Document No. 31**, para. 87).

106. In response to a request for clarification as to whether the authorization from the Conference to the Governing Body to refer legal questions to the ICJ was an overarching approval for all cases and for all time, with no scope for any constitutional exceptions, the Office had the opportunity to explain that "Article IX of the UN–ILO relationship agreement of 1946 was very clear: the UN General Assembly authorized the ILO to request advisory opinions of the ICJ on legal questions arising within the scope of its activities and that such requests could be addressed to the ICJ by either the International Labour Conference or by the Governing Body acting in pursuance of an authorization by the Conference. There was no other qualification, so both bodies had explicit authorization and could validly refer interpretation disputes or questions to the ICJ" (**Document No. 31**, para. 122).

107. There was considerable support for the argument that the referral decision should be left to the International Labour Conference for reasons of inclusivity and representativeness, in particular since the 1949 delegation of authority to the Governing Body was granted at a time when the ILO had 60 Member States, that is, less than one third of the current membership. The Employers' group spokesperson, for instance, argued that "the 1949 resolution was not a democratically legitimate basis for action" (**Document No. 31**, para. 67) while the Government representative of Zimbabwe took the view that "the authority delegated to the Governing Body in the 1949 resolution was outdated" (**Document No. 31**, para. 45) and the Government representative

[34] See also the statements of the Government representatives of Bangladesh and the Sudan (**Document No. 31**, paras 48, 64).

of Bangladesh indicated that "[t]he 1949 resolution had not permanently delegated authority on matters relating to international labour standards to the Governing Body" (**Document No. 31**, para. 48).[35]

108. Nevertheless, until the delegation of authority is revoked or modified by the Conference, the Governing Body may validly continue to exercise that authority and refer legal questions to the ICJ for an advisory opinion. As the Government representative of Barbados stated, "until there was a change in the Constitution or the rules governing the Governing Body, the rules remained in place, including that of delegated authority" (**Document No. 31**, para. 88). It is clear, therefore, that no valid claim that the process was vitiated may be made on account of the fact that the referral request was decided by the ILO Governing Body, which has 56 voting members, and not by the International Labour Conference, which is composed of tripartite delegations of all Member States.

109. The third ground on which the propriety of the referral decision was questioned was the method through which the decision was taken. In the words of the Employers' group spokesperson, "[i]t would be highly problematic to impose a referral to the ICJ by means of a vote when opinion was so divided" (**Document No. 31**, para. 23).

110. Yet, it may be precisely when a question is so divisive that a vote becomes inevitable. In any event, taking a decision through a simple majority vote by show of hands is specifically provided for in article 6.1 of the Standing Orders of the Governing Body, and occurred some 18 times in the period from March 2021 to March 2024 (**Annex No. 18**). It should also be recalled that, with the exception of the Employers' group, which considered that "the Chairperson had forced a vote" (**Document No. 31**, para. 148), the Chairperson's decision at the end of the special session to put to a vote the referral request that had been supported by a group of 44 countries was not contested. Indeed, even a cursory reading of the minutes of the special session suffices to show the sheer impossibility of reaching consensus – defined as "the absence of any objection presented by a Governing Body member as an impediment to the adoption of the decision in question" (Introductory note to the Standing Orders of the Governing Body, para. 46) – and hence the unavoidability of the Chairperson's call for a vote.

111. The referral request was ultimately put to a vote, the result of which was not challenged by any Governing Body member. As the Court confirmed in the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, a "resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted" (ICJ Reports 2004, para. 35).

112. Beyond the doubts expressed regarding procedure, it has also been argued that seeking an advisory opinion from the Court was not a suitable means to address the political questions around the right to strike and would, in any event, be of little help, as the advisory opinion would not have a binding effect and would not put an end to the dispute, as the Conference and/or the Governing Body would need to resume the discussion and agree on possible implementation or other follow-up action.

113. Suffice it to recall, in this respect, the consistent jurisprudence of the Court, according to which:

> [T]he fact that a question has political aspects does not suffice to deprive it of its character as a legal question […]. Whatever its political aspects, the Court cannot

[35] See also the statements of the Government representatives of India and the Russian Federation (**Document No. 31**, paras 57, 63). Others, such as the Association of Southeast Asian Nations and the Government representatives of Switzerland and Tunisia, supported a final decision by the Conference as the most suitable platform to hold an inclusive and in-depth discussion on the issue, without, however, contesting the legitimacy of the Governing Body's role in the process (**Document No. 31**, paras 28, 40, 42).

> refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task […] The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have" (*Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, para. 27).

114. The Office is of the view that the usefulness of the authoritative guidance to be received from the Court can hardly be overestimated, especially in terms of bringing about legal certainty and strengthening the role and impact of the ILO's supervisory organs. Yet, in practical terms, such considerations are irrelevant to assessing the admissibility of a request. As the Court clarified in the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory:*

> [A]dvisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. […]
>
> It follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly (ICJ Reports 2004, paras 60, 62).

115. Moreover, the fact that the Court's advisory opinion may call for proper analysis and follow-up by the ILO's executive and deliberative organs cannot in itself affect the admissibility of the request. As the Court affirmed in the advisory opinion concerning the *Unilateral Declaration of Independence in Respect of Kosovo*:

> [T]he purpose of the advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions. The Court cannot determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps (ICJ Reports 2010, para. 44).

116. As for the legal effect of the Court's advisory opinion under public international law in general and the ILO Constitution in particular, the Office will address this question separately below.

117. Furthermore, it has been contended that the question submitted to the Court is misleading and incomplete since in reality this is not an interpretation dispute but rather a controversy over the excessive and unauthorized interpretative functions performed over the years by the ILO's Committee of Experts.

118. In this respect, it is recalled that the referral request as initially proposed by the Workers' group in July 2023 (**Document No. 5**) comprised a second question regarding the competence of the Committee of Experts to "specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise". This question was, however, omitted in the text of the draft resolution that was submitted to, voted upon and ultimately adopted at the 349th *bis* (Special) Session of the Governing Body. As a result, the legal question put to the Court is specific and relates only to whether the right to strike of workers and their organizations is protected under Convention No. 87.

119. Be that as it may, it is well established that the Court has the power to clarify, refine and even rephrase the question as it deems necessary. As was recalled in the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

> In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the

> question on which the Court's opinion was being sought […], or did not correspond to the "true legal question" under consideration […]. Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (ICJ Reports 2004, para. 38).

120. Similarly, in the advisory opinion concerning the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court indicated that "it may depart from the language of the question put to it where the question is not adequately formulated […] or does not reflect the 'legal questions really in issue'" (ICJ Reports 2019, para. 135). Indeed, in the advisory opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court reformulated the question in its entirety, as it considered that "if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request" (ICJ Reports 1980, para. 35).[36]

121. Moreover, doubts were expressed by some constituents as to the real urgency of seeking guidance from the Court, as they considered that there was still room to explore consensus-based solutions, and that referral to the ICJ under article 37(1) should be envisaged only as a last resort.

122. It should be noted, in this regard, that article 37(1) of the ILO Constitution is not worded in a manner that would imply that only urgent matters may be considered for referral. Nor does article 37 make the referral of a dispute or a question to the ICJ conditional on the prior exhaustion of other possible means of settlement. Even though the ILO Constitution provides that "[*a*]*ny* dispute relating to the interpretation of any […] Convention […] *shall be* referred for decision to the International Court of Justice" (emphasis added), in practice, a referral requires a prior decision of the Governing Body or the Conference, which in itself confirms that not all interpretation disputes will necessarily be brought before the Court.[37]

123. In any event, the urgency of soliciting the Court's legal assistance is not a formal requirement under any of the jurisdictional bases of the present referral, namely article 37(1) of the ILO Constitution, article IX(3) of the UN–ILO relationship agreement, the UN Charter and the ICJ Statute. Hence, the Office will merely recall that the controversy over the interpretation of Convention No. 87 in relation to the right strike has persisted for more than 30 years and has had a direct effect on the smooth functioning of the ILO's supervisory machinery, such that seeking to resolve the dispute through available constitutional means may be said to be anything but premature.

124. In conclusion, the Office respectfully submits that the Court should not refrain from giving an advisory opinion for reasons of judicial propriety, since there is nothing that would render the exercise by the Court of its advisory jurisdiction incompatible with its judicial function. Indeed, there is sufficient factual and documented information to allow the Court to arrive at a judicial determination; the question on which an advisory opinion is sought is eminently legal and not political in nature; it is clear, precisely framed and concrete; and the advisory opinion, if

[36] As an eminent scholar has noted, "in interpreting the meaning of the questions, the Court has paid attention to many different features. These have included the circumstances in which the request came to be made, the terms of the resolution embodying the request, discussions in the organ making it (including proposals for amendment which were not adopted and other procedural votes), and occasionally possible divergences between the English and the French official versions of the resolution embodying the request"; S Rosenne, *The Law and Practice of the International Court 1920-2005*, 4th ed., 2006, vol. II, p. 955.

[37] For instance, in 1932, when the Governing Body was considering referring a question concerning night work of women based on a request from the Government of the United Kingdom, the Government of Germany also requested a referral of a separate but related question. The Governing Body considered that the latter request should be postponed until the Office had carefully studied the question. The Government of Germany did not agree with the proposed postponement and a vote was finally taken to adjourn consideration of the question raised by the German Government; Minutes of the 58th Session of the Governing Body, April 1932, p. 401.

rendered, would serve international public interest and a most useful purpose of assisting a UN organization in steering away from an institutional impasse.

* * *

125. The Office trusts that the Court will confirm its jurisdiction, established concurrently by virtue of article IX(3) of the UN–ILO relationship agreement and article 37(1) of the ILO Constitution, to provide an advisory opinion on a legal question that falls well within the ambit of the ILO's mandate.

126. The Office is also confident that despite the concerns voiced during the referral process, mainly on political and procedural grounds, the Court will not entertain any doubt as to the propriety of exercising its discretion and responding favourably to the present request for an advisory opinion consistent with the precedents of the PCIJ.

D. The legal effect of the Court's opinion

127. The Office has on numerous occasions affirmed that, as a matter of constitutional theory and practice, the advisory opinions issued by the Court at the request of the Organization under article 37(1) of the Constitution are recognized as having a binding effect. For instance, in November 2014, the Office noted that "the rationale underlying article 37 of the ILO Constitution is to recognize the referral to the International Court of Justice as the ultimate recourse in matters of interpretation disputes and to accept the Court's 'decision' as final settlement of any such dispute" (**Document No. 34**, para. 27). Likewise, in March 2022, the Office affirmed that "[t]he wording of article 37 leaves no doubt that […] the authority to give definitive and binding interpretations currently lies exclusively with the ICJ. […] The mechanisms provided for in article 37 are the only methods that can guarantee legal certainty since legal interpretation takes eventually the form of a definitive, non-appealable judicial pronouncement" (**Document No. 38**, para. 66). In the same vein, in March 2023, the Office noted that "according to the letter and the spirit of article 37 of the ILO Constitution ('any question or dispute … shall be referred for decision to the International Court of Justice'), and as consistently reaffirmed by tripartite constituents, advisory opinions rendered by the Court at the ILO's request are considered to be authoritative and final pronouncements, and should be implemented as such" (**Document No. 40**, para. 13).

128. In the following paragraphs, the Office will recall some key considerations in support of these affirmations.

1. Article 37(1) is explicit and unambiguous

129. Article 37(1) unambiguously refers to a "decision" of the International Court of Justice.[38] The term "decision" refers to "[a] judicial or agency determination after consideration of the facts and the law; esp[ecially], a ruling, order, or judgment pronounced by a court when considering or disposing of a case".[39] By definition, a decision is not a recommendation, guidance or mere advice. A decision is intended to apply to, and be complied with by, all those to whom it is addressed.

[38] The French text uses the term *"appréciation".* At the time of drafting of the Constitution, the English verbs "to decide" or "to determine" were commonly translated as *"apprécier"* in French; see, for example, draft article 54 of the PCIJ Rules (Series D, *Acts and Documents concerning the Organisation of the Court, Preparation of the Rules of the Court*, 1922, p.412), draft articles 4bis, 4ter and 28 (Series D, *Acts and documents concerning the Organisation of the Court, Elaboration of the Rules of Court of March 11, 1936*, pp. 22, 32, 388, 389, 560, 563, 565) and article 46 (Series D, *Acts and Documents concerning the Organization of the Court, Statute and Rules of the Court*, Fourth Edition, April 1940, p. 48) (**Annex No. 19**).

[39] *Black's Law Dictionary*, 11th ed., 2019, p. 511.

130. The ICJ has therefore been explicitly entrusted by the drafters of the ILO Constitution with the responsibility of issuing authoritative decisions – not mere guidance – for the final settlement of interpretation disputes.

131. The term "decision" may not be understood in any other manner. Nor would it be reasonable to imagine that the drafters of the original ILO Constitution of 1919 and of the constitutional amendment of 1946 (including the former Director-General and eminent legal scholar Wilfred Jenks) would have used the word "decision" in a sense other than its ordinary meaning and without the intention that it should produce full legal effect.

132. Furthermore, the term "decision" is also used, again in relation to the ICJ, in articles 31 and 34 of the ILO Constitution, which provide that the decision of the Court with respect to an article 26 complaint referred to it shall be final. Naturally, only decisions can be final, and there is no reason to believe that the drafters of the Constitution would have used the same term with a different meaning in article 37(1).

133. If ICJ decisions were not intended to have decisive effect, what would be the rationale for including article 37(1) in the ILO Constitution? Is it sensible to assume that the advisory opinions rendered by the ICJ under that article carry the same weight as the non-binding opinions of the Committee of Experts which have given rise to the interpretation dispute that the Court is called to decide upon?

134. There is a further argument supporting the binding nature of decisions rendered under article 37(1) which draws upon the negotiating history of article 37(2). The *travaux préparatoires* leave no room for doubt that the decisions of the in-house tribunal provided for in article 37(2) were intended to be final and binding on all Member States.[40] If the decisions of the in-house tribunal were meant to be binding, then the decisions of the ICJ, which article 37 places at the apex of the jurisdictional set-up for the resolution of interpretation disputes, should *a fortiori* also be final and binding on all Member States. It would be illogical, not to say absurd, to assume that decisions of the "lower" tribunal (which is mandated to consider expeditiously disputes not warranting referral to the principal judicial organ of the UN) would be binding whereas those of the ICJ would not. Besides, the negotiating history also confirms that the drafters' intention was to put in place judicial mechanisms and procedures vested with powers to settle interpretation disputes authoritatively and conclusively and not simply to provide expert advice or guidance.

2. Article 37(1) is a dispute settlement clause

135. Article 37 is a clause intended to resolve disputes. By inserting such a clause in a treaty, the parties agree in advance on the method they will have to use to resolve any future dispute. They may choose, for instance, arbitration or recourse to judicial process, but in any case, the clause implies compulsory acceptance of the dispute resolution mechanism so agreed. In her seminal work on the advisory function of the International Court, Michla Pomerance makes specific reference to article 37 of the ILO Constitution and notes: "a number of instruments now contain what might be described as "advisory compromissory clauses" – i.e., provisions for requesting advisory opinions in certain circumstances and for accepting the resultant opinions as binding".[41]

136. In the advisory opinion concerning the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the question was whether a country was obligated to follow the arbitration procedure set out in a host country agreement that the country had concluded with the United Nations, and the Court clarified that "[t]he purpose of the arbitration procedure envisaged by that Agreement is precisely the settlement of such

[40] See the explanations on the 1946 Conference discussions in GB.322/INS/5, footnote 35, and GB.347/INS/5, footnote 39.

[41] M Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras,* 1973, p. 38.

disputes as may arise between the Organization and the host country" before concluding that the country concerned was "bound to respect the obligation to have recourse to arbitration under section 21 of the Headquarters Agreement" (ICJ Reports 1988, paras 41, 57).

137. As the Office explained in a recent document to the Governing Body:

> By its nature […] a dispute settlement clause provides for compulsory rather than optional action […].
>
> In the case of article 37, in particular, the unqualified language renders the idea of a direct legal obligation even stronger; "any" interpretation dispute shall be referred to the ICJ for decision (*toutes les questions seront soumises*). […]
>
> In the self-contained legal framework established by the drafters of the ILO Constitution, recourse to the advisory function of the ICJ appears mandatory in all circumstances. Whereas procedurally speaking, a referral needs to be discussed and decided upon by the appropriate organ, the forum and method of settlement are specifically determined under article 37(1). What article 37(2) has added to this framework in 1946 is a possibility to create a separate judicial instance for the expeditious settlement of disputes relating to the interpretation of Conventions when "the points at issue are of so meticulous a character as not to warrant recourse to the principal judicial organ of the international community". As long as this possibility is not put into effect, referral to the ICJ for an advisory opinion under article 37(1) remains to date the only constitutional avenue of authoritatively resolving an interpretation dispute (**Document No. 38**, paras 19–21).

3. The binding effect of ICJ decisions under article 37(1) has long been recognized by tripartite constituents

138. The binding nature of ICJ advisory opinions issued at the ILO's own request has been generally acknowledged and accepted for more than 100 years by all tripartite constituents, with the exception of the dissenting voices raised during the recent debate over the right to strike and the possible referral to the Court. ILO records are replete with statements of constituents conveying the deep-rooted belief that article 37(1) confers a binding effect on advisory opinions obtained on that basis. In essence, this *opinio juris* of the ILO's tripartite constituency reflects the fact that article 37(1) must be understood as a "compromissory clause" attributing decisive and conclusive effect to ICJ advisory opinions.

139. As Edward Phelan, who would later become the fourth Director of the ILO, put it when speaking before the PCIJ in 1932 in the context of the proceedings concerning the *Interpretation of the Convention of 1919 concerning the Employment of Women during the Night*, "it is for the Court to give a final opinion upon it".[42]

[42] PCIJ, Series C, Acts and documents relating to Judgments and Advisory Opinions given by the Court/ Pleadings, Oral Arguments and Documents, Public Sittings and Pleadings, p. 208. During the 1926 advisory proceedings concerning the *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, the representative of the International Organization of Industrial Employers ended his oral statement with these words:

> [L]es patrons se sont empreints tout autant du souci de la critique et de la vérité scientifiques que de la précision et du respect de la constitution. Ils se sentent pénétrés du scrupule d'accomplir intégralement, mais strictement dans le cadre tracé, le mandat conféré par le Traité de paix. […] [I]ls désirent que les décisions de cet organisme soient universellement respectées avec l'autorité qui s'attachera naturellement à une œuvre édifiée sur une base inattaquable et irréprochable. Cette base, c'est le droit qui seul peut la fournir.
> La question que nous avons à développer est une pure question de droit, d'interprétation. En réalité, Messieurs, il n'y a devant vous ni demandeur ni défendeur. Nous ne sommes pas ici des adversaires défendant une cause d'intérêt privé, mais des auxiliaires de ceux qui ont pour haute mission de dire le droit. (PCIJ, Series C, Acts and documents relating to Judgments and Advisory Opinions given by the Court / Pleadings, Oral Arguments and Documents, Speeches Made and Documents Read before the Court, pp. 17–18).

Another representative of the same organization stated: "*Roma locuta est* c'est le droit seul qui parle, c'est le droit seul qui parlera; c'est certainement le droit qui trouvera son expression dans l'avis que vous êtes appelés à donner"; ibid., p. 34.

140. It is also worth recalling that in 1938, when the Governing Body voted down the request of the Employers' group to seek an advisory opinion regarding the designation of the Employers' delegate of the Soviet Union, the spokesperson of the Employers' group stated that "the Governing Body had acted in an unconstitutional way", as:

> Article 37 of the Constitution [...] said that "any question or dispute relating to the interpretation ... shall be referred for decision to the Permanent Court of International Justice". This was an imperative provision for which there was no parallel in the Covenant of the League of Nations [...] [I] would ask the Governing Body to consider seriously whether it could take the responsibility of completely disregarding an article of the Constitution. To do so was to create a most dangerous precedent.[43]

4. The ICJ has consistently recognized that a treaty may attribute binding effect to advisory opinions

141. In affirming the binding legal nature of the Court's guidance when such guidance is solicited under article 37(1), the Office has always recalled the Court's key tenet that its reply "is only of an advisory character: as such, it has no binding force" (*Interpretation of Peace Treaties*, Advisory Opinion, ICJ Reports 1950, p. 71). The Office has, nonetheless, also stressed the Court's common caveat that:

> A distinction should thus be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, "as such, ... has no binding force". [...] These particular effects, extraneous to the Charter and the Statute which regulate the functioning of the Court, are derived from separate agreements (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* Advisory Opinion, ICJ Reports 1999, para. 25).

142. As Roberto Ago has written, "under certain provisions, designed for the purpose, that are contained in instruments other than the Charter and the Statute [...], resort to the procedure may pursue a more ambitious aim, namely, to settle a dispute to which one of those institutions is a party. Examples of such provisions may be found in [...] the constituent instruments of certain of these organizations". He notes that "[t]he essential common feature of these provisions is that they characterize the opinion requested from the Court as a 'decision' in relation to the dispute at issue; that is, they confer 'binding force' on the opinion for the parties to the dispute".[44] Shabtai Rosenne refers to "those exceptional instances in which by collateral agreements States and international organizations have agreed that the opinion will have binding force or will be decisive. In those cases the obligation of compliance derives from the agreement."[45] In the same vein, Robert Kolb acknowledges that "some advisory opinions have binding legal force and some even have a res judicata effect. This binding nature is never derived from the opinion itself; it flows rather from collateral legal acts – provisions contained in treaties or rules – which attribute to the Court's opinion a binding legal effect in a particular situation or context."[46]

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[43] Minutes of the 82nd Session of the Governing Body, February 1938, Report of the Standing Orders Committee, pp. 7–8, 9.

[44] R Ago, "'Binding' Advisory Opinions of the International Court of Justice", *American Journal of International Law*, vol. 85, 1991, p. 439.

[45] S Rosenne, *The Law and Practice of the International Court 1920-2005*, 4th ed., 2006, vol. II, p. 1698.

[46] R Kolb, *The Elgar Companion to the International Court of Justice*, 2014, p. 279. See also C Brölmann, "Specialized Rules of Treaty Interpretation" in D B Hollis (ed.), *The Oxford Guide to Treaties,* 2nd ed., 2020, p. 539.

143. In the case of the ILO, a "particular effect" is attributed to the Court's advisory opinions by an express constitutional provision, article 37(1), which provides for a "decision" of the International Court of Justice. The ILO's constituent instrument has, therefore, endowed the ICJ with responsibility for issuing decisions for the final settlement of interpretation disputes. It follows that by joining the Organization, all Member States accept to be bound by decisions issued by the ICJ in response to a request made by the Organization under article 37(1).

144. In all relevant Governing Body discussions and informal consultations over the past ten years, the Office has been very clear about this point. In 2014, for instance, the Office clarified that "[a]dvisory opinions are neither final nor binding, as those terms are used in articles 59 and 60 of the Court's Statute with respect to contentious cases. However, advisory opinions may be accepted as binding through specific Conventions or acts of international organizations" (**Document No. 34**, para. 25). Similarly, in 2022, the Office noted that "[w]hile advisory opinions are not binding per se, they may be accepted as such, for instance, through a specific clause to this effect. The Court has always drawn a distinction between the advisory nature of its task and the particular effects that parties to an existing dispute may wish to attribute to an advisory opinion" (**Document No. 38**, para. 34). In addition, in March 2023, the Office indicated that "[c]ontrary to judgments in contentious cases, advisory opinions are in essence non-binding. Notwithstanding, the Court has always drawn a distinction between the advisory nature of its task and the particular effects the requesting organization may wish to attribute to an advisory opinion" (**Document No. 40**, para. 13).

5. Legal doctrine and scholarly writings affirm that ICJ advisory opinions have the same intrinsic legal value as judgments

145. As early as 1927, a committee of the PCIJ expressed the opinion that "the difference between contentious cases and advisory opinions is only nominal. [...] So the view that advisory opinions are not binding is more theoretical than real."[47]

146. Legal scholars have since confirmed that the authoritativeness of the Court's opinions renders them – for all intents and purposes – binding on the requesting organ. For instance, Charles de Visscher has stated that a question posed to the Court regarding the legal aspects of a dispute is not a regular consultation, comparable to seeking advice from a committee of legal experts that could be disregarded at will (unofficial translation).[48] Georges Scelle has argued that "an advisory opinion is a statement of the law; it is self-contradictory, and thus technically impossible, to declare that a subject of law [...] when he knows what the law has to say about a concrete case, can refuse to yield to it" (unofficial translation).[49]

147. Shabtai Rosenne has observed:

> The practical difference between the binding force of a judgment, which derives from specific provisions of the Charter and Statute apart from the *auctoritas* of the Court, and the authoritative nature of an advisory opinion possessed of that same *auctoritas,* is not significant. [...] An advisory opinion states the law at large, *erga omnes* so to speak. Following the advisory opinion on *Reparation*, no State can deny the international capacity of the United Nations or a comparable intergovernmental organization. Following the *Immunity from Legal Process* case, no State or other international organ can deny the application to an agent of the United Nations who is not an official of the United Nations the privileges and immunities accorded by

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[47] Quoted in L Goodrich, "The nature of the advisory opinions of the Permanent Court of International Justice", *American Journal of International Law,* vol. 32, 1938, p. 739.

[48] C de Visscher, "Nature des avis consultatifs et limites de leur autorité", *Recueil des cours de l'Académie de La Haye*, vol. 26, 1929, p. 27.

[49] G Scelle, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de La Haye*, vol. 46, 1933, p. 581.

> the Privileges and Immunities Convention. An advisory opinion may state a rule with which the Secretary-General, as the chief administrative officer of the United Nations, is obliged to comply.[50]

148. In the same vein, Robert Kolb writes:

> It [the requesting organ] cannot dispute that the legal position in the case at hand is as the Court has explained in its opinion. The law is known by the Court (*jura novit curia*); the political organ does not have the competence or the authority to contest or ignore the legal *exposé* of the Court. The position is thus a subtle one: the organ is not bound to apply the law to that dispute; at the same time, it cannot take another position with regard to the legal position put forward by the Court. So, to the extent that it has made the choice to try to settle the dispute according only to the law, it has to base itself on the legal findings of the ICJ. With regard to questions of interpretation of the Charter or of other text, which is a question of law, the correct interpretation from the legal point of view is that given by the Court. This, then, is the interpretation that the political organ must endorse.[51]

149. In the words of Juan José Quintana, another eminent scholar, "every seasoned international lawyer knows that the influence that advisory opinions have for the development of international law is incommensurable [...]. The Court's authority as the principal judicial organ of the UN is so undisputed that the reasoning supporting its advisory opinions is as persuasive as that supporting its judgments and they may be said to have the same precedential value".[52]

150. It is not without significance that the UN General Assembly has always acknowledged the compelling force of the opinions rendered by the ICJ. For instance, in its resolution ES-10/15 of 2 August 2004 following the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the General Assembly considered that "respect for the Court and its functions is essential to the rule of law and reason in international affairs" and called upon "all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion". In almost identical terms, in its resolution 73/295 of 24 May 2019 following the advisory opinion concerning *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the General Assembly considered that "respect for the Court and its functions, including in the exercise of its advisory jurisdiction, is essential to international law and justice and to an international order based on the rule of law" and called upon "all Member States to cooperate with the United Nations to ensure the completion of the decolonization of Mauritius as rapidly as possible [...] in accordance with the advisory opinion of the Court".

151. In another noteworthy development, the International Tribunal for the Law of the Sea in its Judgment of 28 January 2021 in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* upheld that "judicial determinations made in advisory opinions [of the ICJ] carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law".[53] The judgment suggests a shift towards recognizing that ICJ advisory opinions may produce *res judicata* effect, thus marking "the beginning of a new era where international courts and

[50] S Rosenne, *The Law and Practice of the international Court 1920-2005*, 4th ed., 2006, vol. III, p. 1702.

[51] R Kolb, *The Elgar Companion to the International Court of Justice,* 2014, p. 278.

[52] J J Quintana, *Litigation at the International Court of Justice,* 2015, p. 1273.

[53] International Tribunal for the Law of the Sea, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Preliminary Objections, Judgment of 28 January 2021, para. 203.

tribunals recognize ICJ advisory opinions as precedents having the (normative) authority to resolve a dispute".[54]

* * *

152. In conclusion, the Office respectfully submits that, notwithstanding the difference between contentious and advisory proceedings in terms of executory force and *res judicata*, the authoritative opinion of the Court in the present case will constitute a binding and final settlement of the interpretation dispute for the ILO and its Member States, as expressly prescribed in article 37(1) of the ILO Constitution.

153. The specificity of this constitutional provision as regards the legal effect of ICJ decisions has been unanimously recognized by the ILO's tripartite constituency for the last hundred years.

154. In strict conformity with the terms of the referral decision of the ILO Governing Body, the Office will accept and follow in good faith the legal answer that it will obtain from the Court as the only legal determination with binding force for all constituents and ILO organs.

E. Participation of international employers' and workers' organizations in the advisory proceedings

155. In its resolution of 10 November 2023, the ILO Governing Body instructed the Director-General to respectfully request that the Court allow for the participation in the proceedings of the employers' and workers' organizations that enjoy general consultative status at the ILO.

156. The six non-governmental organizations concerned are: the International Organisation of Employers, the International Trade Union Confederation, the World Federation of Trade Unions, the International Cooperative Alliance, the Organization of African Trade Union Unity and Business Africa. By granting general consultative status to those organizations, the ILO Governing Body has recognized that collaboration with them has special institutional significance. As explained in the Office Note of 17 April 2023 (**Document No. 51**), the general consultative status, established by the Governing Body in June 1948, represents the most advantageous collaborative framework that an international employers' or workers' organization can benefit from at the ILO. In particular, the IOE and ITUC, by acting as the secretariat of the Employers' and the Workers' groups respectively, stand as the main institutional interlocutors representing the ILO's non-governmental constituents.

[54] N Lanzoni, "The Authority of ICJ Advisory Opinions as Precedents: The *Mauritius/Maldives* Case", *Italian Review of International and Comparative Law*, vol. 2, 2022, p. 321. The Tribunal had to address the question of whether the 2019 ICJ advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* had resolved the sovereignty dispute between Mauritius and the United Kingdom over the Chagos Archipelago. In the view of the Maldives, the resolution of the sovereignty dispute was not an implied or necessary consequence of the ICJ's advisory opinion and even if the ICJ had given advice on the sovereignty dispute, any such opinion would not have been binding on States. In particular, the Maldives stated that the ICJ itself had confirmed on numerous occasions that its advisory opinions were not binding even on the organs which requested them, let alone on other entities such as States. Additionally, the Maldives expressed the view that whatever authority advisory opinions might have in jurisprudence as abstract statements of international law, they were not a means of binding States in specific disputes through the backdoor (para. 194). In contrast, for Mauritius, there could be no doubt that the issue of sovereignty over the Chagos Archipelago had been disposed of by the ICJ in its advisory opinion, which carried legal consequences for all UN Member States and international institutions. Mauritius argued that the pronouncements made by the ICJ in advisory opinions were considered to be on an equal footing with those made in judgments as integral components of its jurisprudence and that States were bound and obliged to comply with the law, as declared and defined by the ICJ, whether in contentious cases or advisory opinions (para. 198).

157. In its Order of 16 November 2023, the Court decided that the six organizations enjoying general consultative status at the ILO were considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion and therefore invited them to make written contributions to the Court. In authorizing six non-governmental organizations to participate fully in the proceedings – which in principle deviates from the Court's position that the terms "international organization" and "intergovernmental organization" are co-extensive (see Practice Direction XII of 2004) – the Court has given primary consideration to "the particular tripartite structure of the International Labour Organization".

158. The Court's decision confirms the trend in favour of a pragmatic approach that seeks to ensure that all interests at stake can be expressed and that shows relative openness to non-State actors (**Document No. 34**, paras 39–47). Importantly, the Court's decision also aligns with the practice followed by its predecessor, the Permanent Court of International Justice, on all but one of the six occasions on which the ILO sought its assistance (**Document No. 29**, Annex II).[55]

159. It is recalled that as many as six international workers' organizations were invited by the PCIJ to participate in the proceedings concerning the *Competence of the ILO in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* (**Document No. 43**), while in each of three other proceedings, namely the *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, the *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer*, and the *Interpretation of the Convention of 1919 concerning the Employment of Women During the Night,* the PCIJ authorized three international employers' and workers' organizations to submit written and oral statements (**Documents Nos 42, 44, 45**).

160. The practice was accepted as obvious from the outset. As a result, in 1926 when the PCIJ undertook a revision of the Rules of Court and discussed the definition of the concept of "international organization" in article 73, its President, Max Huber, stated that:

> [A] species of precedent had been created by admitting great industrial organizations, whether of workers or of employers, and it would be very difficult to leave them out, owing to their very great importance. Moreover, these great organizations were at any rate indirectly recognized as constituting elements of the International Labour Organization, which was composed partly of representatives of States and partly of representatives of an equal number of employers' and workers' organizations (**Document No. 46**).

161. It is also worth noting that when, in 1929, a Committee of Jurists responsible for the revision of the PCIJ Statute proposed that the new provisions on the advisory jurisdiction of the Court should make no reference to international organizations, the ILO Director, Albert Thomas, wrote to the Secretary-General of the League of Nations pointing out that:

> This omission seems somewhat unfortunate. The Court has already been asked on four occasions to give advisory opinions on questions relating to the working of the International Labour Organisation. On each occasion it has requested or accepted observations both from representatives of the International Labour Organisation itself and from representatives of international trade union organisations. This procedure has always worked quite satisfactorily and it might prove inexpedient to change it (**Annex No. 20**).[56]

[55] The only proceedings in which no international organization was invited to furnish information were the proceedings concerning the *Free City of Danzig and International Labour Organization*, since the question put to the Court was not related to the ILO's mandate in labour matters.

[56] Minutes of the Conference regarding the Revision of the Statute of the Permanent Court of International Justice and the Accession of the United States of America to the Protocol of Signature to that Statute, 4–12 September 1929, C.514. M.173. 1929.V, p. 74.

162. At the Conference regarding the revision of the Statute of the PCIJ, those in support of maintaining article 73 and the possibility for international organizations to be invited to participate in the advisory proceedings pointed to the fact that:

> [T]he Labour Organisation had the characteristic feature of comprising not only States but delegates of the working classes and of the employers' organisations, and requests for opinions might often concern the organisations themselves more directly than the States.
>
> Was it not absurd to endeavour to treat in a different manner the international organisations directly concerned and the States which very often were quite indifferent to the solution of those problems?[57]

163. The representative of the ILO stated that:

> [T]he Labour Office's chief desire was that there should be no change in the procedure followed up to the present. The Rules of Court had employed a somewhat vague expression, probably on purpose, "the international organisations". Those included, on the one hand, an official organisation, the International Labour Organisation, and, on the other, unofficial organisations such as the international trade unions. The Court had already pronounced four times on labour questions, and on each occasion had consulted international organisations.
>
> If the text proposed by the Committee of Jurists were adopted, the Court would not be prevented from consulting the international organisations.
>
> At the same time, the proposed modification might be interpreted in a restrictive sense. The existing Rules of the Court provided for the consultation of international organisations, but the proposed text did not. That was what alarmed the International Labour Office, and at the meeting of its Governing Body both employers' and workers' delegates had expressed the hope that no change would be made in the procedure so far followed[58] (**Annex No. 21**).

164. However, the PCIJ had been attentive to approaching international organizations of a certain standing and occasionally declined to grant authorization to international organizations not considered to be "of the same status as the organizations" permitted to furnish information. For instance, in the context of the proceedings concerning the *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer*, the International Union of Federations of Workers in the Food and Drink Trades had expressed interest in providing information but the President of the Court did not grant permission, noting that the organization was affiliated to the International Federation of Trades Unions (which had been invited to participate) and therefore could submit observations through the International Federation of Trades Unions (**Document No. 49**).

165. Accordingly, the Office notes that the invitation extended by the Court to the six international employers' and workers' organizations enjoying general consultative status at the ILO to submit written statements concurs with and reaffirms, in a most felicitous sign of judicial continuity, the position taken by the Court's predecessor that the ILO warranted particular treatment due to its unique tripartite composition. This is all the more appropriate as the dispute currently before the Court crystallizes the deep division between the two non-governmental groups on the matter of whether the right to strike is protected under Convention No. 87, and hence the leading international organizations of employers and workers with an active presence in the Organization's life may indeed be expected to provide fully reasoned briefs in support of their respective theses.

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57 Ibid., p. 45.

58 Ibid., p. 44. See also G Fischer, *Les rapports entre l'Organisation internationale du Travail et la Cour permanente de Justice internationale,* 1946, pp. 253–257.

166. In conclusion, the Office acknowledges with appreciation the fact that the Court unreservedly granted authorization to the six international non-governmental organizations enjoying general consultative status at the ILO to participate autonomously in the written proceedings.

167. The Office has every reason to be pleased about the Court's decision, as it sets a further precedent and foretells the treatment the ILO's non-governmental constituents may expect in similar instances in the future.

▸ PART II. The ILO system of standards

168. Convention No. 87 is part of a comprehensive system of international labour standards that operate in a specific legal and institutional framework. In joining the Organization, participating in its standard-setting activities and eventually ratifying international labour Conventions, Member States accept to be subject to the various procedures relating to standards, as laid down in the Constitution or developed by the governance organs. The drafting and adoption of standards follows a thorough preparatory process and generates specific constitutional obligations, and the application of standards is monitored through an integrated set of mutually reinforcing supervisory procedures. As former ILO Legal Adviser Francis Wolf put it, "the ratification of an international convention does not merely entail acceptance of the undertakings which flow expressly from its provisions; it also includes, uniformly, acceptance of the constitutional rules which concern its application and from which the text of the convention remains indissociable" (unofficial translation).[59]

169. The ILO system of standards draws upon the ILO Constitution, the Standing Orders of the International Labour Conference and of the Governing Body, and the institutional practices that have developed around those basic texts (**Documents Nos 54–56**). The aim of the system is to enable the ILO to fulfil its mandate, as set forth in article 1 of the Constitution and anchored on the values of social justice.

170. In the advisory opinion concerning the *Free City of Danzig and International Labour Organization*, the PCIJ pointed out the specificities of the ILO system of standards:

> The nomination of delegates to a Labour Conference, the way in which such delegates vote at a Conference, the method by which majority decisions of a Conference are embodied in recommendations or draft conventions, the duty imposed on Members to submit such draft conventions to the "competent authorities" of their country and to ratify the draft conventions if they are approved by these "competent authorities", the method by which failure to observe the provisions of a convention can be made the subject of representations or complaints, of enquiry by a commission, of legal proceedings and of sanctions, all present features which differ from the proceedings of the ordinary diplomatic conference, from the way in which conventions drawn up at such conferences are brought into force and from the method by which a contracting Party to any such convention can secure redress if his interests are prejudiced by a violation of its terms by another Party (PCIJ, Series B, Collection of Advisory Opinions, No. 18. 1930, p. 14).

171. Four decades later, recalling the same specificities at the Vienna Conference on the Law of Treaties, former ILO Legal Adviser Wilfred Jenks emphasized the "vital significance for the long-term development of international organizations and international law" of the rule and exception laid down in what would become article 5 of the Vienna Convention on the Law of Treaties: "The rule was that treaties adopted within an international organization were subject in principle to the general law of treaties, and the exception was that the rule was not applicable in respect of matters for which a *lex specialis* existed by virtue of any relevant rules, including the established practice of the organization concerned" (**Document No. 57**, para. 3).

172. It is indicative that almost half of the 40 articles of the ILO Constitution – 17, to be precise – are devoted to international labour standards. These standards can take the form of either international labour Conventions or international labour Recommendations. Conventions

[59] F Wolf, "L'interdépendance des conventions internationales du travail", *Recueil des Cours de l'Académie de La Haye*, vol. 121, 1967, p. 133.

are treaties and produce conventional obligations, whereas Recommendations provide policy guidance. To date, the ILO has adopted 191 international labour Conventions, 5 Protocols (partially revising existing Conventions) and 208 Recommendations. A number of international labour instruments have become obsolete over time and have been abrogated or withdrawn.[60]

173. International labour standards cover a broad range of subjects, which include the fundamental rights and principles at work, labour administration and inspection, employment policy, wages, working time, occupational safety and health, social security, maternity protection, social policy, migrant workers, seafarers and fishers, indigenous and tribal peoples and specific categories of workers. As the Director-General's report to the Conference noted in 1984, "ILO Conventions and Recommendations are not a haphazard collection of instruments but constitute a comprehensive body of standards covering most areas of ILO concern" (**Document No. 58**, p. 7).

174. The ILO system of standards involves close interaction among the Organization's three constitutional organs, namely, the International Labour Conference, the Governing Body and the Office. The Conference is composed of tripartite delegations of all 187 ILO Member States that include two delegates representing the Government, one delegate representing employers and one delegate representing workers.[61] The Conference is vested with primary responsibility for the drafting, adoption and revision of standards. The Governing Body, composed of 56 regular members (28 representing Governments, 14 representing workers and 14 representing employers), is vested with governance functions in relation to determining the standard-setting agenda of the Conference and the functioning of the supervisory system. The Office, as the secretariat of the Organization, facilitates the preparation of the discussions of the Conference and Governing Body in relation to standards, and services the various supervisory bodies. In short, tripartism is a unique feature in the multilateral system and is the cornerstone of – to quote from the Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia) – a "continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare" (**Document No. 118**).

A. Adoption of standards

175. The main rules concerning the adoption, entry into force and application of international labour standards were presented to the ICJ in a 1951 Office memorandum in the context of the advisory proceedings concerning the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Pleadings, Oral Arguments, Documents,1951, pp. 216–282), and are recalled below.

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60 Pursuant to article 19(9) of the Constitution, since 2015 the Conference has been empowered to abrogate, by two-thirds majority and upon recommendation of the Governing Body, a Convention in force if it appears that it has lost its purpose or that it no longer makes a useful contribution to attaining the objectives of the Organization. The list of up-to-date standards is available at the NORMLEX database.

61 The constitutional requirements for the appointment of the national tripartite delegations were examined by the PCIJ in the advisory opinion concerning the *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*. In particular, the Court noted that:

> with regard to the choice of the non-Government Delegates a limitation is imposed. By the third paragraph of Article 389 of the Treaty [currently article 3(5) of the Constitution], the Members undertake that, if industrial organisations exist in the country, the Member shall nominate non-Government Delegates chosen in agreement with the industrial organisations which are most representative of employers or workpeople, as the case may be, in their respective countries.
>
> The engagement contained in the third paragraph is not a mere moral obligation. It is a part of the Treaty and constitutes an obligation by which the Parties to the Treaty are bound to one another (PCIJ, Series B, Collection of Advisory Opinions, No. 1, 1922, p. 19).

176. In considering the inclusion of a standard-setting item on the agenda of the Conference, the Governing Body takes into account suggestions made by governments of Member States, employers' and workers' organizations and public international organizations. For the purposes of the current proceedings, it is worth noting that the consideration of suggestions made by international organizations was introduced in 1946 to facilitate cooperation with the newly established United Nations, as such matters were regarded "as being of outstanding practical importance".[62] Similarly, article III of the UN–ILO relationship agreement (**Document No. 2**) provides for reciprocal arrangements concerning proposals of agenda items. These arrangements were implemented for the first time in 1947 and resulted in the adoption of Convention No. 87.

177. Unless there is unanimity, two consecutive discussions are necessary before the Governing Body can decide to place an item on the agenda of the Conference. The main rationale for this requirement is to allow sufficient time for reflection and consultations before the Governing Body can decide to place an item concerning the adoption of standards, based on information compiled by the Office on law and practice.

178. Unless the Governing Body decides otherwise, an item placed on the agenda of the Conference with a view to the adoption of a standard is regarded as having been referred to the Conference for a double discussion (**Document No. 56**, para. 5.1.4). Under this procedure, which seeks to ensure thorough consideration and technical analysis, the Conference holds two discussions over two sessions before it adopts a standard. In cases of special urgency or where other special circumstances exist, as was the case for Convention No. 87, the Governing Body may decide to refer a question to the Conference for a single discussion (**Document No. 56**, para. 5.1.5).

179. The examination of draft Conventions or Recommendations is referred by the Conference to a tripartite technical Committee, which is established at the opening of the session. Draft instruments, as adopted by the Conference Committee and after having been reviewed by the Drafting Committee of the Conference, are submitted to the plenary of the Conference for adoption by means of a two-thirds majority vote. As was observed in the 1951 Office memorandum, "the Conference is not a meeting of plenipotentiaries but an international pre-legislative organ with a unique composition" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Pleadings, Oral Arguments, Documents, 1951, p. 218). As Wilfred Jenks put it, "a two-thirds majority is required of the votes cast by the delegations present [with] half of the delegates eligible to vote not representing Governments" (**Document No. 57**, para. 8).

180. Beyond the fact that they are prepared and adopted by a tripartite assembly, international labour standards have three other chief characteristics. First, international labour instruments set *minimum standards*, or a "threshold" of socially acceptable norms, which does not affect more favourable labour legal frameworks wherever they exist (**Document No. 54**, article 19(8)). Second, standards aspire to *universality* and hence they must afford sufficient *flexibility* to accommodate highly divergent socio-economic realities (**Document No. 54**, article 19(3)). Third, the *inadmissibility of reservations* to international labour Conventions naturally flows from the special procedure by which they are negotiated and adopted, "which differs in important respects from the procedure applicable to other international instruments. The special features of this procedure have always been regarded as making international labour conventions intrinsically incapable of being ratified subject to any reservation" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Pleadings, Oral Arguments, Documents, 1951, p. 217).

[62] This reflected the UN's approach regarding its relationship with the specialized agencies; ILC, 29th Session, 1946, Report II(1), Part 1: Reports of the Conference Delegation on Constitutional Questions, para. 41.

181. The adoption of standards creates direct legal obligations for Member States, even before they ratify them. Under the Constitution, Members are required to submit Conventions and Recommendations to the national competent authorities within one year of their adoption. A Member State that decides to ratify a Convention must communicate to the Director-General its instrument of ratification, for deposit and registration. If a Member State does not obtain the consent of the competent authority to ratify a Convention, "no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention" (**Document No. 54**, article 19(5)(e)).

B. Supervision of standards

182. The ILO supervisory machinery consists of an integrated set of procedures aiming at ensuring the effective observance of international labour standards. While each of the supervisory procedures has its own mandate and attributes, they are all devised to permit, on the one hand, coordinated or escalated action and, on the other, a special role for employers' and workers' organizations. A distinction is drawn between standing procedures based on the regular submission of reports (*regular supervision*) and ad hoc supervisory mechanisms activated by the submission of complaints (*special procedures*).

1. Regular supervision

183. The reporting obligation is set forth in article 22 of the Constitution, which provides that "[e]ach of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party". This provision has remained essentially unchanged since 1919, but the reporting periods had to be adapted due to the increase in the number of standards adopted.

184. There are two other obligations, both of which were introduced when the Constitution was amended in 1946. The first is the obligation to report on the submission of newly adopted standards to the national competent authorities. The second is the obligation to report on unratified Conventions and Recommendations at the request of the Governing Body. This latter requirement was introduced to obtain information on the impact and relevance of standards and to inform decisions on technical assistance and future standard-setting action. In practice, the information collected in this way is used to prepare an annual global law and practice report on specific standards selected by the Governing Body, which is known as the "General Survey".[63]

185. Reports under article 22 of the Constitution are submitted for the examination of the two standing supervisory bodies, the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards. Neither is provided for in the Constitution. Both committees were created under the same Conference resolution adopted in 1926 (**Document No. 73**) to conduct, on the one hand, a technical

[63] In 1968, in the context of the International Law Commission's work on codification of international law, Roberto Ago examined the obligations of Member States in respect of ILO Conventions. As regards the reporting obligation concerning unratified Conventions, he noted that "this rule has the advantage of enabling the International Labour Organisation's organs to consider the reasons given in the reports by States, to discuss them, and possibly either to eliminate the difficulties which some States encounter in accepting the convention, or to initiate action for revision of the text if those difficulties are sufficiently generalized and seem to have some justification". He therefore recommended that such a reporting obligation should be generalized within the United Nations system; A/CN.4/205/Rev.1, Yearbook of the International Law Commission, 1968, vol. II, paras 30–34.

examination involving certain guarantees of impartiality and independence, and on the other, an examination by a tripartite body of the ILO's supreme organ.[64]

(a) Committee of Experts on the Application of Conventions and Recommendations

186. The mandate of the Committee of Experts is set out in a decision taken by the Governing Body at its 103rd Session (December 1947) (**Documents Nos 74–75**). The Committee is tasked with examining: (a) the annual reports under article 22 of the Constitution on the measures taken by Members to give effect to the provisions of Conventions to which they are parties; (b) the information and reports concerning Conventions and Recommendations communicated by Members in accordance with article 19 of the Constitution; and (c) information and reports on the measures taken by Members in accordance with article 35 of the Constitution.[65] The specificity of the Committee of Experts lies in its functions and its composition, as defined in the 1926 Conference resolution and consolidated in subsequent decisions of the Conference and the Governing Body.

187. The Committee of Experts was appointed as a "technical Committee […] for the purpose of making the best and fullest use of this information [from the reports submitted by Member States] and of securing such additional data as may be provided for in the forms approved by the Governing Body" (**Document No. 73**). The technical examination is based on the impartiality, objectivity and expertise of the Committee's 20 members. The experts are appointed by the Governing Body in an individual capacity from among persons of technical competence and independent standing, principally with a judicial or academic background, and serve for a renewable period of three years.[66]

188. The Committee's work is guided by the principles of independence, objectivity and impartiality. As the Committee has stated, it "undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. […] Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise" (**Document No. 85**, para. 31).

189. The Committee meets each year in private. Its examination is exclusively document-based, and includes the information provided in the reports from Member States, national legislation, collective agreements, court decisions, observations submitted by employers' and workers'

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[64] Although the original intention was that the two Committees would examine the same reports and information, by reason of their distinct nature and composition and for operational reasons, the Committee on the Application of Standards decided in 1932 that, rather than examining the reports and information submitted by governments, it would base its examination on the report of the Committee of Experts to avoid duplication of work. Over the years, the difference between the two Committees has become more distinct. Until 1955, the Committee on the Application of Standards examined all the observations made by the Committee of Experts together with subsequent information received from Governments and the views expressed by delegates. This has been progressively replaced by a selective examination. At the same time, the procedure of the Committee on the Application of Standards has gradually evolved on the basis of the opportunity for Member States to submit explanations only at the specific request of the Committee; ILC, 38th Session, 1955, Record of Proceedings, p. 583, and ILC, 39th Session, 1956, Record of Proceedings, p. 644. In a similar fashion, the reports submitted on unratified Conventions were initially examined by both the Committee of Experts and the Committee on the Application of Standards. The focus was on the instruments themselves rather than a specific topic. Further to the Governing Body's decision in November 1955 to ask the Committee of Experts to prepare General Surveys on an annual basis, the discussion in the Committee on the Application of Standards focused on these surveys and no longer on individual reports; GB.331/INS/5/REF, para. 6.

[65] Article 35 concerns the extension of application of ratified Conventions to non-metropolitan territories by the Member States that are responsible for their international relations.

[66] The following judges of the Court have been members of the Committee of Experts: Roberto Ago (1979–94); Rafael Erich (1928–38); Isaac Forster (1959–63); Abdul G. Koroma (2006–21); Kéba Mbaye (1983–96); Sir Arnold Duncan McNair (1929–45); Sture Petrén (1965–67); Raymond Ranjeva (2008–22); and José María Ruda (1978–94).

organizations and reports of other ILO supervisory bodies or monitoring bodies of other international organizations, as appropriate. The Committee issues to Member States two types of comments: *observations* for more serious or long-standing cases of failure to fulfil obligations and *direct requests* used to raise questions primarily of a technical nature. In addition, the Committee of Experts publishes annually a *General Survey* analysing information submitted under article 19 concerning unratified Conventions.

190. The annual report of the Committee of Experts is transmitted to the Conference at its session in June. Given the nature of the Committee of Experts and its work, the report informs the Conference's discussion but is not submitted for the approval of either the Governing Body or the Conference.

(b) Conference Committee on the Application of Standards

191. The Committee on the Application of Standards is a standing Conference Committee mandated to consider:

(a) compliance by Members with their obligations to communicate information and reports under articles 19, 22, 23 and 35 of the Constitution;

(b) individual cases relating to the measures taken by Members to give effect to the Conventions to which they are parties;

(c) the law and practice of Members with regard to selected Conventions to which they are not parties and Recommendations, as chosen by the Governing Body (general survey) (**Document No. 86**).

Unlike the Committee of Experts, which is composed of independent experts, the Committee on the Application of Standards is composed of representatives of the ILO's tripartite constituency with a direct interest in the application of Conventions.

192. The basic working document of the Committee is the report of the Committee of Experts. The Committee's session is spread over almost the entire two-week session of the Conference. It begins its work with a general discussion, which is followed by a discussion of cases of Member States' serious failure to respect their reporting obligations and of the General Survey of the Committee of Experts. The main portion of the work of the Committee is dedicated to its consideration of a number of cases relating to the application of ratified Conventions, selected on the basis of observations made by the Committee of Experts, in particular those inviting the governments concerned to supply information to the Conference. The governments concerned are expected to provide oral, and if they wish, written information. The Committee adopts conclusions that focus on the action expected from governments.

193. The report of the Committee on the Application of Standards is divided into two parts: part one includes a general report and the outcome of the discussion on the General Survey of the Committee of Experts among other matters, while part two includes a record of the discussions on individual cases. The report is submitted to the plenary of the Conference for discussion and approval.

2. Special procedures

194. The special supervisory procedures are triggered by complaints, mainly filed by employers' or workers' organizations, and involve – with the exception of the Committee on Freedom of Association – the appointment of an ad hoc body.

(a) Representations alleging non-observance of Conventions

195. The procedure for *representations* alleging non-observance of Conventions is governed by articles 24 and 25 of the Constitution and by special Standing Orders adopted by the Governing Body (**Document No. 88)**. Under this procedure, an industrial association of employers or workers is granted the right to present to the Governing Body a representation against any Member State which, in its view, "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party". The implementation of this supervisory procedure falls exclusively under the responsibility of the Governing Body and all the steps in the procedure are confidential until such time as the matter is finally decided by the Governing Body. If the representation relates to a Convention dealing with trade union rights, the Governing Body may decide to refer it to the Committee on Freedom of Association. To date, 239 representations have been made under article 24 of the Constitution.

(b) Complaints alleging non-observance of Conventions

196. The procedure for *complaints* alleging non-observance of Conventions is governed by articles 26-29 and 31–34 of the Constitution. Under this procedure, a complaint alleging non-compliance with a ratified Convention may be filed against a Member State by another Member State that has ratified the same Convention or by a delegate to the Conference. The Governing Body may also adopt the same procedure on its own motion. If the complaint relates to a Convention dealing with trade union rights, the Governing Body may refer the complaint to the Committee on Freedom of Association for preliminary examination and advice. Although it was designed as the apex of the supervisory system, the procedure was not used until the 1960s.[67] To date, 36 complaints have been submitted and 14 Commissions of Inquiry have been appointed (**Document No. 89**).

197. A Commission of Inquiry operates as a quasi-judicial body characterized by the independence, impartiality and objectivity of its members. Members of a Commission of Inquiry are selected among eminent personalities – such as judges or former judges of the International Court of Justice, members of the Permanent Court of Arbitration, former judges of higher-level national courts and law professors – who serve in an individual capacity and take an oath similar to the one taken by the judges of the ICJ.

198. The reports of Commissions of Inquiry often contain recommendations pertaining to three types of action: measures to bring domestic laws in line with the Convention in question; other measures to ensure full compliance with the Convention; and cessation of violations in practice. The government concerned has to indicate within three months whether it accepts the Commission's recommendations. If a government does not accept the recommendations, it must inform the Director-General whether it proposes to refer the report to the International Court of Justice. The Court may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry and its decision is final. To date, no report of a Commission of Inquiry has ever been referred to the Court.

199. If a country fails to implement the recommendations of a Commission of Inquiry or the decision of the International Court of Justice, the Governing Body can take action under article 33 of the ILO Constitution, which provides that "the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance". Measures under article 33 have been adopted on two occasions: first, in 2000 to secure compliance by the Government of

[67] This can be explained by the developments in the regular supervisory procedure and by the establishment of the special procedures for the examination of complaints alleging violations of freedom of association; see N Valticos, "Les commissions d'enquête de l'Organisation internationale du travail", *Revue Générale de Droit International Public*, vol. 81, 1987, pp. 849–851. Judge Jessup commented on the article 26 procedure in the South West Africa Cases, ICJ Reports 1962, pp. 426–428 and ICJ Reports 1966, pp. 377, 416–417.

Myanmar with the recommendations of the Commission of Inquiry in relation to the observance of the Forced Labour Convention, 1930 (No. 29),[68] and again in 2023 to secure compliance by the Government of Belarus with the recommendations of the Commission of Inquiry in relation to the observance of Convention No. 87 and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).[69]

(c) Complaints alleging infringements of trade union rights

200. Procedures for complaints alleging infringements of trade union rights have been established for the purpose of protecting a principle and human right set forth in the Constitution, namely, freedom of association. Even though the principle is laid down in Conventions Nos 87 and 98, the procedures outlined below apply irrespective of whether the Member State concerned has ratified the two Conventions. Furthermore, they may be implemented without the consent of the State concerned and apply across the UN system, since any complaints alleging violations of freedom of association received by the United Nations have to be transmitted to the ILO when they concern an ILO Member State.

201. By a resolution adopted in 1947 concerning international machinery for safeguarding freedom of association, the Conference considered that "steps should be taken to encourage, expand and universally establish freedom of association both by reminding Governments of all States, whether Members of the ILO or not, of their obligations in this respect under the Constitution of the ILO and/or the Charter of the United Nations, and by other practicable means" (**Document No. 131**). The Conference also recognized that "the establishment in consultation with the United Nations of permanent international machinery may be an indispensable condition for the full observance of freedom of association throughout the world and that any such machinery should, if established, operate under the guarantees provided by the tripartite Constitution of the International Labour Organisation".

202. In June 1949, the Governing Body adopted a resolution formally approving the principle of the establishment of a Fact-Finding and Conciliation Commission. In August that year, the UN Economic and Social Council adopted resolution 239(IX) requesting the ILO to proceed with the establishment of the Commission "on behalf of the United Nations, in accordance with its relationship agreement, as well as on its own behalf".[70] In January 1950, the Governing Body decided to establish a Fact-Finding and Conciliation Commission for the impartial examination of any allegations or infringements of trade union rights.[71] Such a referral would require the government's consent if the Member State had not ratified any of the relevant Conventions. Shortly afterwards, in February 1950, the UN Economic and Social Council adopted resolution 277(X), in which it stated that the decision taken by the Governing Body to establish the Commission corresponded to the intent of the Council's resolution of August 1949 and it decided "to accept on behalf of the United Nations the services of the ILO and the Fact-Finding and Conciliation Commission as established by the ILO".[72]

203. In November 1951, the Governing Body decided to establish a committee of nine of its members – the Committee on Freedom of Association – to undertake a preliminary examination of complaints alleging infringements of trade union rights.[73] The Committee on Freedom of

[68] ILC, 88th Session, 2000, Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar.

[69] ILC, 111th Session, 2023, Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Belarus.

[70] ILC, 33rd Session, 1950, Record of Proceedings, p. 569.

[71] Minutes of the 110th Session of the Governing Body, January 1950, pp. 62–90.

[72] ILC, 33rd Session, 1950, Record of Proceedings, p. 570.

[73] Minutes of the 117th Session of the Governing Body, November 1951, pp. 66, 77 and Appendix V, p. 88.

Association rapidly “developed in practice from a preliminary review of the desirability of requesting the government concerned to give its consent to allegations being referred to the Fact-Finding and Conciliation Commission for formal investigation into what [was] in substance an examination of the merits for which, on account of its less formal character and the fact that it continue[d] to be in form a preliminary review by a committee advising the Governing Body, such consent [was] not required”.[74]

(i) Committee on Freedom of Association

204. The Committee on Freedom of Association of the Governing Body is composed of eighteen members representing in equal proportion the Government, Employers’ and Workers’ groups of the Governing Body. All members are appointed in their individual capacity. The Committee is chaired by an independent chairperson appointed by the Governing Body.[75]

205. The procedure for the examination of complaints alleging infringements of trade union rights is based on the provisions adopted by common consent by the Governing Body of the International Labour Office and the Economic and Social Council of the United Nations in January and February 1950, and also on decisions taken by the Governing Body (**Document No. 90**). Ever since the Committee’s inception, emphasis has been placed on the combination of a tripartite examination accompanied by guarantees of objectivity and impartiality. To date, the Committee has examined more than 3,400 complaints.[76]

206. The mandate of the Committee consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions. The Committee’s task is limited to examining the specific allegations submitted to it; thus, it does not formulate general conclusions concerning the trade union situation in particular countries.

207. Under article 32(6) of its Standing Orders, the Conference, upon the recommendation of its Credentials Committee, can decide to refer to the Committee on Freedom of Association issues raised by an objection to credentials “[i]f the Credentials Committee considers unanimously that the issues raised […] relate to a violation of the principles of freedom of association which has not already been examined by the Committee on Freedom of Association”. This referral can be made regardless of whether the Member State concerned has ratified the Conventions on freedom of association. The provision has been applied twice: in the context of the examination of an objection concerning the nomination of the Workers’ delegation of the Islamic Republic of Iran in 2010[77] and an objection concerning the nomination of the Workers’ delegation of Angola in 2022.[78]

208. The Committee on Freedom of Association may also be directly involved in the supervision of the application of Convention No. 87, since it may examine representations submitted under article 24 of the Constitution alleging non-observance of Conventions dealing with trade union rights.

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[74] C W Jenks, “The international protection of freedom of association for trade union purposes”, *Collected Courses of the Hague Academy of International Law*, vol. 87,1955, p. 51.

[75] Until 1978 the Committee was chaired by one of its members. In 1978, the then Chairperson, Roberto Ago, representative of the Government of Italy, was appointed to the International Court of Justice and the Officers of the Governing Body proposed to extend an invitation to Professor Ago to retain the chairmanship of the Committee but as an independent chairperson.

[76] The Committee presents an annual report to the Governing Body on the use of its procedure throughout the year; see, for example, GB.347/INS/17/1(Add.1). In 2022, out of 77 cases, 12 included allegations concerning the right to strike.

[77] ILC, 99th Session, 2010, Record of Proceedings, Provisional Record 5C, paras 59, 61.

[78] ILC, 110th Session, 2022, Record of Proceedings, Provisional Record 2B, paras 33, 34.

209. In its 70 years of operation, the Committee on Freedom of Association has developed an authoritative and coherent body of reasoned decisions, which are published in the *Compilation of decisions of the Committee on Freedom of Association* (**Document No. 282**). This compilation was specifically requested by the Conference in its 1970 Resolution concerning Trade Union Rights and Their Relations to Civil Liberties (**Document No. 136**, para. 11). As these decisions are submitted to and approved by the Governing Body, they constitute an important source in matters of freedom of association.[79]

(ii) Fact-Finding and Conciliation Commission

210. The Fact-Finding and Conciliation Commission is a quasi-judicial procedure involving an independent, impartial and objective examination of complaints of infringements of trade union rights. Under the arrangements adopted by the Governing Body,[80] the Fact-Finding and Conciliation Commission was established as a standing body composed of nine persons appointed in their individual capacity. The Commission has reviewed only six cases[81] and has not been convened since 1992.

211. The Commission was established essentially as a fact-finding body. Nonetheless, it was understood that it could "be authorised to discuss situations referred to it for investigation with the Government concerned with a view to securing the adjustment of difficulties by agreement".[82] A unique feature among the supervisory procedures is that any government against which an allegation of infringement of trade union rights is made may refer such an allegation to the Commission for investigation. At the time of its establishment, the similarities between the Fact-Finding Commission and a Commission of Inquiry appointed under article 26 of the Constitution were taken into account. It was indicated that "[w]ith the exception of cases covered by Article 26 of the Constitution of the International Labour Organisation, no complaint shall be referred to the commission without the consent of the Government concerned".[83] The Fact-Finding and Conciliation Commission reports to the Governing Body.

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212. In conclusion, the Office respectfully submits that any close look at the interpretation of international labour standards needs to take into account the special characteristics of the ILO's normative system and supervisory machinery. The ILO system of standards is based on a chain of distinct responsibilities of the Organization's three constitutional organs and is geared towards the promotion and realization of the objectives set forth in the Preamble to the ILO Constitution and the Declaration of Philadelphia. The preparation of standards follows a systemic approach aimed at constructing a comprehensive and coherent body, with tripartism permeating its fabric.

213. The various components of the supervisory machinery do not operate in isolation but are designed to exercise complementary and mutually reinforcing functions. The integration of the system is evidenced at four different levels. First, the most appropriate body is selected for the examination of a specific complaint. Thus, a representation made under article 24 of

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79 B Gernigon, "La protection de la liberté syndicale par l'OIT : une expérience de cinquante années", *Revue belge de droit international*, 2000/1, pp. 12-25; J Bellace, "The Committee on Freedom of Association: Making freedom of association a reality" in K Curtis, O Wolfson (eds), *70 years of the ILO Committee on Freedom of Association: A Reliable Compass in Any Weather*, 2022, pp. 5-20; J de Givry, *Droits de l'homme, travail et syndicats – L'action normative de l'Organisation internationale du Travail en matière de liberté syndicale et des relations professionnelles de 1944 à 1985*, 1989.

80 ILC, 33rd Session, 1950, Record of Proceedings, pp. 565–567.

81 Japan (1964–66); Greece (1974–75); Chile (1974–76); Lesotho (1973–75); United States/Puerto Rico (1978–81); and South Africa (1991–92).

82 ILC, 33rd Session, 1950, Record of Proceedings, p. 566.

83 Minutes of the 110th Session of the Governing Body, January 1950, pp. 91–92.

the Constitution may be directed by the Governing Body to the Committee on Freedom of Association rather than to an ad hoc tripartite committee if it concerns infringement of trade union rights, or the Governing Body may transform a representation made under article 24 into a complaint if it considers that the case needs to be elevated to another level. Second, regular supervision is in certain cases suspended for as long as a special procedure is being implemented. For instance, the Committee of Experts refrains from examining the application of a given Convention by a State while a complaint of non-observance of that Convention by the same State is being considered by a Commission of Inquiry. Third, responsibility is passed among supervisory procedures to ensure continuity and an effective outcome for the process. In most cases, for instance, the Committee of Experts is requested by ad hoc bodies such as tripartite committees and Commissions of Inquiry or by the Committee on Freedom of Association to follow up on the implementation of their recommendations. Similarly, the Committee of Experts and the Committee on the Application of Standards occasionally transmit to each other special cases of non-compliance in an effort to maintain pressure and achieve tangible results. Fourth, the work of each supervisory organ informs and nourishes the work of all others, as amply demonstrated by the resounding effect that the Committee on Freedom of Association has had on the observations of the Committee of Experts in relation to the right to strike.

C. Interpretation of standards

214. International labour Conventions are international treaties with special characteristics, most of which are directly related to the Organization’s unique tripartite structure. ILO Conventions are negotiated in tripartite delegations composed of government, employers’ and workers’ representatives; hence, reservations to Conventions on behalf of governments – which represent only some of the drafters – are not admissible. International labour Conventions are the fruit of an aspiration to universality and of pragmatic imperatives. They seek to ensure a level playing field by setting standards that correspond to minimum acceptable standards of fairness and decency, while being sufficiently flexible to take into account the great disparities in socio-economic development among Member States.

215. The specificities of international labour Conventions necessarily affect the methods and means employed for their interpretation. Accordingly, to establish the true intention of the drafters, an in-depth analysis of the Conference proceedings and of all other preparatory work that preceded their adoption is a prerequisite. At the same time, international labour Conventions are “living” human rights instruments that need to be understood in accordance with the principle of intertemporality based on their object and purpose.

1. ILO bodies engaged in interpretation of standards

216. It is uncontested that under article 37(1) of the ILO Constitution, the International Court of Justice is the only body empowered to deliver binding interpretations of international labour Conventions. In practice, however, other bodies at times engage in the art of hermeneutics, including the Committee of Experts on the Application of Conventions and Recommendations and the International Labour Office. Over the years, reliable and effective mechanisms for answering questions of interpretation have become a *sine qua non* for preserving the credibility and resonance of the ILO’s system of standards.

(a) Interpretative functions of the Committee of Experts

217. The authority of the Committee of Experts to interpret international labour standards in the discharge of its responsibilities has been at the epicentre of the dispute that is now before the Court. While the primary function of the Committee of Experts is to monitor the application of

international labour Conventions, it has often expressed views on the scope and meaning of key provisions and concepts of those texts.

218. At the time of the establishment of the Committee of Experts in 1926, it was envisaged that the Committee's function would be solely technical and not judicial in nature (**Document No. 72**, p. 400). The supervision of the implementation of standards was to be separated from the interpretation of their content. When the examination of the annual reports revealed divergent interpretations, the Committee of Experts was invited to refer the matter to the Office to engage with the governments concerned, without prejudging the correct interpretation. If the difficulties were likely to affect the national legislation of several Member States, the Committee of Experts would bring them to the attention of the Governing Body.[84]

219. In the 1930s, the question of conflicting interpretations gave rise to further discussion.[85] In this context, the Office proposed that, between the unofficial procedure of seeking the Office's opinion and the constitutional procedure of referring matters to the PCIJ, an intermediate procedure should be established. It considered that the Committee of Experts would be the most suitable body, noting that "it appear[ed] almost inevitable that the experts, when confronted with a manifestly arbitrary interpretation, should draw attention to the real meaning of the clauses which seem[ed] to them to be wrongly interpreted" (**Document No. 93**, p. 10). However, the Governing Body's Standing Orders Committee took the view that the procedure for the interpretation of Conventions should not be changed.[86]

220. In the 1950s, the Committee of Experts was tasked by the Governing Body with preparing annual global reports, known as General Surveys, on the law and practice in respect of selected instruments. In drawing up those General Surveys, the Committee was often compelled to

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[84] For instance, in its 1929 report, the Committee of Experts informed the Governing Body of a difficulty concerning the Night Work (Women) Convention, 1919 (No. 4), and considered that "it is difficult to interpret the absence of any express stipulation on this subject in the Convention as implying that the employment at night of women in such position is authorised"; ILC, 14th Session, 1930, Report of the Director, pp. 289–290. The ensuing discussions led to the submission of a request for an advisory opinion to the PCIJ.

[85] In its 1930 report, the Committee on the Application of Standards indicated that:

> The discussions […] have shown that there exist in certain cases, as between different States which have ratified the same Convention, divergencies of interpretation on the meaning and scope of certain provisions of the Convention. These divergencies sometimes relate to important questions. It is not the function of the Committee to give an authentic interpretation of the provisions in question. The Committee […] suggests that the Conference might invite the Governing Body to study the question. It is important to find a means of solving the questions with regard to which there have been such divergencies. The choice of the procedure remains open (ILC, 14th Session, 1930, Record of Proceedings, pp. 638–639).

In its 1931 report, the Committee on the Application of Standards noted that:

> Certain members wondered whether the responsibility for settling differences of interpretation of the Conventions could not be entrusted to the Conference. Other members however considered on the one hand that by reason of its very composition the Conference was hardly the body qualified to give an opinion on questions of law, sometimes of an extremely delicate character, and on the other that according to the terms of Article 423 of the Treaty of Versailles, all questions or difficulties relating to the interpretation of the Conventions adopted through the International Labour Organisation are to be referred for decision to the Permanent Court of International Justice (ILC, 15th Session, 1931, Record of Proceedings, p. 618).

In 1933, the Committee on the Application of Standards reiterated that:

> [T]he situation is not entirely satisfactory, since the fact remains that certain provisions of Conventions are interpreted differently by different States. In such cases the position of the Committee is extremely difficult; it can indeed discuss the question at issue, but the only conclusion it can reach generally is that there are two conflicting assertions, that the question is brought up by the Experts every year and that their view is opposed by the Government concerned without any possibility of a solution being arrived at (ILC, 17th Session, 1933, Record of Proceedings, p. 520).

[86] During the discussion at the Standing Orders Committee, constituents pointed out that the Committee of Experts would offer no further guarantees to Member States in terms of interpretation, since the only organ provided for by the Treaty of Peace to interpret Conventions was the PCIJ. It was also considered that it would be undesirable to give judicial powers to the Committee of Experts, which had been set up to supervise the application of Conventions. Any additional duty of giving interpretations would have required a modification of its mandate, which, in view of the excellence of the work that it performed, would be undesirable; Minutes of the 57th Session of the Governing Body, April 1932, pp. 210–211, 345.

make interpretative observations or clarifications of a general nature on the instruments under review. In that vein, in 1977, the Committee of Experts indicated that its "terms of reference do not require it to give interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution. Nevertheless, in order to carry out its function of evaluating the implementation of Conventions, the Committee has to consider and express its views on the meaning of certain provisions of Conventions" (**Document No. 98**, para. 32). This statement did not give rise to any comments at the Conference Committee on the Application of Standards. However, a similar statement made ten years later stirred controversy,[87] as the socialist countries considered that the Committee of Experts had "converted itself into a kind of supra-national tribunal". This assertion was opposed by the Employers, the Workers and a large number of governments, which did not consider that the Committee of Experts had exceeded its mandate. In particular, the Worker spokesperson recalled that "the Committee of Experts is not a tribunal and does not act like one" and that it "should remain above the struggle and should retain its autonomy"[88] (**Annex No. 22**).

221. In 1989, the Employers' group started voicing concerns that "the jurisprudence of the Committee of Experts was sometimes unstable, evolving and variable". The group recalled that "[o]nly one body – the International Court of Justice – could make authoritative interpretations of international labour Conventions. Recourse to it had seldom been sought, probably because there had been considerable satisfaction with the way the system functioned. None the less, the role of the International Court of Justice as the ultimate arbiter should always be borne in mind"[89] (**Annex No. 23**). Attention was also drawn to the Committee of Experts' report of 1989, which, according to the Employers' group, "unfortunately contained a number of over-interpretations, especially regarding basic human rights Conventions and in particular Convention No. 87". In the Employers' group's view, it was not for the Committee of Experts or the Office to provide conclusive interpretations of Conventions.

222. The Committee of Experts itself noted on numerous occasions that "in order to carry out its function of determining whether the requirements of Conventions are being respected, the Committee has to consider and express its views on the content and meaning of the provisions of Conventions and to determine their legal scope, where appropriate" (**Document No. 99**, para. 7). The Committee further opined that, as long as its views were not contradicted by the International Court of Justice, they should "be considered as valid and generally recognised". It also stated that acceptance of these considerations was essential for the maintenance of the principle of legality and, consequently, for the legal certainty necessary for the proper functioning of the International Labour Organization.

223. In 2011, the Committee of Experts noted once again that:

> Although the Committee's mandate does not require it to give definitive interpretations of Conventions, it has to consider and express its views on the legal scope and meaning of certain provisions of these Conventions, where appropriate, in order to fulfil the mandate with which it has been entrusted of supervising the application of ratified Conventions. The examination of the meaning of the provisions of Conventions is necessarily an integral part of the function of evaluating and assessing the application and implementation of Conventions. The application of Conventions being the Committee's mandate, the Governing Body has therefore chosen to ensure that the Committee is composed of persons who are capable of fulfilling such mandate. The Committee ensures that the understanding of the provisions remains constant and uniform so that all member States may be guided in fulfilling their obligations arising from ratification of a Convention (**Document No. 101**, para. 11).

87 ILC, 73rd Session, 1987, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III(Part 4A), para. 21.

88 ILC, 73rd Session, 1987, Record of Proceedings, p. 24/6, paras 26–27.

89 ILC, 76th Session, 1989, Record of Proceedings, p. 26/6, para. 21.

224. Concerns persisted, nonetheless, about the legal weight of the views of the Committee of Experts. The Employers' group's understanding was that "the Governing Body had never decided to amend the stated terms of reference of the Committee of Experts to expressly include the interpretation of international labour standards. In addition, it could not be the Governing Body's intention to change those terms of reference since the ILO Constitution provided that the authority to interpret ILO Conventions was vested with the International Court of Justice, which meant that the Constitution would need to be amended first" (**Document No. 104**, para. 16). On that basis, the Employers' group requested that mention should be made in all reports of the Committee of Experts that the Committee's views and observations were meant to provide a basis for the supervisory work of the Conference Committee on the Application of Standards, that they had not been approved by the tripartite bodies of the ILO, and that these views were not legally authoritative interpretations and not legally binding for ratifying countries.

225. The Committee's response read as follows:

> In stating that its views are to be considered as valid and generally recognized (absent contradictory ruling from the ICJ), the Committee is not saying that it regards its views as having any res judicata or comparable effect. The Committee does not regard itself as a court of law. Indeed, it has been consistently clear that its formulations of guidance – presented as opinions or recommendations in the context of observations, direct requests, and General Surveys – are not binding. Rather, the persuasive validity of the Committee's formulations for member countries, social partners, the Conference Committee, and others within the ILO stems from: (1) their logical relation to the standards application process; (2) the equal treatment and uniformity that accompanies their implementation; (3) the quality of their reasoning; and (4) the recognized independence and expertise of the Committee as a whole.
>
> In this respect, the Committee's guidance is part of the so-called international law landscape. Like the work of independent supervisory bodies created within other UN organizations addressing human rights and labour rights, the Committee's non-binding opinions or conclusions are intended to guide the actions of ILO member States by virtue of their rationality and persuasiveness, their source of legitimacy (by which is meant the independence, experience, and expertise of the members), and their responsiveness to a set of national realities including the informational input of the social partners. At the same time, the Committee observes that it is only before the ILO supervisory machinery that the social partners can bring forward their concerns relating to the application of Conventions.[90]

226. In 2014, the Committee of Experts included in its annual report the following explanatory note with regard to its mandate:

> The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing

[90] ILC, 102nd Session, 2013, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III(Part 1A), para. 35.

> dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions (**Document No. 105**, para. 31).

227. The Committee's statement on its mandate was welcomed by the Governing Body (**Document No. 84**, para. 596(b)) and was endorsed in a Joint Statement of the Workers' and Employers' groups of 23 February 2015 (**Document No. 106**, Annex I). It has since been reproduced each year in the Committee's annual report (**Document No. 109**, para. 33).

228. Nevertheless, the authority of the Committee of Experts to interpret international labour Conventions has remained a contentious issue.[91]

(b) The role of other supervisory bodies

229. All of the ILO's other supervisory bodies – the Conference Committee on the Application of Standards, the Committee on Freedom of Association, the tripartite committees set up to examine representations made under article 24 of the Constitution, and the Commissions of Inquiry set up to examine complaints made under article 26 – may also exercise a certain degree of interpretation, albeit limited, in the discharge of their functions. As Georges Scelle has observed, supervision of standards "implique en quelque façon une compétence interprétative".[92]

(i) Conference Committee on the Application of Standards

230. In the 1930s, when the Office had raised the possibility of setting up an intermediate body between the PCIJ and the Office or of entrusting interpretative functions to an existing body, the idea of conferring such powers upon the Conference was briefly considered. The idea was that, as the legislative body that negotiates and adopts Conventions, the Conference would be better placed to determine authoritatively the meaning of their provisions. Yet, it was considered that although, in theory, the Conference is the same body from one year to the next, in practice, its composition varies and thus delegations at the session of the Conference at which a question of interpretation of a particular Convention might arise would be composed of persons other than those who had negotiated and adopted that Convention. It was also noted that the political nature of the Conference did not offer the objectivity that should characterize an interpretation of a legal text (**Document No. 93**).

231. More recently, without denying the relevance of "interpretations given by parties to a treaty or by the body that is the author of a treaty", the Office noted that "an interpretation by the Conference, if it is to be perfectly legitimate, should logically be recast – that is, through a revision [of the Convention concerned]; such a revision can be undertaken either spontaneously in the case of a difficulty encountered in application, or with the aim of reversing case-law with which one disagrees" (**Document No. 96**, paras 22, 24).

232. In practice, as the body that receives and examines the annual report of the Committee of Experts – including any views the Experts may express on the interpretation of Conventions – the Conference Committee on the Application of Standards may also hold discussions on the interpretation of those Conventions, and has done so in relation to Convention No. 87.

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[91] For instance, in March 2023, the Employers' group spokesperson stated: "The Employers' objective was to ensure that the Committee of Experts did not create new obligations beyond those intended by the tripartite constituents at the Conference. The Committee of Experts should refer difficult questions or gaps in a Convention to the constituents for them to resolve; its failure to do so in the case of the right to strike had led to the current dispute" (**Document No. 41**, para. 230).

[92] G Scelle, *L'Organisation internationale du Travail et le BIT*, 1930, p. 219.

(ii) Committee on Freedom of Association

233. The observations and decisions of the Committee on Freedom of Association are highly relevant to the understanding of the Conventions related to freedom of association. However, the Committee's *raison d'être* is not to supervise their application, as complaints concerning freedom of association may be filed against States even if they have not ratified Conventions Nos 87 and 98. Thus, it has "a limited role in interpreting Conventions as such, but rather serves as the authoritative international voice in establishing the basic principles of freedom of association and assisting countries in putting in place more harmonious labour relations systems based thereon" (**Document No. 97**, para. 47). In elaborating on the meaning and scope of the principle of freedom of association and the right to organize, the Committee provides input for the work of the Committee of Experts on these matters and it does so as the only specialized international tripartite body on the subject.

(iii) Commissions of Inquiry

234. Commissions of Inquiry are appointed to examine complaints alleging non-observance of ratified Conventions and to exercise their functions as quasi-judicial bodies. In doing so, they may interpret Conventions, but, in practice, they tend to rely on the work of the Committee of Experts and on the comments of the Committee on Freedom of Association. While each Commission of Inquiry takes into account the views expressed by previous ones, their ad hoc nature, sparse existence and changing composition have meant that they have not had a systematic impact on the interpretation of international labour Conventions.

(c) Informal opinions of the International Labour Office

235. Shortly after the establishment of the ILO, the Office started receiving requests for clarifications on the scope and meaning of adopted Conventions. The requests were made on the basis of article 10 of the Constitution, which assigns the Office the responsibility for collecting and distributing "information on all subjects relating to the international adjustment of conditions of industrial life and labour". Extensive explanations were given on this practice in the early years of the Organization[93] and the practice was addressed in a number of internal circulars (**Documents Nos 110–113**).

[93] As stated in an Office report, when difficulties of interpretation have arisen:

> [T]hey [ILO Members] have made a practice of communicating their difficulties to the International Labour Office and asking for its opinion. The Office has always pointed out that, although no special authority is conferred upon it by the Treaty to give interpretations of the provisions of draft Conventions, nevertheless, it considers that it is fulfilling the function for which it was intended in endeavouring, by supplying them with as complete information as possible as to what would appear to have been the intentions of the Commission or the Conference which elaborated the Convention, to secure that the decision which they take should be in accord with the interpretation which would seem to have been generally given. In this way the Office believes that it is performing a useful function by securing in as large a measure as possible that the interpretations given by the Members of the Organisation should be uniform. Where consultations of this kind have taken place, the point of difficulty raised and reply of the Office have been published in the Official Bulletin for the information of all the Members of the Organisation; Minutes of the 9th Session of the Governing Body, October 1921, p. 365.

236. From 1921 to 2002, a total of 147 informal opinions of the Office were published in the ILO's Official Bulletin.[94] No informal opinions have been published in the Official Bulletin since 2002, nor have any informal opinions been submitted to the Governing Body since the 1980s.[95] Yet, a number of requests for the Office's views on the scope and meaning of specific provisions of Conventions continue to be made by Member States every year (**Documents Nos 114–117)**.

237. Informal opinions of the Office have been a response to constituents who have expressed difficulty in fully apprehending the true and correct meaning of certain standards, as the Office had the "technical means, linguistic capacity and some degree of practice in the techniques of interpretation that enable it to provide all the elements necessary for considered replies that are fully corroborated and which States frequently need to draw on when they are considering ratifying a new Convention"[96] (**Document No. 96**).

238. Most requests for interpretation are made by Member States when they are considering ratifying a Convention. At that stage, States may face doubts as to the scope and meaning of specific provisions and may therefore not be in a position to determine precisely the scope of obligations arising from ratification, or the extent of adjustments that may need to be made to their national legislation. In this context, the views of the Office may assist them in ascertaining the degree of compatibility of national law and practice with the requirements of the Convention concerned, prior to undertaking any international commitment. Less frequently, requests come from Member States that have already ratified a Convention and are encountering particular difficulties arising from its implementation.

239. It is well established that informal opinions of the Office have no obligatory force and remain of a purely administrative nature. They continue to represent, however, an important service that the Office offers to its constituents. From the 1920s, the Office took the view that, if uncontested, its views were presumed to have been accepted by the Members of the Organization (**Document No. 93**, p. 4).[97] In another instance, the Office considered that when a provision that had already been "interpreted" by the Office and published in the Official Bulletin was incorporated into a new Convention, it could be presumed, in the absence of any evidence to the contrary, that the Conference had intended it to be understood in line with the Office's interpretation.[98] The Office's position, as explained in the introductory note to a 1951 Office publication, was that "[t]hough not authoritative in the same final sense as an interpretation by the Court, these interpretations […] enjoy such authority as derives from their having been formulated by the International Labour Office in its official capacity at the request of Governments of Members of the Organisation".[99]

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94 In 1921, the Office explained the practice of publishing certain opinions in the Official Bulletin as follows:

> In view of the fact that many Governments are at present reconsidering their legislation on labour matters with the object of bringing it into conformity with the decisions of the International Labour Conference, it is felt that information already furnished for this purpose might usefully be made generally available, and it is accordingly proposed to print in the *Official Bulletin* from time to time the more interesting correspondence which has been or may be exchanged on these subjects; *Official Bulletin*, vol. III, 1921, p. 383.

Similarly, under the Director-General's Instruction No. 45, 1952, Procedure concerning requests for interpretations of Conventions and Recommendations (**Document No. 110)**, "[r]equests for interpretations which raise questions of general interest or are of some importance, and the replies to such requests, are brought to the notice of the Governing Body and later published in the Official Bulletin".

95 According to former ILO Legal Adviser Francis Maupain, this may have been justified by concerns over the authority that such practice was conferring to the views of the Office; F Maupain, "L'interprétation des conventions internationales du travail" in R.-J. Dupuy (ed.), *Mélanges en l'honneur de Nicolas Valticos – Droit et justice*, 1999, p. 569.

96 GB.256/SC/2/2, p. 5.

97 Although the Office had suggested that formal approval by the Governing Body could be useful, the Governing Body did not accept the proposal, as some members considered that the Governing Body was not qualified to give a juridical interpretation of the text of Conventions; Minutes of the 9th Session of the Governing Body, October 1921, p. 309.

98 Interpretation of the Decisions of the International Labour Conference, *Official Bulletin*, vol. XXIII, 1938, p. 32.

99 ILO, International Labour Code 1951, 1952, vol. 1, Explanatory Note, p. cix.

240. In reality, informal opinions of the Office contribute in their own way to maintaining a coherent body of international labour standards and can prevent or resolve differences of interpretation. Writing in 1939, Wilfred Jenks observed that the Office had developed "a considerable body of interpretative case law".[100]

241. Informal opinions are systematically accompanied by a disclaimer that indicates that the Constitution confers no special competence on the Office to provide official interpretations of international labour Conventions and that any views expressed are without prejudice to the positions that may be taken by the supervisory bodies of the ILO.[101] Both the reservation that the Office's views are without prejudice to any determination made by the supervisory organs and the constant practice of the Office of taking fully into account the views of these organs in preparing its own opinions[102] suggest that there is an informal hierarchy in interpretations produced within the ILO. Yet, in practice, no conflict has ever arisen between the views expressed by the Office and those of the supervisory organs.[103]

242. Lastly, it is particularly pertinent to note that, since 1953, the Office has refrained from expressing any views on the interpretation of Conventions Nos 87 and 98, owing to the existence of a special procedure for dealing with complaints concerning alleged infringements of freedom of association[104] (**Annex No. 26**).

(d) In-house tribunal

243. Since the adoption of a constitutional amendment of 1946 that introduced a second paragraph in article 37, the ILO Constitution has provided for the possibility of establishing an in-house tribunal to resolve disputes relating to the interpretation of international labour Conventions.

244. Diverse views have been expressed on the usefulness of creating such a tribunal. The adoption of article 37(2) came at a time of uncertainty about the possibility of the ILO being granted access to the new International Court of Justice.[105] The aim was to ensure that the Governing Body could establish an international tribunal for the prompt settlement of questions of interpretation of ILO Conventions.[106] However, once access to the ICJ had been secured, the

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[100] C W Jenks, "The Interpretation of International Labour Conventions by the International Labour Office", *British Yearbook of International Law*, vol. 20, 1939, p. 133.

[101] The caveat did not always read the same. In 1921, for instance, the statement indicated: "Although the Treaty of Peace has not conferred on the International Labour Office any special authority as regards the interpretation of the text of the Draft Conventions and Recommendations adopted by the Conference, the Office is in a position to examine the records and documents of the meetings of the Conference and of its various Commissions, and is thereby able frequently to assist Governments in the elucidation of doubtful points"; *Official Bulletin*, vol. III, 1921, p. 383.

[102] For instance, the 2020 Office instruction for preparing informal opinions (**Document No. 113**) requires that "special consideration shall be given to […] any relevant indications contained in the comments/conclusions/ recommendations of ILO supervisory bodies, as the case may be".

[103] As the 1982 report of the Director-General on the interpretation of international labour Conventions read:

> It is […] true that a position might conceivably arise in which a State, basing itself on an interpretation provided by the Office, decided that it could ratify a Convention and thereafter the Committee of Experts on the Application of Conventions and Recommendations took a different view as to the meaning of that Convention. Such a case has never arisen, and if it did a solution to the question at issue would be available, namely its reference to the International Court of Justice for decision. However, experience seems to show that the existing practice has functioned satisfactorily hitherto and is found generally acceptable; GB.221/19/1, para. 10 (**Annex No. 24**).

[104] Minutes of the 122nd Session of the Governing Body, May-June 1953, p. 110. This was recalled in all official correspondence with Member States concerning issues of interpretation of Convention No. 87, including as regards the right to strike, while at times specific mention was made of relevant considerations of the Committee on Freedom of Association (**Annex No. 25**).

[105] Minutes of the twenty-eighth meeting of the second session of the Conference Delegation on Constitutional Questions, 13 May 1946, *Official Bulletin*, vol. XXVII, 1946, p. 768.

[106] ILC, 27th Session,1945, Report IV, Part 1, *Relationship of the ILO to other international bodies*, p. 107.

tribunal was seen as complementary to the existing judicial framework, and likely to improve the Organization's own ability to deal with future difficulties of interpretation.[107] While some concern has been expressed by constituents about the potential impact of a new in-house tribunal on the supervisory system, and in particular the risk of weakening the Committee of Experts, such a tribunal is perceived by its proponents as a means of obtaining authoritative interpretations on questions not necessarily warranting referral to the ICJ, thus promoting legal certainty and lightening the workload of the supervisory bodies. Since 1946, the modalities for setting up an in-house tribunal have been discussed extensively (**Document No. 34**, pp. 15–25; **Document No. 35**, paras 47–209; **Document No. 38**, pp. 12–17; **Document No. 39**, paras 136–199) but no agreement has ever been reached on its establishment.

2. Means of interpretation of ILO standards

(a) General rule under the Vienna Convention and special significance of the preparatory work

245. The methods of treaty interpretation under international law are laid down in articles 31 to 33 of the Vienna Convention on the Law of Treaties of 1969. As the Court has ruled on a number of occasions, those articles codify principles of customary international law.[108]

246. Article 31 sets out in its first paragraph the basic tenet that a treaty must 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. The second paragraph specifies what should be understood by "context" in addition to the text of the treaty, namely, contemporaneous agreements between the parties or other instruments related to the treaty. The third paragraph provides that further elements to be considered are any subsequent agreements between the parties, subsequent practice and relevant rules of international law applicable between the parties. The fourth and final paragraph confirms the primacy of the intention of the parties by recognizing that the parties to a treaty may have intended that a special meaning be given to a term.

247. Article 32 addresses supplementary means of interpretation, including the preparatory work (*travaux préparatoires*) that led to the adoption of a treaty. Such means may be used to confirm an interpretation resulting from the application of the methods under article 31 or to determine the meaning of a provision when the interpretation according to article 31 leads to unclear, absurd or unreasonable results. It is generally accepted that articles 31 and 32 need to be read together, or, as the International Law Commission has put it, "[t]he interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32 [of the Vienna Convention]".[109]

248. The ILO has explicitly acknowledged that the Vienna Convention applies to international labour Conventions adopted by the Organization. It has always taken the view, however, that pursuant to its article 5, the Vienna Convention is without prejudice to the relevant rules and practices of the Organization, which constitute a *lex specialis*.[110] In fact, the ILO, which by the time of the Vienna Conference on the Law of Treaties had already accumulated 50 years of experience in drawing up international labour Conventions, played a key role in advocating in

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[107] F Maupain, "L'interprétation des conventions internationales du travail" in R-J Dupuy (ed.), *Mélanges en l'honneur de Nicolas Valticos – Droit et justice*, 1999, p. 568.

[108] See, for example, *Legality of Use of Force (Serbia and Montenegro v. Belgium),* Preliminary Objections, Judgment of 15 December 2004, ICJ Reports 2004, para. 100.

[109] UN General Assembly, resolution on the report of the Sixth Committee, *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, A/RES/73/202, annex, conclusion 2, para. 5.

[110] GB.235/IO/2/4, para. 7; ILC, 88th Session, 2000, Record of Proceedings, Provisional Record, 5, p. 5/3.

favour of the derogation clause set out in article 5 of the Convention.[111] Addressing the First Session of the Vienna Conference in 1968, Wilfred Jenks listed a number of rules and practices relating to standard-setting that he viewed as being partly or entirely incompatible with the draft articles considered by the Conference. As regards the interpretation of ILO Conventions in particular, Jenks drew attention to the fact that "ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in article 28" and suggested that "[t]he principle that conventions adopted within an international organization might be subject to a *lex specialis* was of long term as well as immediate importance" (**Document No. 57**, paras 12, 18).

249. Many legal scholars support the argument that scrutinizing the *travaux préparatoires* is a method constantly used in interpreting treaties. For instance, Hersch Lauterpacht wrote, "if the interpreters' task is to ascertain the intention of the parties, how could they better achieve this […] than by studying the minutes and documents relating to the negotiations, the instructions sent to the delegates, the reports of the discussions, the successive stages of the draft, the declarations made by common accord, the approved reports – in short, all the documents that preceded the conclusion of the treaty?" (unofficial translation).[112]

(i) Recourse by the ILO supervisory bodies to preparatory work

250. The rationale behind the prominence of the preparatory work in interpreting international labour Conventions is that those Conventions are not drafted by government delegates alone but studiously negotiated within tripartite committees with the direct participation of employers' and workers' representatives (**Document No. 96**, para. 43).

251. Due to its central role in monitoring the application of the entire body of ILO Conventions, the practice of the Committee of Experts in matters of interpretation is of particular importance. The Committee of Experts has occasionally given indications as to the methods it follows when expressing views on the scope and meaning of provisions of Conventions. In 1991, for instance, it indicated that it "bears in mind constantly all the different methods of interpreting treaties",[113] while in 2007, the Committee's Chairperson noted that "in interpreting Conventions, their terms and purposes had to be taken into consideration, as they were living instruments which had not to be interpreted solely in the context of the prevailing conditions which existed at the time of their adoption".[114]

252. In 2011, in a detailed observation on this matter, the Committee properly acknowledged both the weight of the customary rules of the Vienna Convention and the permissible deviations under article 5:

> [T]he Committee reiterates that it constantly and consistently bears in mind all the different methods of interpreting treaties recognized under international public law, and in particular under the Vienna Convention on the Law of Treaties, 1969. In particular, the Committee has always paid due regard to 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, namely the English and French versions (Article 33 of the Vienna Convention). In addition and in accordance with Articles 5 and 32 of the Vienna Convention, the Committee takes into account the Organization's practice of examining the preparatory work leading to the

[111] A Trebilcock, "International Labour Organization" in M Bowman and D Kritsiotis (eds), *Conceptual and contextual perspectives on the modern law of treaties*, 2017, pp. 853–855.

[112] H Lauterpacht, "De l'interprétation des traités – Rapport et projet de Résolutions", *Annuaire de l'Institut de Droit International*, vol. 43, 1950, p. 392.

[113] ILC, 78th Session, 1991, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4A), para. 13.

[114] ILC, 96th Session, 2007, Report of the Committee on the Application of Standards, Provisional Record 22 (Part One), para. 133.

> adoption of the Convention. This is especially important for ILO Conventions in view of the tripartite nature of the Organization and the role that the tripartite constituents play in standard setting.[115]

253. A year later, in 2012, the Committee restated its overall position as follows:

> [T]he Committee would first observe that the absence of a concrete provision is not dispositive, as the terms of the Convention must be interpreted in the light of its object and purpose. While the Committee considers that the preparatory work is an important supplementary interpretative source when reviewing the application of a particular Convention in a given country, it may yield to the other interpretative factors, in particular, in this specific case, to the subsequent practice over a period of 52 years (see Articles 31 and 32 of the Vienna Convention on the Law of Treaties). […] The Committee has further borne in mind over the years the considerations set forth by the tripartite constituency and would recall in this respect that the right to strike was indeed first asserted as a basic principle of freedom of association by the tripartite Committee on Freedom of Association in 1952 and has been recognized and developed in scores of its decisions over more than a half century. Moreover, the 1959 General Survey, in which the Committee first raised its consideration in respect of the right to strike in relation to the Convention, was fully discussed by the Conference Committee on the Application of Standards without objection from any of the constituents (**Document No. 236**, para. 118).

(ii) Preparatory work and informal opinions of the Office

254. Apart from the work of the Committee of Experts, the practice of drawing principally upon the *travaux préparatoires* in order to elucidate the meaning of provisions of a Convention is clearly evidenced in the informal opinions of the Office **(Documents Nos 116–117)**. It is also reflected in all administrative instructions issued by the Director-General on the procedure to be followed for preparing those informal opinions (**Documents Nos 110–113**). Among the sources, the *travaux préparatoires* have always been listed first. Whether the Office opinion is drawn up "on the basis of", as the 1952 instructions read, or "taking account of" the preparatory work, as per the 1968 and 1987 administrative instructions, the importance attached to the intention of the drafters as reflected in the Conference records and other negotiating history is preponderant.

255. The Office procedure currently in effect states that "[i]n preparing Office informal opinions, and in particular in analysing the ordinary meaning of terms and expressions used in international labour standards in the light of their object and purpose, special consideration shall be given to […] (a) the preparatory work which preceded the adoption of the Convention or Recommendation in question, in particular the various reports submitted to the International Labour Conference and the reports of the Conference Committees" (**Document No. 113**, para. 23). This recognizes the precedence of the general rule, while maintaining particular focus on the preparatory work.

256. It should be further noted that a significant part of the preparatory work of international labour Conventions consists of the records of debates that take place in tripartite committees of the International Labour Conference, which reflect the views of tripartite delegations, not only the views of the governments of the States that eventually become parties to the Conventions. It is in this sense, therefore, that referring to the debates at the tripartite International Labour Conference to establish the intention of the drafters of a Convention may be deemed to depart from the general rule of article 31 of the Vienna Convention.

[115] ILC, 100th Session, 2011, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), para. 12.

(b) Other means of interpretation

257. While recourse to the preparatory work is extensive, if not systematic, in the ILO interpretative practice, other means of interpretation, such as those provided for in paragraphs 2 and 3 of article 31 of the Vienna Convention, are also applied.

(i) Contextual agreements and instruments

258. In accordance with article 31(2) of the Vienna Convention, the context for the purpose of the interpretation of a treaty includes any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty as well as any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. In the case of the ILO, such agreements or instruments may be texts drafted by the International Labour Conference in connection with the adoption of a Convention. These include, for instance, international labour Recommendations, which according to their own terms, supplement the provisions of the Conventions they accompany. In some cases, the Conference adopts resolutions that are explicitly linked to Conventions adopted at the same session (mainly with respect to maritime labour standards).[116] Some of those resolutions clearly show the intention of the Conference to weigh in on the interpretation that should be given to certain provisions of the Convention.[117]

(ii) Subsequent agreement and subsequent practice

259. Under article 31(3)(a) and (b) of the Vienna Convention, together with the context, account must be taken of any subsequent agreement between the parties regarding the interpretation or application of a treaty and of any subsequent practice in the application of the treaty that establishes the agreement of the parties on the interpretation of its provisions. Insofar as the interpretation of international labour Conventions is concerned, in the early years of the Organization the view was put forward that States wishing to ratify a Convention could establish a joint interpretation, which, if it were generally accepted, could become authoritative.[118] This understanding was put into effect once, in 1926, when the labour ministers of France, the United Kingdom, Belgium, Germany and Italy agreed on a set of conclusions setting out their agreement on the interpretation of certain provisions of the Hours of Work (Industry) Convention, 1919 (No. 1). The initiative was criticized, however, based on the fact that certain States parties to the Convention that had not accepted those conclusions could contest the agreed interpretation by filing a complaint under article 26 of the Constitution, and workers' organizations could make a representation under article 24.[119]

260. Wilfred Jenks was of the view that the tripartite supervisory bodies of the ILO "cannot be bound by an interpretation agreed upon by the parties but not accepted by the other elements [employers and workers] which participated in the adoption of the Convention

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116 At its 94th (Maritime) Session, 2006, the Conference adopted no less than 17 resolutions in connection with the adoption of the Maritime Labour Convention, 2006.

117 For example, the Resolution concerning information on occupational groups, adopted by the Conference at its 94th (Maritime) Session (2006), provides detailed criteria to facilitate Members' determination of whether certain occupations on board a ship qualify as seafarers for the purpose of the Maritime Labour Convention, 2006, in order to ensure uniform implementation of the Convention. Accordingly, reference to that resolution has been made in informal opinions of the Office (**Annex No. 27**). In the resolution on the implementation of the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185), and entry into force of the proposed amendments to its Annexes, including transitional measures, adopted in 2016, the Conference "[c]onsider[ed] that the entry into force of the amendments or the expiry of the previous transitional period should not affect the validity of any seafarers' identity documents issued under the prior provisions".

118 G Scelle, *L'Organisation internationale du Travail et le BIT*, 1930, p. 216.

119 C W Jenks, "The Significance for International Law of the Tripartite Character of the International Labour Organisation", *Transactions of the Grotius Society*, vol. 22, 1937, p. 65.

and participate in supervising its application".[120] It would thus appear that subsequent agreements between parties to a treaty regarding its interpretation would not be permissible in respect of international labour Conventions unless the Convention concerned provides for such agreements.

261. As regards subsequent practice, the Office circular of 2020 on the procedure to be followed in preparing Office informal opinions (**Document No. 113**) provides that, in addition to the preparatory work, special consideration must be given *inter alia* to:

[...]

(b) any relevant work which may have followed the adoption of the Convention or Recommendation in question, such as code of practice, guidelines, Conference general/recurrent discussion, Office manual, etc.; [...]

(d) any relevant indications contained in the comments/conclusions/recommendations of ILO supervisory bodies, as the case may be;

(e) any informal opinion already provided by the Office on the same or similar question;

(f) the relevant provisions of the national legislation, the critical review of which is requested;

(g) the extent to which the law and practice in countries other than the one making the request may assist in clarifying the issue(s) in question; [...]

262. Arguably, all of these – and most importantly the pronouncements of the ILO supervisory bodies – could qualify as subsequent practice within the meaning of article 31(3)(b).

263. When the International Law Commission addressed, at its seventieth session (2018), the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, it examined in some detail the legal weight that should be attributed to pronouncements of expert treaty bodies. In its conclusion 13, the Commission stated the following: "A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32."[121]

264. For the purposes of the Commission's conclusions, an expert treaty body is "a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization". Therefore, all ILO supervisory bodies, including the Committee of Experts, do not appear to be covered by the International Law Commission's definition of an expert treaty body. Be that as it may, the Commission acknowledged that this "does not exclude that the substance of the present draft conclusion may apply, *mutatis mutandis*, to pronouncements of independent expert bodies that are organs of international organizations", of which the Committee of Experts is "an important example".[122]

265. At the request of Special Rapporteur Georg Nolte at the Commission's seventieth session, the Office provided selected examples of observations of the Committee of Experts that had generated subsequent practice (**Annex No. 28**), in particular by Member States that had adapted their national laws following a particular interpretation suggested by the Committee. For example, the Committee of Experts had adopted a general observation according to which human trafficking for the purposes of exploitation is covered by the definition of forced labour contained in the Forced Labour Convention, 1930 (No. 29). In another example, the Committee had provided guidance on methods of objective job evaluation for the purpose of implementing

[120] Ibid., p. 64.

[121] International Law Commission, *Subsequent agreements and subsequent practice in relation to the interpretation of treaties,* A/RES/73/202, annex.

[122] International Law Commission, *Report of the International Law Commission on the work of its seventieth session (30 April–1 June and 2 July–10 August 2018)*, A/73/10, p. 82, Commentary on conclusion 13, para. 4 and footnote 578.

the principle of equal pay for work of equal value that is protected under the Equal Remuneration Convention, 1951 (No. 100).

266. Regardless of whether the views of expert bodies qualify as subsequent practice under article 31(3) of the Vienna Convention, the International Law Commission recognizes that their pronouncements play an important role for the interpretation of the treaties that fall under their mandates. This is in line with the well-known dictum of the Court in the *Diallo* case, according to which the pronouncements of expert bodies, such as the Human Rights Committee, carry special weight for the purpose of interpreting the treaties that these bodies are primarily mandated to supervise:

> Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of "General Comments".
>
> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.[123]

(iii) Relevant rules of international law

267. Under article 31(3)(c) of the Vienna Convention, account must also be taken of any relevant rules of international law applicable in the relations between the parties. In the ILO's legal framework, such rules would be, first of all, the ILO Constitution, which defines in essence the object and purpose of all international labour standards,[124] and second, the entire corpus of international labour Conventions, which may contain the same or a similar provision or concept that is the subject of interpretation.

268. More concretely as to how account may be taken of other international labour Conventions, it is recalled that in its advisory opinion concerning the *Interpretation of the Convention of 1919 concerning Employment of Women during the Night,* the PCIJ found it useful to compare the text of that Convention with another Convention adopted by the Conference at the same session, in view of the "similarity both in structure and in expression between the various draft conventions adopted by the Labour Conference".[125] It has been observed that there is a continuity in the approach and structure of international labour Conventions that pervades their design and content (**Document No. 96**).[126] From a substantive point of view, this is reflected in the idea that the body of international labour standards represents an "International Labour Code". This

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[123] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Judgment of 30 November 2010, ICJ Reports 2010, para. 66.

[124] When examining whether to give a restrictive interpretation of Convention No. 4, the PCIJ considered that "[t]o justify the adoption of a rule for the interpretation of Labour conventions to the effect that words describing general categories of human beings such as 'persons' or 'women' must *prima facie* be regarded as referring only to manual workers, it would be necessary to show that it was only with manual workers that the Labour Organization was intended to concern itself"; PCIJ, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, Advisory Opinion, 15 November 1932, p. 14 (**Document No. 45**).
By way of another example, in providing an informal opinion on the meaning of the expression "the most representative organisations of employers and workers" in Article 1 of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), the Office drew upon the interpretation provided by the PCIJ of the same expression that is to be found in article 3(5) of the ILO Constitution; Official Bulletin, vol. LXI, 1978, pp. 193–198.

[125] PCIJ, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night,* Advisory Opinion, 15 November 1932, p. 19.

[126] GB.256/SC/2/2, para. 37, note 20.

concept has sometimes been used because, as Nicolas Valticos has written, “the instruments that comprise it, although formally distinct, are logically integrated in a coherent whole” (unofficial translation).[127]

269. It should also be noted that the Office procedure for preparing informal opinions (**Document No. 113**) requires the Office to take into account “the use of identical or similar terms in other Conventions or Recommendations and the preparatory work that led to their adoption”. The Office has frequently had recourse to such comparative analysis (**Annex No. 29**). Moreover, the Office has drawn up a *Manual for drafting ILO instruments* (**Annex No. 30**), which draws upon established drafting practices of the Organization to seek to ensure, *inter alia,* that the same terms and concepts are understood in the same manner in different instruments.[128]

270. Explicit reference to non-ILO sources is rarely made in the interpretation of international labour standards. Yet, as standards tend to be crafted taking into account other relevant norms of international law for the purpose of ensuring the coherence of international law, those norms may be relevant to an understanding of an international labour Convention. Office informal opinions may occasionally refer to other treaties or to other documents of international organizations or even to documents of international non-governmental organizations, but they usually do so only because the preparatory work of the Convention in question points to such treaties or documents as having been at the origin of the use of a certain term or concept in a Convention.[129] There are, nevertheless, cases where reference is made to non-ILO sources in order to interpret international labour Conventions. One such case is the general observation of the Committee of Experts in which it took note of the adoption of the draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the United Nations Convention against Transnational Organized Crime, before concluding that trafficking in persons for the purposes of exploitation is covered by the definition of forced labour under the Forced Labour Convention, 1930 (No. 29).[130]

271. Another example is the interpretation of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), by the UN Expert Mechanism on the Rights of Indigenous Peoples. This interpretation concerned the requirement set out in Article 6 of the Convention to consult tribal or indigenous peoples on planned legislative or administrative measures which may affect them directly. The Expert Mechanism called upon the ILO and its Member States to take into account the evolution of general international law on indigenous peoples, notably the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples, to interpret a treaty adopted by the International Labour Conference in 1989.[131] The Committee of Experts noted that this would transform the consultation provision of Convention No. 169 from a procedural to a substantive requirement.[132] While a divergent interpretation by another entity of the UN system on an ILO Convention is a matter of concern (**Annex No. 33**),[133] it provides an example of the possible influence of expert bodies outside the Organization on the interpretation of international labour Conventions.

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127 N Valticos, *Droit international du Travail*, 1983, p. 133.

128 ILO, *Manual for Drafting ILO Instruments*, 2006, pp. vii, ix.

129 See the reference in one informal opinion (**Document No. 116**) to a definition by the International Occupational Hygiene Association, and in another (**Annex No. 31**) to a definition from the Fisheries Glossary of the Food and Agriculture Organization of the United Nations.

130 ILC, 89th Session, 2001, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), paras 72–81. See also ILC, 96th Session, 2007, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), p. 200 (Mexico).

131 Human Rights Council, *Free, Prior and Informed Consent: A Human Rights-Based Approach, Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62, paras 46–48.

132 ILC, 100th Session, 2011, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), pp. 783–788 (**Annex No. 32**).

133 GB.335/POL/2, paras 11–14.

(iv) Intention of the parties

272. Lastly, according to article 31(4) of the Vienna Convention, "[a] special meaning shall be given to a term if it is established that the parties so intended". As noted above, in the case of ILO Conventions, the intention of the parties can only be the intention of the International Labour Conference in its full, tripartite composition. Therefore, when interpreters of ILO Conventions focus on the preparatory work, they seek to establish the intention of the Conference that adopted the Convention. While article 31(4) permits the establishment of a special meaning of a term that goes beyond, and no longer corresponds to, the apparent ordinary meaning of the term,[134] there is no indication in the records of the ILO that that possibility has ever been used.

* * *

273. In conclusion, the Office respectfully submits that, in view of the multiplicity and diversity of international labour Conventions, which have been adopted by tripartite assemblies over the past hundred years in order to address the needs of countries with highly dissimilar socio-economic conditions, the interpretation of those texts has inevitably become necessary and has had a significant impact. From routine Office informal opinions to requests for advisory opinions from the World Court, the ILO uses various means to seek to address questions or disputes relating to the interpretation of standards with a view to preserving and enhancing their clarity, certainty and persuasive force.

274. In this context, the negotiating history of international labour standards is of particular relevance, to the extent that it is no longer a supplementary means, but rather the primary means for the interpretation of international labour standards.

275. Although the question put to the Court does not directly touch upon the scope of the interpretative functions of the ILO Committee of Experts, this dimension – as with the matter of the interpretative authority of all other supervisory organs within the broader UN system and the legal weight to be attributed to their pronouncements – is impossible to ignore.

[134] M E Villiger, "Article 31", *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 2009, p. 434.

PART III. Freedom of association, Convention No. 87 and the right to strike

A. ILO normative texts relating to freedom of association

276. As early as 1919, discussions in the Commission on International Labour Legislation[135] on the inclusion of the principle of freedom of association in the Preamble to the ILO Constitution gave an indication of the issues that would arise much later in the course of the standard-setting exercise on this matter.[136]

277. In addition to the principles set forth in the Preamble, the Commission felt the urgent need to include in the Constitution a separate provision with a list of "fundamental principles necessary to social progress", to guide the Conference in its future work.[137] The principle of freedom of association, which was to be included in the list, was initially worded as follows: "The principle that employers and workers should be allowed the right of association and combination for all purposes, subject only to such restrictions as are essential for safeguarding national interests." Ultimately, "[t]he right of association for all lawful purposes by the employed as well as by the employers" was included in article 41 of the Constitution (article 427 of the Treaty of Versailles) as one of the principles "of special and urgent importance".[138] In the words of the representative of the British Government, the list of principles of special and urgent importance "constituted neither an ideal charter nor a practical programme. They were an impossible mixture of both."[139]

278. The Declaration concerning the aims and purposes of the International Labour Organisation, commonly known as the Declaration of Philadelphia (**Document No. 118**), which was adopted in 1944 and incorporated into the Constitution in 1946,[140] reaffirms freedom of expression and of association as being "essential to sustained progress". The intention of the drafters was to place the principle in its broader context as "the cornerstone of the democratic structure of the Organisation".[141] The Declaration also recognizes the solemn obligation of the ILO to further among the nations of the world programmes which will achieve "the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures".

279. In addition to the Constitution, freedom of association is addressed in a number of ILO texts, including international labour standards and resolutions of the International Labour Conference.

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135 The Commission was appointed by the Paris Peace Conference on 31 January 1919 to consider the international regulation of labour conditions and to recommend the form of a permanent agency that would deal with these matters.

136 The reference to "the recognition of the principle of freedom of association" in the Preamble appeared in the early drafts which were prepared by the British delegation and served as basis for the elaboration of the Constitution; see J T Shotwell (ed.), *The Origins of the International Labor Organization*, 1934, vol. I, p. 372.

137 The Commission indicated: "It will be the duty of the International Labour Conference to examine them thoroughly and to put them in the form of recommendations or draft conventions elaborated with the detail necessary for their practical application"; Official Bulletin, vol. I, 1919–1920, pp. 267–268.

138 Ibid., pp. 202–205, 345.

139 Ibid., p. 197.

140 C W Jenks, "The Declaration of Philadelphia after Twenty-five Years" in ILO, *Social Policy in a Changing World: The ILO Response – Selected Speeches by Wilfred Jenks*, 1976, pp. 55–67.

141 ILC, 26th Session, 1944, Future Policy, Programme and Status of the International Labour Organisation, Report I, p. 5.

280. The two international labour instruments of general application concerning freedom of association are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Convention No. 87 (**Document No. 120)** provides that "[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation" (Article 2). The term "organisation" in the Convention means "any organisation of workers or of employers for furthering and defending the interests of workers or of employers" (Article 10). The Convention provides that these organizations "shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes", and that "[t]he public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof" (Article 3). The Convention also provides that "[w]orkers' and employers' organisations shall have the right to establish and join federations and confederations, and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers" (Article 5). It further specifies that "[i]n exercising the rights provided for in this Convention workers and employers and their respective organisations [...] shall respect the law of the land" but at the same time "[t]he law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention" (Article 8).

281. Convention No. 98 (**Document No. 121**) provides that "[w]orkers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment [and that] such protection shall apply more particularly in respect of acts calculated to (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours (Article 1). The Convention also specifies that "[w]orkers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration" (Article 2), that "[m]achinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise" (Article 3) and that "[m]easures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements" (Article 4). The Convention further specifies that it "does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way" (Article 6).

282. These two Conventions are supplemented by stand-alone Recommendations that focus on industrial relations, such as the Collective Agreements Recommendation, 1951 (No. 91), and the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92) (**Document No. 126**). Of particular relevance is Paragraph 7 of Recommendation No. 92, which states: "No provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike."

283. Other relevant instruments include: the Right of Association (Agriculture) Convention, 1921 (No. 11) (**Document No. 119**); the Right of Association (Non-Metropolitan Territories) Convention, 1947 (No. 84); the Workers' Representatives Convention, 1971 (No. 135), and its accompanying Recommendation (No. 143); the Rural Workers' Organisations Convention, 1975 (No. 141) (**Document No. 123**), and its accompanying Recommendation (No. 149); the Labour Relations (Public Service) Convention, 1978 (No. 151) (**Document No. 124**), and its accompanying Recommendation (No. 159); and the Collective Bargaining Convention, 1981 (No. 154) (**Document No. 125**), and its accompanying Recommendation (No. 163).

284. Furthermore, reference should be made to another two instruments that contain provisions of special interest, namely the Abolition of Forced Labour Convention, 1957 (No. 105) (**Document No. 122**), Article 1 of which provides that "[e]ach Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour [...] as a punishment for having participated in strikes", and the Private Employment Agencies Recommendation, 1997 (No. 188) (**Document No. 127**), Paragraph 6 of which provides that "[p]rivate employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike".

285. With respect to ILO Declarations adopted by Conference resolutions, special mention should be made of the Declaration on Fundamental Principles and Rights at Work (1998) and the Declaration on Social Justice for a Fair Globalization (2008), both of which were amended in 2022. These two Declarations emerged from an in-depth review undertaken by the ILO of the Organization's relevance and impact in the context of globalization.

286. In paragraph 1 of the 1998 Declaration, the Conference recalled that "in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia [...] [which] have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization". Conventions Nos 87 and 98 are two of the ten Conventions that are presently recognized as fundamental. In paragraph 2 of the 1998 Declaration, the Conference declared that "all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions", including freedom of association and the effective recognition of the right to collective bargaining.[142]

287. The 2008 Declaration confirms the continued relevance of the ILO's mandate and provides a contemporary vision of its constitutional objectives. In Part I(A), the Conference recognized and declared that "the commitments and efforts of Members and the Organization to implement the ILO's constitutional mandate [...] should be based on the four equally important strategic objectives of the ILO". One of those objectives is:

> respecting, promoting and realizing the fundamental principles and rights at work, which are of particular significance, as both rights and enabling conditions that are necessary for the full realization of all of the strategic objectives, noting:
>
> — that freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives.

288. Freedom of association was also the subject of numerous other Conference resolutions that were adopted in the period 1947–87, which cover topics such as safeguarding freedom of association, abolishing anti-trade union legislation, protecting trade union rights, addressing colonial oppression and promoting human rights (**Documents Nos 130–139**).

[142] The other fundamental principles and rights at work are the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; the elimination of discrimination in respect of employment and occupation; and a safe and healthy working environment.

B. Convention No. 87: Origins, context and adoption

1. Early attempts at a comprehensive standard on freedom of association

289. Contrary to popular belief, Convention No. 87 is not the first international labour instrument concerning freedom of association. In fact, the first international labour standard to refer to freedom of association was the Reciprocity of Treatment Recommendation, 1919 (No. 2), which recommended that Members extend to foreign workers, on condition of reciprocity, the protective coverage provided to their own workers, including the right of lawful organization. This was followed in 1921 by the first international labour Convention dedicated to freedom of association, the Right of Association (Agriculture) Convention, 1921 (No. 11).[143]

290. By 1927, the Office had carried out in-depth studies of relevant national laws and practice (**Annex No. 34**, pp. 19–136). In addition, the ILO had been seized of complaints alleging violations of freedom of association. The position of the Office was to indicate that no action could be taken by the Organization under its Constitution until a Convention on freedom of association had been adopted and ratified by the State against which a complaint had been made. This was challenged by some members of the Governing Body, who considered that the Office had the right to intervene based on the principle set forth in article 427 of the Treaty of Peace (subsequently article 41 of the Constitution).[144]

291. One of the difficulties encountered by the Organization in its early attempts to develop standards on freedom of association was the diversity in the conceptualization of the principle. As observed by Wilfred Jenks in 1955, "historically, the claim to freedom of association derives from the principle of religious freedom and, subsequently, from the doctrine of free enterprise for commercial purposes; the general claim to freedom of association for political purposes and the specific claim to freedom of association for trade union purposes represent more recent developments. The international recognition of freedom of association has followed the same pattern of development." In addition, "the relationship of trade unionism with the State [was] one of the fundamental problems of modern society with far-reaching implications for constitutional law and for industrial law and relations. It [was] also a problem which [lay] at the heart of the ideological conflict which has split international society asunder."[145]

[143] Prior to the drafting of the Convention, the Office indicated in the questionnaire sent to Member States that the rights of association were mentioned in the Preamble and Article 427 of the Treaty of Versailles; ILC, 3rd Session, 1921, Report on Special Measures for the Protection of Agricultural Workers, Report IV, pp. 78–79. A succinct draft Convention was prepared by the Office with one provision under which the parties would undertake to guarantee agricultural workers the same rights of association and combination ("*coalition*" in French) as those of industrial workers and to repeal any legislative or other provision which placed restrictions on these rights for agricultural workers. The text was amended in the Conference Committee, notably to guarantee these workers full and effective liberty to belong or not to belong to an association; ILC, 3rd Session, 1921, Record of Proceedings, Appendix VII, pp. 697–699. The general feeling in the plenary was that the right not to belong to an association was not in line with the purpose of the item placed on the agenda of the Conference; ibid., pp. 150–152. In fact, the ILO Director Albert Thomas noted during the debate that the question of protecting workers who are on strike, or the question of protecting the right not to join associations, raised broader questions that went beyond the item placed on the agenda of the Conference; ibid., p. 150.
In its 2015 General Survey concerning the right of association and rural workers' organizations instruments, the Committee of Experts also referred to the questionnaire and the Conference debate and stated: "the questionnaire for the draft Convention on the right to association and combination of agricultural workers referred in its introduction to the need to combat situations where workers were punished for their simple participation in strikes. Moreover, this was reflected in the discussions held during the International Labour Conference in 1921 when the French Government delegate is recorded as referring to freedom to strike of workers. Several mentions of the right to strike can be found among the first government reports related to Convention No. 11".

[144] Minutes of the 20th Session of the Governing Body, October 1923, pp. 519–520.

[145] C W Jenks, "The international protection of freedom of association for trade union purposes", *Collected Courses of The Hague Academy of International Law*, vol. 87, 1955, pp. 9, 11.

292. At its 30th Session (January 1926), the Governing Body considered the inclusion of an item concerning freedom of association on the agenda of the 1927 session of the Conference. In its report, the Office stated that "the time ha[d] arrived for the Organisation to deal with the whole problem", while recognizing the difficulties:

> The brief survey of law and practice given above shows, at any rate, that the principle of the expression freedom of association which is enshrined in Part XIII is affirmed in all countries: but it is equally clear that the expression "freedom of association" bears different meanings in different countries. While the right of association for trade purposes is a special application of the general right of association, which, incidentally, is itself differently conceived, the relation between the particular and the general right varies to a considerable extent […].
>
> The problem is extremely complicated and delicate; the great difficulty is to keep the trade activities of an association separate from its political activities.[146]

293. The Office outlined two possible approaches for drawing up a Convention. Under the first approach, the instrument would include a definition of freedom of association and determine the legal limits in which such definition would operate. The second approach, which was deemed more practicable, would consist in a Convention that would only lay down the general concept of freedom of association as enshrined in the Constitution. In addition, the Convention would provide for a machinery to consider complaints, including a procedure of conciliation.[147]

294. The Governing Body decided to place the question of freedom of association on the agenda of the Conference, and the Director sought confirmation as to whether the term "freedom of association" could be used to formulate the agenda item, indicating that it was necessary to be clear on the scope of the item, and that "[i]t was understood, for instance, that the question of freedom of association did not include the question of the right to strike".[148] In a subsequent communication to Member States, the Director indicated that "[i]n the case of *freedom of association*, it was simply agreed that the question of the right to strike should not be included. With this reservation the Governing Body considered that the whole question should be laid before the Conference for the discussion of all its aspects."[149]

295. The Office prepared a report and a questionnaire for the Conference (**Annex No. 34**) that presented a comparative analysis of various aspects of freedom of association across countries, including trade disputes and the right to strike, the right to lock out and other methods. The report noted that:

> All forms of combination for trade purposes originate in the trade dispute and begin by owing their importance to it. The trade dispute represents for a trade union its primary form of external activity. […]
>
> In view therefore of the intimate relationship between the right to combine for trade purposes and the right to strike, it is necessary to proceed to a study of the latter and to describe the exact nature of the legal nexus between the trade combination and the trade dispute – i.e. the part played by the former in the latter.[150]

The report also addressed the questions of prohibition or qualified recognition of strikes and restrictions on the right to strike, noting that "[t]he right to strike is not an absolute right enjoyed under all circumstances by all workers without distinction".[151]

146 Minutes of the 30th Session of the Governing Body, January 1926, pp. 105–106.

147 Ibid., pp. 106–107.

148 Ibid., p. 42.

149 ILC, 10th Session, 1927, Volume I, First, Second and Third parts, p. XVII.

150 ILC, 10th Session, 1927, Freedom of Association, Report and Draft Questionnaire, p. 75.

151 Ibid., p. 79.

296. The report further explained that the Office had considered the options of drafting a questionnaire with a view to preparing a draft Convention that included detailed provisions, or of "restricting the consultation of the Governments to two fundamental principles which could probably be embodied in an international Convention and which are mutually complementary – the principle of *the right of combination for trade purposes,* and the principle of *the right to take combined action for trade purposes*".[152] The Office chose the second option.

297. The draft questionnaire was referred by the Conference to a Committee, in which highly divergent views were expressed on issues of substance. The Committee submitted a revised questionnaire to the Conference, which included, among others, a question on whether the definition of the right of combination should refer to the need to observe the legal formalities and include a condition that the right not to combine be safeguarded, and another question on whether the definition of the right of combined action for trade union purposes should refer to a right of trade unions to "pursue their objects by all such means as are not contrary to the interests of the community and to the maintenance of public order".[153] The discussions in the Conference plenary proved equally difficult. The Conference was ultimately unable to adopt the questionnaire and decided not to place the item on the agenda of its next session.[154]

298. In the period from 1930 to 1933, the Governing Body made new attempts to place on the agenda of the Conference the examination of a general Convention on freedom of association, but to no avail (**Document No. 147** pp. 18–22). As has been observed, "conditions were not propitious for the adoption of an international convention embodying a clear-cut obligation to give effect to the principle of freedom of association set forth in the Constitution of the ILO".[155]

2. The negotiating history of Convention No. 87

(a) Prior to the 31st Session of the Conference (1948)

299. It was eventually a resolution of the UN Economic and Social Council – resolution 52(IV) of 24 March 1947 on Guarantees for the exercise and development of trade union rights (**Documents Nos 143, 144**) – which prompted the Governing Body to place the question of freedom of association and industrial relations on the agenda of the 30th Session of the Conference (June–July 1947). Indeed, at its fourth session (February–March 1947), the UN Economic and Social Council had been seized of a memorandum submitted by the World Federation of Trade Unions (**Document No. 141)** and a memorandum submitted by the American Federation of Labor (**Document No. 142**). In particular, the World Federation of Trade Unions proposed a draft resolution which enumerated principles to guarantee trade union rights and under which the Council would set up a Committee for Trade Union Rights to enquire into violations of the principles and submit recommendations to the Council. In describing the situation of trade union rights, the World Federation of Trade Unions observed that if it was rendered impossible for workers to conclude a collective agreement, they had "no other means of redressing the wrongs inflicted on them than by the collective stoppage of work". The memorandum of the American Federation of Labor considered that the Council should refer the matter of trade union rights to the ILO and invite the Organization to study a series of questions, including a question on the extent to which the right of workers and of their organizations to resort to strikes was recognized and protected.

[152] Ibid., p. 143.

[153] ILC, 10th Session, 1927, Record of Proceedings, p. 654.

[154] Ibid., pp. 375, 389.

[155] C W Jenks, "The international protection of freedom of association for trade union purposes", *Collected Courses of The Hague Academy of International Law*, vol. 87, 1955, p. 19.

300. On 18 April 1947, the UN Secretary-General transmitted the Council resolution to the ILO Director-General. The following day, the Director-General wrote to the Governing Body suggesting that the Office be asked to prepare a brief report on freedom of association and industrial relations for discussion at the Conference. The Director-General noted that as it was not possible to give the constitutional four months' notice concerning the placement of the item on the agenda of the Conference, the Conference at its 30th Session could hold only a general discussion on possible future action **(Document No. 146**).

301. The Office report to the Conference gave an account of the history of the problem of freedom of association and industrial relations, provided a global overview of national legislation and practice, and presented a number of suggestions regarding possible ILO action. The Office proposed a draft resolution which would, *inter alia*: define the freedom of association of employers and workers as individuals; define the right of employers and workers' organizations to draw up their constitutions and rules, to organize their administration and to formulate their programmes without interference on the part of the public authorities; provide for guarantees against arbitrary dissolution of organizations by administrative authority; and guarantee the right to establish federations and confederations and the right of affiliation with international organizations of employers and workers. The Office further proposed that no distinction should be made between the private and public sectors and specified that "the recognition of the right of association of public servants in no way prejudges the question of the right of such officials to strike, which is something quite apart from the question under consideration" (**Document No. 147**, p. 109).[156] Lastly, the Office report touched upon the right to strike in the context of voluntary conciliation and arbitration, and proposed that "once a dispute has been referred to conciliation by the consent of all the parties concerned, the parties should be obliged to refrain from strike or lockout during the procedure of conciliation" (**Document No. 147**, p. 130).

302. The item was referred to a Conference Committee, which discussed and amended the proposed resolution. The Committee placed particular emphasis on the universality of the principle of freedom of association and agreed that it was to be guaranteed not only for employers and workers in private industry, but also for public employees, and without distinction or discrimination of any kind. At the same time, it agreed that the recognition of the freedom of association of public officials or employees by means of international regulation should not in any way prejudge the question of the right of such officials to strike. The Government delegate of India submitted an amendment to exclude the armed forces and the police "because they were not authorised to take part in collective negotiations and had not the right to strike". The amendment was rejected (**Document No. 152**, p. 570). An amendment submitted by the Employer members to affirm the right not to join organizations was also rejected. In contrast, the Committee adopted an amendment proposed by the Government delegate of the United Kingdom to indicate that there should be no interference from the public authorities which would restrict the organizations' right to draw up their constitutions and rules, to organize their administration and activities and to formulate their programmes or which would impede the organizations in the lawful exercise of this right (**Document No. 152**, p. 571).

303. The Committee approved the revised resolution concerning freedom of association and the protection of the right to organize and bargain collectively, together with a list of points to guide future Conference discussions, including as regards the drawing up of a Convention. The Committee proposed a resolution in which the Conference would decide to place on the agenda of its 1948 session: (i) the question of freedom of association and of the protection of the right to organize with a view to the adoption of one or several Conventions; and (ii) a first discussion on the application of the principles of the right to organize and to bargain collectively, collective

[156] The report noted that while several legal systems excluded civil servants from the application of the right of association, "the legislature actually intended to debar them from the right to strike and not from the right of association […] It follows that the recognition of the right of association does not imply a recognition of the right to strike" (**Document No. 147**, p. 46).

agreements, conciliation and arbitration and cooperation between the public authorities and employers' and workers' organizations (**Document No. 152**, pp. 575–577). By a record vote, the Conference adopted the resolution to place on the agenda of its next session the two questions proposed by the Committee (**Documents Nos 150, 153**).

304. The decisions taken by the Conference were communicated by the ILO Director-General to the UN Secretary-General for the information of the Economic and Social Council (**Document No. 148**, pp. 421–422). The decisions of the Conference were discussed by the Council at its fifth session. On 8 August 1947, the Council adopted Resolution 84(V) on Trade union rights (freedom of association), in which it decided to "recognize the principles proclaimed by the International Labour Conference" and "request the International Labour Organisation to continue its efforts in order that one or several international conventions may be quickly adopted" (**Document No. 154**). On 17 November 1947, the UN General Assembly adopted Resolution 128(II) on Trade union rights (freedom of association), in which it declared that "it endorses the principles proclaimed by the International Labour Conference in respect of trade union rights as well as the principles the importance of which to labour has already been recognized and which are mentioned in the Constitution of the International Labour Organisation and in the Declaration of Philadelphia" (**Document No. 155**). The text of the resolutions of the UN Economic and Social Council and of the General Assembly were communicated to the ILO Governing Body at its 103rd Session (December 1947) (**Document No. 156**).[157]

305. In accordance with the resolution adopted by the Conference at its 30th Session, the item "freedom of association and protection of the right to organise" was placed on the agenda of the 31st Session with a view to the adoption of a Convention through a single discussion.

306. In August 1947, the Office circulated a questionnaire in which it recalled that the Committee of the Conference "[had taken] the view that freedom of association should be guaranteed in general terms" and that it had adopted a general formulation rather than a detailed enumeration of guarantees. The Office noted that "[i]n view of the differences of opinion which were made manifest in the Committee with regard to the precise field of application of the guarantee of freedom of association", two alternative formulas defining the right of employers and workers to establish organizations had been proposed, while governments were also expected to indicate whether they considered that "it would be desirable to provide that the recognition of the right of association of public officials by international regulation should in no way prejudge the question of the right of such officials to strike" (**Document No. 157**, pp. 7–8, 15).

307. Based on the replies received, the Office prepared another report, in which it noted that "the Governments are almost unanimous in recognising the need, and even the urgency, for an international Convention on freedom of association and the protection of the right to organise" (**Document No. 158**, p. 63). It also indicated that "[t]he large majority of the countries which have replied, therefore, are in favour of the principle that employers and workers, without distinction whatsoever, should have the right to establish or join organisations of their own choosing without previous authorisation, and almost all these countries prefer the provision to be drawn up in general terms rather than as a descriptive enumeration" (**Document No. 158**, p. 67). As for the recognition of the right of association of public officials and the right to strike, the report concluded that "[m]ost countries [...] implicitly recognise the right of association of public officials without prejudice to the question of the right to strike, which latter question, many countries point out, is not relevant to the present proposed Convention" (**Document No. 158**, p. 67).

308. In submitting the text of the draft Convention, the Office proposed including a reference to the obligation of employers, workers and their organizations to observe the law, and added that "in order to avoid any ambiguity, it is necessary to state specifically that the laws relating to

[157] Minutes of the 103rd Session of the Governing Body, December 1947, pp. 21–25.

public order in various countries, whatever they may be, must be compatible with the provisions of any Convention which may be adopted concerning freedom of association" (**Document No. 158,** p. 84).

309. With regard to the normative approach, the Office explained that it had "endeavoured to define as concisely as possible the principles determining the rules governing freedom of association [which] are expressly sanctioned by the legislation and practice of the great majority of countries". Therefore, considering that "all these countries [were] in a position to ratify the Convention without having first to amend their legislation concerning occupational organisations", the Office had "purposely refrained from proposing to the Conference any kind of 'code or model regulations' concerning freedom of association" (**Document No. 158**, pp. 84–85).

310. In relation to public officials, it was observed that:

> Several Governments, while giving their approval to the formula, have nevertheless emphasised, justifiably it would appear, that the proposed Convention relates only to the freedom of association and not to the right to strike, a question which will be considered in connection with Item VIII (conciliation and arbitration) on the agenda of the Conference. In these circumstances, it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association (**Document No. 158**, p. 87).

311. With respect to the autonomy of organizations, the Office noted that the replies had emphasized the need to supplement the freedom to establish organizations with the freedom of organizations to administer themselves as they deemed fit. The Office further indicated that "if the national authorities possess [...] a fairly considerable latitude to regulate the functioning of organisations, it would appear, nevertheless, that the insertion in Article 3 of the words 'in conformity with national laws' (an insertion asked for by certain Governments) would be incompatible with the principle of autonomy of occupational organisations" **(Document No. 158**, p. 91).

(b) Proceedings at the 31st Session of the Conference (1948)

312. The proposed Convention was referred to the Conference Committee on Freedom of Association and Industrial Relations. As the Committee stated in its first report to the Conference (**Document No. 164**), the problem of "legality" dealt with in the Preamble was of vital importance. Numerous amendments were submitted. The Committee ultimately decided to delete the last preambular paragraph of the Office text, and instead insert a new Article. The wording was left to the Drafting Committee, which proposed a text which subsequently became Article 8 of the Convention (**Document No. 164,** pp. 474–475). A proposal to insert a definition of "organisations of workers or of employers" in draft Article 2 (on establishment of organizations) was also examined and agreed on. It later became Article 10 of the Convention. An amendment to remove the reference to employers from the Convention was discussed and rejected (**Document No. 164**, pp. 475–476). With respect to Article 3 (on autonomy of the organizations), the report indicates: "A number of amendments were presented to include in the text a reference to national legislation concerning industrial organisations, with a view to permitting States to promulgate certain rules which, without restricting the rights of these organisations, would, however, establish certain minimum conditions to be fulfilled by them in respect to their constitution and operation." The amendments submitted were withdrawn in light of the Chairman's statement that: "the Convention was not intended to be a 'code of regulations' for the right to organise, but rather a concise statement of certain fundamental principles. The States would remain free to provide such formalities in their legislation as appeared appropriate to ensure the normal functioning of industrial organisations" (**Document No. 164**, p. 477). Two amendments were proposed that sought to exclude the armed forces and the police from the scope of the Convention "on the ground that most countries would not find it possible to ratify a Convention which required absolute freedom of association and organisation to be granted to members of the armed

forces and the police, having regard to the responsibility of Governments for defending the law and assuring the maintenance of public order". The Committee approved the principle of the amendments and asked the Drafting Committee to propose a text, which subsequently became Article 9(1) of the Convention **(Document No. 164,** p. 478).

313. Following the submission of the Committee's report to the plenary (**Document No. 161**), the Conference adopted the Convention as a whole on 6 July 1948 and transmitted it to the Drafting Committee. A final record vote was taken on 9 July 1948 and the Convention was adopted by 127 votes in favour, 0 against and 11 abstentions (**Document No. 163**).[158]

(c) Developments after the adoption of Convention No. 87

314. One year later, when the proposed Convention concerning the application of principles of the right to organize and to bargain collectively was examined by the Conference at its 32nd Session (1949), it was reiterated that the question of the right to strike was addressed under the matter of conciliation and arbitration and not under the proposed Convention. An amendment was submitted to propose a new Article under which the right to strike would be guaranteed to workers, and as a result, the collective cessation of work could not be regarded as a breach of a contract of employment and could not give rise to any repressive measure on the part of employers or public authorities. The Chairperson declared the amendment not receivable "on the ground that the question of the right to strike was not covered by the proposed text, and that its consideration should therefore be deferred until the Conference took up item V of its agenda relating, *inter alia*, to the question of conciliation and arbitration".[159]

315. The Conference subsequently discussed at its 33rd (1950) and 34th (1951) Sessions an item concerning voluntary conciliation and arbitration with a view to adopting a Recommendation.[160] The issues of strikes and lockouts were addressed in connection with the impact of voluntary conciliation and voluntary arbitration on these actions. During the second discussion, the Conference Committee to which the draft Recommendation had been referred adopted an amendment proposed by the Worker members to add a new paragraph, to read: "No provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike." The report indicates that the amendment – which eventually became Paragraph 7 of Recommendation No. 92 – was intended "to emphasise the purely optional character of the procedures referred to".[161]

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158 Between the adoption of the Convention and the record vote, the Director-General requested the authorization of the Governing Body to communicate to the United Nations the official texts of the decisions of the Conference relating to freedom of association, which had been referred to the ILO by the UN and might be discussed in a Committee of the Assembly. The Director-General noted that if the Governing Body did not authorize their transmission at its 106th Session, "the matter would have to be adjourned until its December Session, when the Assembly would have already finished its work"; Minutes of the 106th Session of the Governing Body, July 1948, p. 22. The Governing Body gave its authorization. Five months later, on 10 December 1948, by resolution 217A(III), the UN General Assembly adopted the Universal Declaration of Human Rights, article 20 of which affirms that "[e]veryone has the right to freedom of peaceful assembly and association [and that] no one may be compelled to belong to an association". The Governing Body was informed of the adoption of the Declaration at its 108th Session (March 1949).

159 ILC, 32nd Session, 1949, Record of Proceedings, pp. 468–469.

160 The Office report on item VIII submitted to the 31st Session (1948) of the Conference addressed strikes and lockouts in relation to conciliation and arbitration procedures. In that report, the Office analysed the national legislation as regards the conditions under which strikes and lockouts were lawful, the notice of intention to resort to strike and lockout, the restrictions during the conciliation and arbitration procedure and strikes and lockouts in the public services, in public utility undertakings, as well as systems of compulsory conciliation and arbitrations under which strikes and lockouts were prohibited. The Office identified a number of general principles which "might usefully figure in a Recommendation" and formulated on this basis a questionnaire, which included the following question: "Do you consider that it should be provided that, once a dispute has been submitted to a conciliation authority with the consent of all the parties concerned, the latter should be required to abstain from strikes and lockouts while the conciliation is in process?"; ILC, 31st Session, 1948, Report VIII(1), pp. 111–126.

161 ILC, 34th Session, 1951, Record of Proceedings, pp. 367, 604.

316. It is also worth noting that in 1956, the Governing Body decided against revising the report form on the application of Convention No. 87 with a view to adding specific questions on restrictions on the right to strike for public employees, as it considered that Convention No. 87 did not cover the right to strike.[162]

317. In a further development, in 1992, the Governing Body discussed a proposal to place a standard-setting item concerning the right to strike on the agenda of the Conference[163] but ultimately decided against it.

* * *

318. In conclusion, the Office respectfully submits that the negotiating history of Convention No. 87 offers a number of insights that may be of practical interest in the context of the current proceedings. First, the Convention was not intended to be a "code of regulations" for the right to organize, but rather a concise statement of fundamental principles; the stated objective at the time was to enable a great majority of countries to ratify the Convention without amending their respective national legislations. A similar approach had been followed when the ILO first attempted to adopt a general Convention in 1927.

319. Second, the question of the right to strike arose incidentally in relation to the question of the right to organize of public officials but was never addressed in a comprehensive manner by the Office or the Conference.

320. Third, the preparatory work that led to the adoption of Convention No. 87, Convention No. 98 and Recommendation No. 92 suggests that the question of the right to strike was to be addressed in connection with conciliation and arbitration. Earlier discussions at the ILO reveal a general reluctance to address the right to strike when drawing up standards on freedom of association.

C. Comments of the ILO supervisory bodies in relation to Convention No. 87 and the right to strike

321. Since the 1950s, overseeing compliance with the principle of freedom of association has involved not only monitoring the effective application of the two fundamental Conventions Nos 87 and 98 by States parties, but also applying a dedicated and unique procedure that may hold accountable any Member State for infringements of the constitutional principle. As the main organ of the regular supervision of standards, the Committee of Experts has produced the majority of the observations regarding the application of Convention No. 87, while the Committee on Freedom of Association has over the years built a substantial body of decisions in the context of complaints alleging violations of freedom of association by Member States, regardless of whether they are bound by Convention No. 87.

322. It is indicative that approximately 10 per cent of all the observations published by the Committee of Experts each year relate to the application of Conventions Nos 87 and 98 (33 in 1990, 151 in 2012 and 117 in 2023), while representations alleging non-observance of these Conventions make up almost 20 per cent of all representations received to date under article 24 of the Constitution

162 Minutes of the 131st Session of the Governing Body, March 1956, pp. 58, 188. In the Committee that examined the question, "[t]here was a general agreement [...] that it would not be advisable to include in the form of annual report a question which would go beyond the obligations accepted by ratifying States".

163 GB.253/2/3(Rev.), paras 14, 35–38 and Appendix I. As the Office document indicated, it was left to the supervisory bodies – the Committee on Freedom of Association, the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards – to spell out the ILO's principles in this matter on the basis of the cases which they have been called upon to examine.

(45 out of 239). Similarly, nine of the fourteen Commissions of Inquiry established to date under article 26 of the Constitution have had to examine complaints alleging non-observance of those Conventions. Meanwhile, the Committee on Freedom of Association has so far examined more than 3,400 complaints concerning violations of the principle of freedom of association. Lastly, one of the two cases that have so far given rise to the adoption of measures under article 33 of the Constitution concerned the non-observance of Conventions Nos 87 and 98.

1. Committee of Experts on the Application of Conventions and Recommendations

323. In addition to the country-specific comments/observations relating to the application of Convention No. 87, the Committee of Experts has consolidated its views on Convention No. 87 in its General Surveys. The latest comprehensive report of the views of the Committee of Experts on the right to strike can be found in its General Survey of 2012 (**Document No. 236**).

(a) On the right to strike as a fundamental workers' right

324. One of the central pronouncements of the Committee of Experts when examining the application of Convention No. 87 by ratifying countries in relation to the right to strike is that "the right to strike is an intrinsic corollary of the right to organize that is protected by the Convention" (**Document No. 167**) and that "adequate safeguards and immunities from civil liability are necessary to ensure respect for this fundamental right [workers' right to exercise legitimate industrial action], which is an intrinsic corollary of the right to organize" (**Document No. 169**).[164]

325. At the same time, the Committee has emphasized that "the right to strike cannot be considered as an absolute right: not only may it be subject to a general prohibition in exceptional circumstances, but it may be governed by provisions laying down conditions for, or restrictions on, the exercise of this fundamental right" (**Document No. 235**, para. 151).

(b) On strike as legitimate means to defend workers' occupational and economic interests

326. The view of the Committee of Experts is that, although not specifically mentioned in Convention No. 87, the right to strike flows naturally from Article 3, which provides that "workers' organisations shall have the right to organise their activities and formulate their programmes in full freedom. [...] [T]his right includes recourse to strikes, which are one of the essential means through which workers and their organisations may promote and defend their economic and social interests" (**Document No. 166**).

327. The Committee has further specified that "trade unions and employers' organizations responsible for defending socio-economic and occupational interests should be able to use, respectively, strike action or protest action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members", and that therefore workers should be able to "exercise their right to strike to defend occupational and economic interests, which do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions" (**Document No. 178**, pp. 97–98).

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[164] In addition, the Committee of Experts has considered that the fundamental right to strike is similarly protected for agricultural and migrant workers under the relevant Conventions Nos 11, 97, 141 and 143; ILC, 104th Session, 2015, Report III (Part 1B), *Giving a voice to rural workers*, para. 151, and ILC, 87th Session, 1999, Report III (Part 1B), *Migrant workers*, para. 150.

328. In its General Survey of 1994, the Committee of Experts elaborated on the reasoning underpinning its position as follows:

> The words "activities and ... programmes" in this context acquire their full meaning only when read together with Article 10, which states that in this Convention the term "organization" means any organization "for furthering and defending the interests of workers or of employers". The promotion and defence of workers' interests presupposes means of action by which the latter can bring pressure to bear in order to have their demands met. In a traditional economic relationship, one of the means of pressure available to workers is to suspend their services by temporarily withholding their labour, according to various methods, thus inflicting a cost on the employer in order to gain concessions. [...] The Committee therefore considers that the ordinary meaning of the word "programmes" includes strike action, which led it very early on to the view that the right to strike is one of the essential means available to workers and their organizations to promote their economic and social interests.
>
> Under Article 3(1) of Convention No. 87, the right to organize activities and to formulate programmes is recognized for workers' and employers' *organizations*. In the view of the Committee, strike action is part of these activities under the provisions of Article 3; it is a collective right exercised, in the case of workers, by a group of persons who decide not to work in order to have their demands met. The right to strike is therefore considered as an activity of workers' organizations within the meaning of Article 3 (**Document No. 235**, paras 148–149).

(c) On limitations on the right to strike

329. While noting that the right to strike is not absolute or unlimited, the Committee of Experts has taken the view that a general "prohibition of strikes in all the economic activities of the country constitutes a considerable limitation of the possibilities of action of trade union organisations and that such a limitation is not compatible with the principles of freedom of association generally admitted" (**Document No. 183**). The Committee has on numerous occasions stressed that the right to strike "should not be the object of excessive restrictions" (**Document No. 166**) and that "it can only be restricted in exceptional cases" (**Document No. 167**).

330. More specifically, the Committee has consistently considered that "[t]he prohibition or restriction of [the] exercise [of the right to strike] is compatible with Convention only in respect of public officials acting in their capacity as agents of the public authority or in essential services in the strict sense of the term (and not in public services in general) where the interruption of such activities due to a strike would endanger the life, personal safety or health of the whole or part of the population" (**Document No. 186**). In this regard, the Committee has considered that a "list of essential services [...] is too wide in scope to be considered compatible with the Convention [if] it permits strikes to be stopped in a wide range of activities, such as the banking services, transport, loading and unloading of ships, oil refining, etc." (**Document No. 182**).

331. In other instances, the Committee recalled that "the principle whereby the right to strike may be limited or prohibited in essential services would become meaningless if the legislation defined essential services too broadly" (**Document No. 190**) and reaffirmed its position that "oil production and distribution, the post and telegraph service, railways and airways (except for air traffic controllers), and ports" are not within its definition of essential services (**Document No. 191**). In the same vein, the Committee has clarified that "the concepts of public utility and of damage to the economy are broader than that of essential services" (**Document No. 194**). Moreover, the Committee has pointed out that even where the prohibition of strikes is "permissible in strictly essential services [...] it is important that adequate guarantees are given to the workers concerned so that their interests will be safeguarded by appropriate conciliation and arbitration procedures which are both impartial and rapid, and in which those concerned can take part at every stage" (**Document No. 179**).

332. In its General Survey of 1973 on freedom of association and collective bargaining, the Committee summarized the situation by stating that "[t]he right to strike is subject to restrictions in many countries, but the scope and severity of these restrictions may vary to a considerable extent, ranging from temporary prohibition and prohibition for only certain categories of workers, to prohibition of a general character applicable to all workers" (**Document No. 233**, para. 107). The Committee's overall yardstick to measure the conformity of the various national laws and regulations with the letter and the spirit of Convention No. 87 seems to have always been Article 8, which 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, together with Articles 3 and 10, which include the right of trade unions to organize freely their activities, and to defend the interests of their members. Similarly, in the General Survey of 1983, the Committee concluded that "restrictions relating to the objectives of a strike and to the methods used should be sufficiently reasonable as not to result in practice in a total prohibition or an excessive limitation of the exercise of the right to strike" (**Document No. 234**, para. 226).

333. As regards the concept of essential services, the Committee's General Survey of 1994 provided the following considerations:

> Numerous countries have provisions prohibiting or limiting strike in essential services, a concept which varies from one national legislation to another. They may range from merely a relatively short limitative enumeration to a long list which is included in the law itself. Sometimes the law includes definitions, from the most restrictive to the most general kind, covering all activities which the government may consider appropriate to include or all strikes which it deems detrimental to public order, the general interest or economic development. [...] As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee [...] is of the opinion that it would not be desirable – or even possible – to attempt to draw up a complete and fixed list of services which can be considered as essential (**Document No. 235**, para. 159).

334. The Committee went on to explain the difficulty in inventorying essential services as follows:

> While recalling the paramount importance which it attaches to the universal nature of standards, the Committee considers that account must be taken of the special circumstances existing in the various member States, since the interruption of certain services which in some countries might at worst cause economic hardship could prove disastrous in other countries and rapidly lead to conditions which might endanger the life, personal safety or health of the population. A strike in the port or maritime transport services, for example, might more rapidly cause serious disruptions for an island which is heavily dependent on such services to provide basic supplies to its population than it would for a country on a continent. Furthermore, a non-essential service in the strict sense of the term may become essential if the strike affecting it exceeds a certain duration or extent so that the life, personal safety or health of the population are endangered (**Document No. 235**, para. 160).

(d) On voting thresholds

335. One of the restrictions on the exercise of the right to strike reviewed by the Committee of Experts is the minimum level of support among trade union members that may be required by national legislation. The Committee has thus considered that requiring "a majority of two-thirds at the general assembly of a trade union in order to call a strike" would be incompatible with the Convention (**Document No. 199**), while on other occasions it has drawn attention to the need to "lift the excessive limitations on the exercise of the right to strike, requiring a majority of 60 per cent for calling a strike" (**Document No. 200**). In other instances, the Committee has requested governments in more general terms "to ensure that the quorum and majority required for voting on a strike as well as to call a strike are fixed at a reasonable level" (**Document No. 202**).

336. There are examples where national legislation provides that strikes in certain sectors may be postponed or suspended by a discretionary decision of the public authorities. The Committee has recalled, in this respect, that governments should ensure that the legislation "is not applied in a manner so as to infringe on the right of workers' organizations to organize their activities free from government interference" (**Document No. 205**). In any event, the Committee has considered that "to be permissible, a prohibition from striking applied to all workers owing to special circumstances should not last longer than is strictly necessary" and that "a general prohibition from striking considerably restricts the possibilities that trade unions have of furthering and defending the interests of their members (Article 10 of the Convention) and of organising their activities (Article 3)" (**Document No. 204**).

(e) On the right to strike in the public service

337. The right to industrial action for public service employees has long been a contentious issue. The Committee has always affirmed, in this regard, "the need to ensure basic labour rights for public service employees, in particular [...] the right to industrial action without risk of sanctions, with the only exception being public servants exercising authority in the name of the State and workers employed in essential services in the strict sense of the term" (**Document No. 212**).

338. As the Committee has explained:

> [W]hereas it has always acknowledged that the right to strike may be limited or even prohibited in the public service, such a prohibition would be nonsensical if legislation adopted a too broad definition of the concept of public service. The Committee cannot disregard the peculiarities or legal and social traditions of each country but it must nevertheless attempt to identify relatively uniform criteria permitting examination of the compatibility of a legislation with the principles of freedom of association" (**Document No. 210**).

In this respect, the Committee commented that "when they are not exercising authority in the name of the State, they [public servants] should benefit from the right to strike without being liable to sanctions, except in the case that the maintenance of a minimum service may be envisaged" (**Document No. 211**). Moreover, the Committee held that:

> [I]f strikes are prohibited or restricted in the public service or in essential services, appropriate guarantees must be afforded to workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by adequate, impartial and speedy conciliation and arbitration procedures in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented (**Document No. 209**).

339. In its General Survey of 1994, the Committee explained in relation to the definition of the concept of "public servant":

> One of the main difficulties is due to the fact that the concept itself varies considerably from one legal system to another. For example, the terms "civil servant", "fonctionnaire" and "funcionario" are far from having the same coverage; furthermore, an identical term used in the same language does not always mean the same thing in different countries; lastly, some systems classify public servants in different categories, with different status, obligations and rights, while such distinctions do not exist in other systems or do not have the same consequences.

Nonetheless, the Committee reiterated its position that "a too broad definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers" (**Document No. 235**, para. 158).

(f) On compulsory arbitration

340. The Committee has commented extensively on national laws that provide for compulsory conciliation and arbitration procedures that could limit the effectiveness of strike action or even exclude recourse to strike action altogether. The Committee has drawn attention, for instance, to conciliation and arbitration procedures when "the total effect of the various provisions […] might be to make any legal strike practically impossible" (**Document No. 213**) and "provisions [that are rendered] inoperative by establishing a system of conciliation and arbitration whose awards the parties are bound to accept. This results in prohibition of the right to strike in practice, which seriously restricts trade union activities and is contrary to Articles 3, 8 and 10 of the Convention" (**Document No. 215**).

341. More generally, the Committee has recalled that "recourse to compulsory arbitration to bring an end to a collective labour dispute is only acceptable when the two parties to the dispute so agree, or when a strike may be restricted or prohibited – that is, in the case of disputes concerning public servants exercising authority in the name of the State, essential services in the strict sense of the term or situations of acute national crisis" (**Document No. 220**).

(g) On sanctions for strike action

342. Based on the premise that "the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against these organizations' leaders and members" (**Document No. 224**), the Committee has, on a number of occasions, called upon governments "to ensure that no penal sanctions may be imposed for having carried out a peaceful strike" (**Document No. 225**) so as not to "criminalize social protest" (**Document No. 226**). It has further specified that "penal sanctions should only be imposed where there are violations of strike prohibitions that are in conformity with the principles of freedom of association. In addition, in these cases, the sanctions should be proportionate to the offences committed, and penalties of imprisonment should not be imposed in the case of peaceful strikes" (**Document No. 209**). In the same vein, the Committee has stated that it "remains convinced that conformity with the Convention requires that workers should enjoy real and effective protection against dismissal or any other disciplinary measure taken by reason of their participation, whether actual or proposed, in strikes or other forms of industrial action" (**Document No. 223**).

(h) On minimum service

343. The Committee has recognized that there may be services that require the maintenance of a minimum service in the event of a strike, but has specified that this should be limited to the following:

> (i) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (ii) services which are not essential in the strict sense of the term, but in which strikes of a certain scope and duration could give rise to an acute crisis threatening the normal living conditions of the population; or (iii) public services of fundamental importance (**Document No. 228**).

344. Furthermore, the Committee has specified that "the minimum service must genuinely and exclusively be a minimum service, that is one which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear" and also that "workers' organizations should be able, if they so wish, to participate in establishing the minimum service" and "any disagreement on such services should be resolved by a joint or independent body responsible for examining rapidly and without formalities the difficulties raised by the definition and application of such minimum services" (**Document No. 229**).

2. Committee on Freedom of Association

345. A systematic compilation of the decisions of the Committee on Freedom of Association on the right to strike in specific cases can be found in Chapter 10 of the latest edition of its *Compilation of decisions*, which summarizes its main findings over the course of its examination of individual allegations of violation of freedom of association **(Document No. 282)**.[165] The purpose of this compilation has been explained by the Committee itself as a response to the need to safeguard "the principles of universality, continuity, predictability, fairness and equal treatment" in its review of individual allegations in the area of freedom of association.[166]

(a) On the right to strike as a fundamental workers' right

346. Over the course of its 70 years of existence, the Committee on Freedom of Association has found that "[t]he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87" and that "[w]hile the Committee has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, it has regarded it as such only in so far as it is utilized as a means of defending their economic interests" (**Document No. 282**, paras 751, 754).

(b) On strike as legitimate means to defend workers' occupational and economic interests

347. The Committee on Freedom of Association "has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests" and has recognized 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" (**Document No. 282**, paras 752–753).

(c) On limitations on the right to strike

348. According to the Committee on Freedom of Association, the right to strike is not absolute, but is subject to the law of the country. Nevertheless, the Committee verifies in practice whether "[t]he conditions that have to be fulfilled under the law in order to render a strike lawful [are] reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations" (**Document No. 282**, para. 789).

349. In particular, the Committee on Freedom of Association has found that "strikes at the national level are legitimate in so far as they have economic and social objectives and not purely political ones; the prohibition of strikes could only be acceptable in the case of civil servants acting on behalf of the public authorities or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population" (**Document No. 282**, para. 779). Moreover, the Committee has underlined the need, in cases where the right to strike is restricted in essential services, for "adequate guarantees [...] to safeguard the workers' interests" (**Document No. 282**, para. 861).

350. Faced with the tasks of determining what constitutes an essential service, the Committee on Freedom of Association has considered that "[t]he principle regarding the prohibition of strikes in essential services might lose its meaning if a strike were declared illegal in one or more undertakings which were not performing an 'essential service' in the strict sense of the term" (**Document No. 282**, para. 838) and that what could qualify as such "depends to a large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute,

[165] From 2017 to 2022, cases relating to anti-trade union activities involving the right to strike represented between 10 and 25 per cent of all the complaints examined annually by the Committee on Freedom of Association.

[166] GB.332/INS/11/1(Add.), para. 7.

in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population" (**Document No. 282**, para. 837).

(d) On voting thresholds

351. As regards the minimum level of support among trade union members for a strike to be considered lawful, the Committee on Freedom of Association has explained that, in principle, "[t]he obligation to observe a certain quorum and to take strike decisions by secret ballot may be considered acceptable" (**Document No. 282**, para. 809), but has also found that "[t]he requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises" (**Document No. 282**, para. 806). More specifically, in relation to a legal requirement of a majority of two thirds of the total number of members of the union or branch concerned, the Committee on Freedom of Association has followed the conclusion of the Commission of Experts that "such legal provisions constitute an intervention by the public authorities in the activities of trade unions which is of such a nature as to restrict the rights of these organizations, contrary to Article 3 of the Convention [No. 87]" (**Document No. 282**, para. 805).

(e) On the prohibition or suspension of strikes

352. With respect to special measures prohibiting or suspending strikes for all workers, the Committee has held as a matter of principle that "[a] general prohibition of strikes can only be justified in the event of an acute national emergency and for a limited period of time" (**Document No. 282**, para. 824) and that, in practice, "[a] provision which allows the Government to suspend a strike and impose compulsory arbitration on the grounds of national security or public health is not in itself contrary to freedom of association principles as long as it is implemented in good faith and in accordance with the ordinary meaning of the terms 'national security' and 'public health'" (**Document No. 282**, para. 916).

(f) On the right to strike in the public service

353. Concerning the contentious question of the right to industrial action for public service employees, the long-standing position of the Committee on Freedom of Association has been that while "[r]ecognition of the principle of freedom of association in the case of public servants does not necessarily imply the right to strike" (**Document No. 282**, para. 826), "[t]oo broad a definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers. The prohibition of the right to strike in the public service should be limited to public servants exercising authority in the name of the State" (**Document No. 282**, para. 829). On the contrary, the Committee considered that normally "[p]ublic servants in state-owned commercial or industrial enterprises should [...] enjoy the right to strike" (**Document No. 282**, para. 831). In any event, where restrictions have been placed on the right to strike in the public service, the Committee on Freedom of Association has considered that these restrictions "should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented" (**Document No. 282**, para. 856).

(g) On compulsory arbitration

354. The Committee on Freedom of Association has considered that "[i]n as far as compulsory arbitration prevents strike action, it is contrary to the right of trade unions to organize freely their activities" (**Document No. 282**, para. 818). This principle is qualified, however, in several respects, for instance, "[c]ompulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in a dispute, or if the strike in question

may be restricted, even banned, i.e. in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population" (**Document No. 282**, para. 816) and "[c]ompulsory arbitration is acceptable in cases of acute national crisis" (**Document No. 282**, para. 817).

(h) On sanctions for strike action

355. The Committee on Freedom of Association has taken the firm view that "[i]mposing sanctions on unions for leading a legitimate strike is a grave violation of the principles of freedom of association" (**Document No. 282**, para. 951) and that "[n]o one should be penalized for carrying out or attempting to carry out a legitimate strike" (**Document No. 282**, para. 953). The Committee has explained that "[p]enal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike" (**Document No. 282**, para. 966). In addition, the Committee has stated that "[r]espect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action" (**Document No. 282**, para. 959).

(i) On minimum service

356. One regular question brought to the attention of the Committee on Freedom of Association concerns the legal requirements aiming at maintaining a level of minimum service in the event of a strike in specific sectors. The Committee has deduced from the principles of freedom of association that "[t]he establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance" (**Document No. 282**, para. 866). More concretely, the Committee has considered that "[m]inimum service should be restricted to the operations which are necessary to satisfy the basic needs of the population or the minimum requirements of the service, while ensuring that the scope of the minimum service does not render the strike ineffective" (**Document No. 282**, para. 874). In addition, the Committee has underlined that "[t]he workers' and employers' organizations concerned must be able to participate in determining the minimum services which should be ensured, and in the event of disagreement, legislation should provide that the matter be resolved by an independent body and not by the administrative authority" (**Document No. 282**, para. 882).

(j) Representations alleging non-observance of Convention No. 87

357. Apart from the individual complaints received directly from workers' and employers' organizations, and as expressly provided for in article 3(2) of the Standing Orders concerning the procedure for the examination of representations under article 24 of the Constitution, the Committee on Freedom of Association has on occasion been called upon by the Governing Body to examine representations alleging non-observance of Convention No. 87. In all those instances, the Committee reaffirmed basic principles of its voluminous case law. For example, in a representation relating to the prohibition of strikes in the banking sector, the Committee recalled that:

> [T]he right to strike may be prohibited or largely restricted with respect to public servants acting in their capacity as agents of the public authorities (among whom those performing bank services can obviously not be counted) or with respect to

> workers in essential services in the strict sense of the term [...]. The Committee has considered that the banking sector is not an essential service in the sense mentioned [...] and that nobody should be deprived of his liberty or subjected to penal sanctions for the mere fact of organising or participating in a peaceful strike (**Document No. 272**, para. 99).

358. In another representation concerning the banning of political strikes and sympathy strikes, the Committee on Freedom of Association concluded that:

> [T]he excessive restrictions on the right to strike imposed on workers constitute a serious violation of the principles of freedom of association [and] that these limitations would be justifiable only if the strike were to lose its peaceful character. In any case, the general banning of sympathy strikes is abusive [...].
>
> In addition, the general ban on strikes in banks and transport is not in conformity with the principles of freedom of association, and should therefore be lifted. Furthermore, it should be possible to impose sanctions for strike action solely in cases in which the action is not in conformity with the principles of freedom of association, and such sanctions should not be disproportionate with the severity of the offence involved; and this is not the case when the strikers expose themselves to penalties of up to two years or even three years in prison (**Document No. 274**, paras 61–62).

359. In a further representation, the Committee recalled its views on essential services and:

> While noting the Government's position that the transport sector [...] is under all circumstances essential to the functioning of society [stated that] it does not consider transport generally to constitute essential service in the strict sense of the term [...].
>
> [A]lthough it is recognized that a stoppage in services or undertakings such as transport companies might disturb the normal life of the community, it can hardly be admitted that the stoppage of such services could cause a state of acute national emergency [and] therefore measures taken to mobilize workers at the time of disputes in services of this kind are such as to restrict the workers' right to strike as a means of defending their occupational and economic interests" (**Document No. 275**, paras 55–56).[167]

3. Commissions of Inquiry

360. Of the nine complaints alleging non-observance of Convention No. 87 that have led to the establishment of a Commission of Inquiry, six have related, at least in part, to restrictions on the right to strike. In all six instances, the Commissions of Inquiry echoed the views and conclusions of other ILO supervisory bodies on this matter. For instance, in its 1971 report, a Commission of Inquiry observed that:

> Convention No. 87 contains no specific guarantee of the right to strike. On the other hand, the Commission accepts that an absolute prohibition of strikes would constitute a serious limitation of the right of organisations to further and defend the interest of their members (Article 10 of the Convention) and could be contrary to Article 8, paragraph 2, of the Convention, under which "the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention", including the right of unions to organise their activities in full freedom (Article 3) (**Document No. 276**, para. 261).

[167] The Committee has also commented on the right to strike in the context of the examination of representations of non-compliance with Convention No. 98 (220th report, 1982, Cases Nos 997, 999 and 1029, paras 99 and 107; 282nd report, 1992, Cases Nos 997, 999 and 1029, para. 16) and No. 154 (GB.345/INS/5/4, para. 34).

361. In another report, published in 1984, a Commission of Inquiry recalled that "[t]he supervisory bodies of the ILO [...] have aways taken the view – which is shared by the Commission – that the right to strike constitutes one of the essential means that should be available to trade union organisations for, in accordance with Article 10 of the Convention, furthering and defending the interests of their members". The Commission concluded that requiring that the decision to call for a strike be approved by the majority of the workers concerned and not merely by the majority of those voting, establishing a very long list of essential services, and applying severe penalties for the organizers of strikes imposed undue restrictions on the right of trade unions to organize their activities (**Document No. 277**, paras 517, 554–556).

362. In 1991, a Commission of Inquiry noted the view of the Committee of Experts that:

> [T]he provision requiring a majority of 60 per cent of the workers for the calling of a strike [...]; the prohibition of strikes in rural occupations when produce may be damaged if it is not immediately disposed of [...]; [and] the provision enabling the authorities to impose compulsory arbitration to end a strike that has lasted 30 days [were all] restrictions on the right to strike which go beyond what is accepted by the ILO supervisory bodies and which infringe the right of trade unions to organise their activities (Article 3 of the Convention) for the purposes of promoting and defending the interests of their members (Article 10) (**Document No. 278**, para. 506).

363. In another case, which was concluded in 2010, the Commission of Inquiry expressed concern that "the legislation includes disproportionate sanctions for the exercise of the right to strike and an excessively large definition of essential services; and that in practice the procedure for the declaration of strikes is problematic and that it appears that the security forces often intervene in strikes" and went on to "confirm that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87" (**Document No. 280**, para. 575).

364. Lastly, in the most recent complaint alleging non-compliance with Convention No. 87, the Commission of Inquiry concluded that "the right to strike, as an essential means for workers to defend their interests, has been severely limited" and pointed out that "in no case should penal sanctions be imposed simply for having organized or participated in a peaceful strike" (**Document No. 281**, para. 586).

4. Committee on the Application of Standards

365. Since the adoption of Convention No. 87, the reports of the Committee on the Application of Standards have reflected a degree of disagreement expressed from certain constituents with the views of the Committee of Experts on the right to strike. The main point of contention has been whether the right to strike is covered by Convention No. 87. The question was raised sporadically (**Documents Nos 241–246**), but has been broached more consistently since 1991 (**Documents Nos 247–264**, **266**). Disagreement has been expressed in relation to the conditions of exercise of the right to strike and to the permissible limitations of that right.

366. Since 2012, there has been a noticeable shift, in that the Committee on the Application of Standards has refrained altogether from addressing the right to strike in its conclusions on individual cases concerning the application of Convention No. 87. At most, the Committee's reports provide an account of the divergent views and note the existing controversy on this issue (**Document No. 267**, para. 75; **Document No. 268**, para. 147; **Document No. 269**, para. 37; **Document No. 270**, para. 46; **Document No. 271**, paras 44, 93, 147).

367. In brief, while the discussions within the Committee on the Application of Standards have had less of an impact on the question of the recognition of the right to strike, they reflect in the most visible manner the profound disagreement between two of the groups of ILO constituents over the interpretation of Convention No. 87 in relation to the right to strike.

5. Complementarity and synergy among the supervisory organs

368. As highlighted above, the machinery for the supervision of standards has issued convergent and mutually reinforcing comments on the protection of the fundamental right to strike under Convention No. 87 and the principles governing its exercise. The various supervisory bodies make frequent cross-references to each other's views and conclusions, which attests to the coherence, constancy and stability of the normative guidance they provide to Member States. This close interaction is particularly evident in the case of the Committee of Experts and the Committee on Freedom of Association. Thus, "the principles regarding the right to strike laid down by the [two Committees] coincide on practically all essential points".[168]

369. As the Committee of Experts put it in 1973, "[t]here is a definite link between all these special procedures and the work of the Committee of Experts, particularly in the case of ratified Conventions. For example, whenever appropriate the Committee on Freedom of Association takes account of the conclusions of the Committee of Experts, and it also brings its own conclusions to the attention of this Committee, in order to ensure that a matter is properly followed up under the normal supervisory procedure".[169]

370. In the context of the 1994 General Survey on freedom of association, the Committee of Experts commented on its special linkages with the Committee on Freedom of Association as follows:

> Thus, when considering the practice and legislation of a country as part of the regular examination of the application of Conventions under article 22 of the ILO Constitution, the Committee of Experts may be called upon to take account of the unanimous recommendations of the Committee on Freedom of Association approved by the Governing Body, in addition to the information provided by the government and by employers' and workers' organizations. While the Committee on Freedom of Association and the Committee of Experts differ in terms of their composition, the nature of their functions and their procedure, they apply the same principles, which are universal and cannot be applied selectively. The Committee of Experts does take into consideration particular facts when applying these principles which it tends to view as guidelines from which governments and the social partners might draw inspiration with a view to promoting harmonious labour relations.[170]

371. More recently, putting the emphasis on the complementary and integrated manner in which the supervisory bodies function, the Committee of Experts explained that when it referred to the conclusions and recommendations of the Committee on Freedom of Association:

> [I]t was basically for two reasons: either because the CFA [Committee on Freedom of Association] had referred the legislative aspects of a case to the Committee of Experts, or for other intersectional reasons, for example when the CFA had addressed similar issues in the recent past as was sometimes indicated by the government or the social partners themselves. The CFA's assessment of the practical application of Conventions on freedom of association sometimes informed the Committee of Experts as to how the Convention was applied, especially as the CFA based its examination on complaints. The Committee's approach reinforced the integration of the supervisory mechanisms, while doing so through a suitably tailored set of circumstances as part of the independence and discretion that the Committee was expected to exercise (**Document No. 239**, para. 29).

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[168] B Gernigon, A Odero, H Guido, "ILO principles concerning the right to strike", *International Labour Review*, vol. 137, 1998, p. 478.

[169] ILC, 58th Session, 1973, Report III (Part 4B), *Freedom of Association and Collective Bargaining*, para. 18.

[170] ILC, 81st Session, 1994, Report III (Part 4B), *Freedom of Association and Collective Bargaining*, para. 20.

372. In addition to referring to the Committee of Experts the legislative aspects of cases concerning the right to strike, on a reciprocal basis the Committee on Freedom of Association has on multiple occasions concurred with the comments of the Committee of Experts. For example, the view of the Committee of Experts that a general prohibition of the right to strike would be incompatible with Convention No. 87 was echoed by the Committee on Freedom of Association in 1965, when it indicated that "such a prohibition may constitute a considerable restriction of the potential activities of trade unions" (78th Report, 1965, Case No. 364, para. 80). In another example, the definition of the Committee of Experts of the concept of "essential services", as refined in the Committee's General Survey of 1983, was reproduced by the Committee on Freedom of Association immediately after the publication of the General Survey (226th Report, 1983, Case No. 1166, para. 343). In a further example, the position of the Committee of Experts, first expressed in 1961, that a voting threshold of two thirds of all union members is contrary to Article 3 of Convention No. 87 was shared by the Committee on Freedom of Association as from 1965 (79th Report, 1965, Case No. 408, para. 182).

373. In the same synergetic fashion, in 1966 the Fact-Finding Commission on Freedom of Association concerning Persons Employed in the Public Sector in Japan stated that "[t]here is no Convention, Recommendation, or other decision of the International Labour Conference defining the extent of the right to strike in public services, but the Governing Body Committee on Freedom of Association has formulated a series of principles on the matter which has won general acceptance" before concluding: "The Commission endorses these principles" (Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Persons Employed in the Public Sector in Japan, 1966, paras 2139, 2248).

* * *

374. In conclusion, the Office respectfully submits that the wealth of normative guidance provided by the ILO's supervisory machinery on various aspects of the right to strike is relevant, if not decisive, for the purposes of the current proceedings. Of particular significance is the elaborate body of principles developed by the Committee of Experts and the Committee on Freedom of Association as an integral part of the broader protection of the right to freedom of association. Whether the remarkably consistent pronouncements of all the expert bodies engaged in the supervision of ILO standards may be considered likely to contribute to the interpretation of the relevant provisions of Convention No. 87 is of course for the Court to assess.

▶ PART IV. International recognition of the right to strike

375. In the broader landscape of international protection of human and social rights, a number of instruments negotiated and adopted outside the ILO make explicit reference to the right to strike. Most of these instruments indicate that the right to strike is not unlimited and that its exercise is subject to national laws and regulations. The expert bodies responsible for monitoring their implementation, where they exist, occasionally make reference to ILO Convention No. 87 and the views and observations of the ILO Committee of Experts on trade union rights.

A. International human rights instruments and jurisprudence of human rights courts

1. Global instruments

376. At the global level, the right to strike is expressly provided for in article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966 (**Document No. 284**), which enumerates the trade union rights that States Parties are bound to respect as follows:

1. The States Parties to the present Covenant undertake to ensure:

   (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

   (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

   (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

   (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

377. The Committee on Economic, Social and Cultural Rights, which oversees the application of the Covenant by the 172 States Parties, has at times commented on legislative provisions or practices that would be inconsistent with article 8 of the Covenant. For instance, the Committee expressed concern "in line with the Human Rights Committee and the ILO Committee of Experts, that the prohibition by the State party of strikes by public servants other than public officials who do not provide essential services [...] constitutes a restriction of the activities of trade unions that

is beyond the scope of article 8(2) of the Covenant" (**Document No. 306**, paras 22, 40). On other occasions, the Committee recommended that a State party "revise its legislation on the right to strike, in line with article 8 of the Covenant and the relevant Conventions of the International Labour Organization" (**Document No. 307**, para. 27), and that another State party "revise the scope of the category of essential services with a view to ensuring that all those civil servants whose services cannot reasonably be deemed as essential are entitled to their right to strike in accordance with article 8 of the Covenant and with the International Labour Organization (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)" (**Document No. 309**, para. 45).

378. In other instances, the Committee urged the State party concerned to revise its Criminal Code to bring it in conformity with article 8 of the Covenant and the provisions of ILO Convention No. 87 so as "to prevent the criminal prosecution of workers who have participated in strikes" (**Document No. 311**, para. 29). It should also be noted that in its General comment No. 23 of 2016 on the right to just and favourable conditions of work, the Committee stated that "trade union rights, freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work" (**Document No. 308**, para. 1).

379. In addition, article 22 of the International Covenant on Civil and Political Rights, 1966 (**Document No. 285**) provides:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

380. The Human Rights Committee, which is mandated to supervise compliance with the latter Covenant by the 173 States Parties, has on numerous occasions addressed the right to strike in its concluding observations. In one such instance, the Committee expressed concern about a Labour Code that was "too restrictive in providing, inter alia, for the prohibition of strikes in services that cannot be considered as essential and requiring a two-thirds majority to call a strike, which may amount to a violation of article 22" (**Document No. 302**, para. 18).

381. In other instances, the Committee called on one State party to "ensure in its legislation that only the most limited number of public servants is denied the right to strike" (**Document No. 303**, para. 15), on another to "adopt measures to safeguard workers' freedom of association in practice, including [...] the right to strike" (**Document No. 304**, para. 32), and on a third to "refrain from imposing any undue limitations on the right to strike" that "may adversely affect the meaningful exercise of the right to strike in practice" (**Document No. 305**, paras 31–32).

382. Moreover, special reference should be made to the joint statement of the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, issued in 2019 on the occasion of the ILO's centenary. Referring to "basic principles of freedom of association common to both Covenants, in particular in relation to trade union rights, as also protected under the Universal Declaration of Human Rights and the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)", the two Committees recalled that "the right

to strike is the corollary to the effective exercise of the freedom to form and join trade unions" and that "[b]oth 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" (**Document No. 314**).

383. Also of note are the relevant reports and recommendations made in the context of the special procedures of the UN Human Rights Council. For instance, the Special Rapporteur on Extreme Poverty and Human Rights has considered that the human rights system could do more to explore synergies that enrich human rights law and make it more operational for governments by referring to international labour standards and their interpretation by the ILO Committee on Freedom of Association and the Committee of Experts. In his view, article 8 of the International Covenant on Economic, Social and Cultural Rights and article 22 of the International Covenant on Civil and Political Rights should be read in accordance with ILO Conventions Nos 87 and 98 (**Annex No. 35**).

384. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted that "[t]he right to strike has been established in international law for decades, in global and regional instruments, and is also enshrined in the constitutions of at least 90 countries" and concluded that "[t]he right to strike has, in fact, become customary international law" (**Document No. 315**, para. 56). Further, the Special Rapporteur recommended that:

> [B]usinesses (including employers, lead firms, subsidiaries, suppliers, franchisees or investors in supply chains):
>
> (i) Meet their obligations to respect the rights to freedom of peaceful assembly and of association. That includes respecting the rights of all workers to form and join trade unions and labour associations and to engage in collective bargaining and other collective action, including the right to strike (**Document No. 315**, para. 99).

385. Each of the two Covenants contains a saving clause to the effect that no provision may be deemed to authorize States parties to Convention No. 87 to adopt or apply laws which might contravene the requirements of the Convention. When the clause was first introduced in the International Covenant on Civil and Political Rights, it was stressed that failure to make the suggested reference to Convention No. 87 "could be interpreted as an indication that the United Nations overlooked or underestimated the progress achieved in safeguarding trade union rights in international law" (**Annex No. 36**). When the same clause was inserted in the International Covenant on Economic, Social and Cultural Rights, it was emphasized that the provision "would avoid any subsequent conflict between the ILO Convention and the draft Covenant" (**Annex No. 37**).

2. Regional instruments

386. At the European regional level, article 6 of the European Social Charter (1961, revised 1996) (**Document No. 287**) provides that "[w]ith a view to ensuring the effective exercise of the right to bargain collectively, the Parties [...] recognise 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". Moreover, under article G, the right "shall not be subject to any restrictions or limitations not specified [...] except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals".

387. The monitoring body of the Charter, the European Committee of Social Rights, has commented extensively on the permissible limitations to the right to strike in sectors that are essential to the community and where strikes could pose a threat to public interest, national security

and/or public health, as well as on restrictions on the right to strike of certain categories of public servants, for example those whose duties and functions, given their nature or level of responsibility, are directly affecting the rights of others, national security or public interest (**Annex No. 38**, p. 92). The Committee has also indicated that the use of compulsory arbitration to terminate a strike is contrary to the Charter except in the cases established by article G.

388. Article 11 of the European Convention on Human Rights sets out the right of everyone to "freedom of peaceful assembly and to freedom of association with others" and specifies that:

> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State (**Document No. 286**).

389. The European Court of Human Rights has made important pronouncements concerning the right to strike within the meaning of article 11 of the European Convention. In *Enerji Yapi-Yol Sen v. Turkey*, for instance, the Court considered that "[s]trike action, which enables a trade union to make its voice heard, is an important aspect for the members of a trade union in the protection of their interests" and noted that "the right to strike is recognized by the supervisory bodies of the International Labour Organization […] as an intrinsic corollary of the right to organize protected by ILO Convention C87" (unofficial translation) (**Document No. 318**, para. 24).

390. In *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, the Court concluded that "secondary action is recognised and protected as part of trade-union freedom under ILO Convention No. 87 and the European Social Charter". The Court was also called on to consider objections raised by the Government on the authority to be attributed to the interpretative pronouncements of the Committee of Experts when supervising compliance with Convention No. 87 and, while noting the "soft law" nature of those interpretations as well as the ongoing disagreement within the ILO precisely regarding the legal status or even existence of a right to strike, decided that there was no reason "to reconsider this body's [Committee of Experts'] role as a point of reference and guidance for the interpretation of certain provisions of the Convention" (**Document No. 319**, paras 27–33, 76, 96–97).

391. In *Ognevenko v. Russia*, the Court reviewed the ILO principles concerning the right to strike, as reflected in the Digest of decisions of the Committee on Freedom of Association and relevant comments of the Committee of Experts, before recalling some of the Court's own general principles, namely that "strike action is protected by Article 11" but that "[t]he right to strike is not absolute and may be subject under national law to regulation of a kind that limits or conditions its exercise in certain instances" (**Document No. 320**, paras 20–23, 57–58).

392. In *Humpert and Others v. Germany*, the Court noted that Convention No. 87 "does not expressly provide for a right to strike but has been interpreted by the ILO's two main supervisory bodies – the Committee of Experts on the Application of Conventions and Recommendations […] and the Committee on Freedom of Association […] – as providing for such right, mainly derived from its Articles 3 and 10". It went on to state that:

> The Court, in defining the meaning of terms and notions in the text of the Convention [European Convention on Human Rights], can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. Any consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases […].

> At the same time, the Court's jurisdiction is limited to the Convention. It has no competence to assess a respondent State's compliance with the relevant standards of the ILO.

In its reasoning, the Court did not call into question the analysis carried out by the competent bodies in their assessment of the respondent State's compliance with the international instruments that they had been set up to monitor, but reiterated that "its task is to determine whether the relevant domestic law in its application to the applicants was proportionate as required by Article 11 § 2 of the Convention [...], its jurisdiction being limited to the Convention". Ultimately, the Court considered that a prohibition on strikes by civil servants did not violate their freedom of assembly and association when there are institutional safeguards that allow for the effective defence of occupational interests (**Annex No. 39**, paras 55–56, 101, 125–126, 146).

393. Moreover, article 28 of the Charter of Fundamental Rights of the European Union (**Document No. 288**) provides: "Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

394. The right to strike is explicitly referred to in secondary law, for instance Council Regulation (EC) No. 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States, article 2 of which provides: "This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike" (**Annex No. 40**).

395. As regards relevant jurisprudence, in *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*, the Court of Justice of the European Union recalled that "the right to take collective action, including the right to strike, is recognised both by various international instruments [...] such as the European Social Charter [...] and Convention No. 87" and added that "[a]lthough the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law [...], the exercise of that right may none the less be subject to certain restrictions" (**Document No. 321**).

396. In another relevant judicial decision, in *Roberto Aquino and Others v. European Parliament* of 2020, the General Court annulled a decision insofar as it infringed the fundamental right to strike, and considered that:

> [T]o be regarded as complying with EU law, a limitation on a right protected by the Charter must, in any event, satisfy three conditions [...].
>
> First, the limitation must be "provided for by law". [...]
>
> Secondly, the limitation must refer to an objective of general interest [...].
>
> Thirdly, the imitation may not be excessive (**Annex No. 41**, paras 59–62, 81).

397. In relation to the Americas, article 45(c) of the Charter of the Organization of American States, as amended in 1967 (**Annex No. 42**), reads as follows:

> Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws.

398. In addition, article 8 of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") (**Document No. 290**) provides that:

> 1. The States Parties shall ensure:
>
> (a) The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. [...]
>
> (b) The right to strike. [...]

399. Moreover, article 27 of the 1948 Inter-American Charter of Social Guarantees (**Annex No. 43**) provides that "[w]orkers have the right to strike. The law shall regulate the conditions and exercise of that right."

400. Drawing upon the above-referenced instruments, the Inter-American Court of Human Rights has held that the right to strike is "one of the fundamental human rights of workers" and "a general principle of international law". Making detailed references to the work of the ILO supervisory bodies on this matter, it noted:

> The Court cautions that, although the right to strike is not expressly recognized in the ILO conventions, nonetheless, Article 3 of Convention 87 does recognize the right of worker organizations "in full freedom, to organise their administration and activities and to formulate their programmes" [...]. The Committee on Freedom of Association has accordingly recognized the importance of the right to strike as "an intrinsic corollary to the right to organize protected by Convention No. 87". In both cases, the strike is a legitimate means for defending economic, social and occupational interests. It is a resource that workers use to apply pressure on their employers for correcting an injustice or for seeking solutions to economic and social policy questions and problems [...].
>
> The Court [...] deems the right to strike to be one of the fundamental rights of workers and their organizations, as it is a legitimate means to defend their economic, social and occupational interests (**Document No. 323**, paras 95–98).

401. In relation to Africa, paragraph 59(b) of the African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights of 2011 (**Document No. 292**) provides that the right to work under article 15 of the Charter includes the obligation for the State to:

> Ensure the right to freedom of association, including the rights to collective bargaining, to strike and other related organisational and trade union rights. These rights include the right to form and join a trade union of choice (including the right not to), the right of trade unions to join national and international federations and confederations, and the right of trade unions to function freely without undue interference.

402. In addition, article 4 of the 2003 Charter of Fundamental Social Rights in the Southern African Development Community (**Document No. 294**) provides:

> Member States shall create an enabling environment consistent with ILO Conventions on freedom of association, the right to organise and collective bargaining so that: [...]
>
> (e) the right to resort to collective action in the event of a dispute remaining unresolved shall:
>
> (i) for workers, include the right to strike and to traditional collective bargaining;
>
> (ii) for employers, include traditional collective bargaining and remedies consistent with ILO instruments and other international laws.

403. This provision is practically reproduced in article 6 of the 2014 Southern African Development Community Protocol on Employment and Labour (**Document No. 299**), which reads:

> State Parties shall, consistent with ILO Conventions on Freedom of Association, the Right to Organize and Collective Bargaining, ensure in particular that: [...]
>
> (e) the right to take collective action in the event of a dispute remaining unresolved includes:
>
> (i) for workers, the right to collective bargaining and resort to lawful strike action; and
>
> (ii) for employers, the right to collective bargaining and remedies consistent with national laws.

404. Lastly, with reference to the Arab region, article 35(3) of the Arab Charter on Human Rights, 2004, (**Document No. 293**) provides that "[e]very State party to the present Charter guarantees the right to strike within the limits laid down by the laws in force". Furthermore, three conventions adopted by the Arab Labour Organization make explicit reference to the right to strike: both article 93 of Arab Convention No. 6 of 1976 on labour standards and article 12 of Arab Convention No. 8 of 1977 on trade union rights and freedoms provide that "[w]orkers shall have the right to strike in defence of their economic and social interests after the exhaustion of legal means of negotiation to achieve those interests", while article 11 of Arab Convention No. 11 of 1979 on collective bargaining provides that "[t]he national legislation shall determine the timeframe for entry into force and the conclusion of negotiations and shall further regulate the right to strike and the right to lock out during the course of negotiations" (**Annex No. 44**).[171]

B. Bilateral free trade/labour agreements

405. Since the beginning of the 1990s, the need to create a minimum social foundation for the development of trade resulted in the signing of free trade agreements that include labour clauses, either in the main body of the agreement or in a separate text annexed to it.

406. Some trade/labour agreements contain explicit references to the right to strike. The first such document was the North American Agreement on Labor Cooperation (1993) (**Annex No. 45**), which was annexed to the North American Free Trade Agreement. Article 49 of the former provides that "'labor law' means laws and regulations, or provisions thereof, that are directly related to: [...] the right to strike". Under the guiding principles in Annex 1, the right to strike is described as "[t]he protection of the right of workers to strike in order to defend their collective interests". To date, three petitions have been filed against one of the signatories for alleged failure to protect the right to strike under the Agreement.

407. Moreover, article 23.3 of the United States–Mexico–Canada Agreement (2018) (**Document No. 300**) reads as follows:

> 1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Rights at Work:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
>
> (b) the elimination of all forms of forced or compulsory labor;

[171] To date, Arab Conventions Nos 6, 8 and 11 have received a total of 14 ratifications from among the 21 Member States of the Arab Labour Organization.

> (c) the effective abolition of child labor and, for the purposes of this Agreement, a prohibition on the worst forms of child labor; and
>
> (d) the elimination of discrimination in respect of employment and occupation.
>
> 2. Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

The term "freedom of association" is accompanied by a footnote that reads: "For greater certainty, the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike."

408. Furthermore, several bilateral labour cooperation agreements concluded by Canada explicitly refer to the right to strike (**Documents Nos 295–298**). For instance, article 1 of the Canada–Colombia Agreement on Labour Cooperation (2008) provides that:

> Each Party shall ensure that its statutes and regulations, and practices thereunder, embody and provide protection for the following internationally recognized labour principles and rights:
>
> a. freedom of association and the right to collective bargaining (including protection of the right to organize and the right to strike) **(Document No. 296)**.

C. Decisions of national courts

409. In applying or interpreting domestic laws on industrial action, national courts refer at times to Convention No. 87 and the views expressed by the ILO supervisory bodies. For example, one Supreme Court, drawing upon article 8 of the International Covenant on Economic, Social and Cultural Rights, article 45 of the Charter of the Organization of American States and Convention No. 87 - all three of which had been ratified by the country concerned - recognized that the right to strike was protected under the country's Charter of Rights and Freedoms. Among other things, the Court considered the country's international obligations and the relevant principles of international law in its decision. It held that the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents ratified by the country. In this context, the Court added:

> Although Convention No. 87 does not explicitly refer to the right to strike, the ILO supervisory bodies, including the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have recognized the right to strike as an indissociable corollary of the right of trade union association that is protected in that convention [...].

> Though not strictly binding, the decisions of the Committee on Freedom of Association have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world, including our Court (**Document No. 342**).[172]

410. In another case, a High Court noted that "opinions of the ILO Committee of Experts constitute one of the sources of international labour law" and also that the Committee had addressed an observation to the Government in which it had expressed the view that new categories added to the list of essential services did not constitute essential services in the strict sense of the term, and went on to invalidate the relevant statutory instrument as it violated the country's international law obligations (**Document No. 333**). Likewise, an industrial court relied on the observations of the Committee of Experts regarding essential services to conclude that air transport employees, with the exception of those providing air traffic control services, had the right to embark on strike action under the Trade Unions Act (**Document No. 340**).

411. In a further example, a labour court drew upon the fact that the ILO Committee of Experts and the Committee on Freedom of Association accept as a starting point that the right to strike is not absolute and that it may be restricted or, in exceptional circumstances, even prohibited, in order to conclude that a specific restriction of the right to strike contained in the Labour Relations Act of the country concerned was not unconstitutional (**Document No. 341**).

* * *

412. In conclusion, the Office respectfully submits that there is an abundance of treaty texts in the legal framework of international human rights at both the global and regional levels that recognize the right to strike as a key workers' right. This recognition has been echoed in a multitude of comments and observations of expert bodies and also upheld by human rights courts. Consideration is also given to ILO Convention No. 87 and the comments of the ILO supervisory organs, such as the Committee of Experts and the Committee on Freedom of Association. Nonetheless, it is also clear from those texts and related practice that the right to strike is not unlimited.

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[172] The case concerned the constitutionality of provincial legislation that limited the ability of public sector employees who performed essential services to strike. The Court found that the law in question interfered with a meaningful process of collective bargaining and therefore violated the country's Charter of Rights and Freedoms, which provides that everyone enjoys *inter alia* the fundamental freedom of association. The Court's basic premise was that the right to strike was not merely derivative of collective bargaining but an indispensable component of that right and that it was precisely because of its crucial role in collective bargaining that the right to strike was constitutionally protected by the Charter. Having reviewed what it called the historical, international and jurisprudential landscape, the Court concluded that this analysis compellingly suggested that a meaningful process of collective bargaining required the ability of employees to participate in the collective work stoppage, and that this was the "irreducible minimum" of the freedom to associate within the national system of labour relations. The law in question was found to be unconstitutional because it limited strike action in a way that substantially interfered with a meaningful process of collective bargaining without replacing it by one of the meaningful dispute resolution mechanisms commonly used in labour relations.
In their dissenting opinion, two Supreme Court judges pointed out that international bodies disagreed as to whether the right to strike was protected under international labour and human rights instruments and that the current state of international law on the right to strike was unclear. They also took the view that the threat of work stoppage is not what motivates good faith bargaining, and therefore, it was incorrect to say that without the right to strike a constitutionalized right to bargain collectively was meaningless.

▸ Conclusions

413. To conclude this Written Statement, the Office wishes to submit the following final observations.

414. There is long-standing disagreement among ILO constituents concerning the exact scope and meaning of certain provisions of Convention No. 87, namely whether the right to strike falls within the protective scope of the Convention.

- The dispute crystallizes years of institutional debate and deep differences of opinion surrounding issues such as the legal effect of the negotiating history of Convention No. 87 and the dynamic interpretation of standards by the ILO supervisory organs.
- Part of the ILO's tripartite constituency has challenged the consistent view taken, principally by the Committee of independent experts responsible for the regular supervision of ratified Conventions, that, notwithstanding the absence of any express provision to this effect in Convention No. 87, the only meaningful understanding of the right of trade unions to organize freely their activities for the purposes of defending the interests of their members is that it includes the right to strike.
- The dispute does not relate to the existence of an internationally recognized right to strike, but to the interpretation of the relevant provisions of Convention No. 87, in particular Articles 3 and 10.

415. In the Office's considered view, the Court's rendering of an opinion on this matter cannot be challenged on the grounds of either competence or propriety, as the question contains nothing that could jeopardize the Court's judicial integrity or judicial function.

- The competence of the requesting organ and the formal validity of the resolution requesting the advisory opinion are undisputed. The referral emanated from the Governing Body of the ILO pursuant to a standing authorization granted by the International Labour Conference in 1949. The decision to refer the matter to the Court was taken by a vote at the end of a process that was managed with procedural rigour, having due regard to the importance and urgency of the constitutional procedure.
- No other procedure for resolving authoritatively the question contained in the request is available, since article 37(1) of the ILO Constitution recognizes that only the International Court of Justice has the authority to make final determinations on disputes relating to the interpretation of international labour Conventions.
- As the question relates to the interpretation of specific provisions of an ILO Convention, it is singularly legal in nature and arises within the scope of a central function of the Organization: the work of its supervisory organs. Additionally, as the circumstances leading up to the request clearly indicate, the question is motivated by a desire – indeed, a pressing need – for legal clarity and legal security, not political expediency.
- There are no disputed facts to be established; indeed, the facts upon which the opinion of the Court is requested have not been contested and may be ascertained from the documentation that has been made available to the Court. In any event, interested parties (beyond the States parties to Convention No. 87) have been authorized to participate fully in the proceedings and are thus able to produce any additional information they may consider appropriate and necessary.
- The question put to the Court does not suffer any imprecision, nor is it couched in abstract terms.

416. **Convention No. 87 sits prominently within the ILO's normative architecture, which includes specific techniques and processes – some codified in statutory rules and others developed by long-standing practice – for setting, supervising and interpreting standards. At the core of that architecture lies a systemic approach that aims at ensuring, at all levels, uniformity, predictability and tripartite representation.**

- The negotiating history of Convention No. 87 shows that it was devised as a programmatic instrument to set out general principles and that, in this context, the right to strike was not reflected in the instrument nor was it discussed in any detail during the Conference proceedings.
- Drawing upon relevant provisions of Convention No. 87, the Committee of Experts has commented on national laws regulating the right to strike and has developed extensive guidance concerning the conditions of and limitations on the exercise of that right. The legal value of the guidance of the Committee of Experts on the right to strike is not directly linked to the question put to the Court, but the Court's authoritative determination will necessarily have an impact on the role and functions of the ILO supervisory bodies concerning the interpretation of Convention No. 87.
- There is ample evidence that the right to strike is an internationally recognized workers' right, or, as some would suggest, that it has acquired the status of customary international law. Yet, that is not necessarily a determining factor in answering the question at hand, which essentially pertains to the legal basis for the supervision of the application of Convention No. 87 based on the premise that it includes the right to strike.

417. **The advisory opinion to be issued by the Court will be vested with the authority and stature of the full Bench, and will have the binding effect that stems from article 37(1) of the ILO Constitution.**

- The authoritative opinion of the Court will constitute for all intents and purposes the final settlement of the interpretation dispute that led to the referral decision.
- In addressing the question in its globality, the Court's opinion will enable the ILO's constituents to make progress on the Organization's mandate of promoting and protecting fundamental workers' rights with all the necessary legal certainty and institutional serenity.

* * *

418. The Office has striven to furnish all the elements in its possession that could be of assistance to the Court, from the history and the context of the dispute to the system of standards and the adoption of Convention No. 87, through to the work of the supervisory bodies and the specificities of the interpretation of standards. The Office's only guide has been, to cite once again Georges Scelle, "le souci du bien public, la possession de la vérité technique, la discipline de l'objectivité".[173]

419. The Office must scrupulously avoid expressing any views on the substance of the dispute, but it cannot refrain from drawing attention to the risks that a prolonged – or worse, perpetually unresolved – controversy around workers' right to strike would represent for the Organization. Since 1919, the ILO has stood as the authoritative voice on social justice at the global level. Its incapacity to resolve an interpretation dispute concerning one of its landmark achievements – the Convention on freedom of association – can only erode the credibility and relevance of that voice. That is why the Organization is now turning to the Court for assistance.

173 G Scelle, *L'Organisation internationale du travail et le BIT*, 1930, p. 37.

420. In November 2023, a resolute decision was taken in order to resolve the dispute. The outcome of that decision, and hence of the current proceedings, will be that the ILO will once again be able to speak authoritatively and persuasively on the matter of the right to strike. The dispute has habitually been referred to as major institutional crisis. After years of robust discussions, the ILO is confident that the proverbial light at the end of the tunnel will soon be in sight, which will mean that the procedure for referral to the Court under article 37(1) of the Constitution will have been put to good use, resulting in a final determination on the legal question, clarification of the key provisions of Convention No. 87, and the enlightenment and appeasement of the ILO's tripartite constituents.

* * *

421. Standing before the PCIJ almost one hundred years ago in June 1926, the first Director of the ILO, Albert Thomas, ended his oral statement with these words:

> Monsieur le Président, Messieurs, il est un vieux mythe grec que mon esprit se plaît souvent à évoquer, dans notre effort quotidien d'organisation internationale. À la porte du ciel, les Grecs avaient placé trois déesses sœurs: Dikè, Eiréné, Eunomia. Ne se retrouvent-elles pas au seuil du temps nouveau que nous devons préparer? C'est nous qui sommes les serviteurs fidèles de Dikè, de la justice sociale; la Société des Nations se consacre au culte d'Eiréné; mais ces deux cultes seraient peut-être inefficaces et les deux déesses seraient hésitantes et incertaines, si elles étaient séparées de celle que vous servez si pieusement, Eunomia, déesse de l'ordre et de l'harmonie par la loi.
>
> C'est à ses décrets, rendus par vous, que nous nous soumettrons respectueusement (PCIJ, Series C, Documents relating to Advisory Opinion No. 13, p. 79).

422. Beyond the magnificent metaphor, these are not hollow words; they reflect a profound attachment to the ILO's constitutional values and the rule of law, and thus the spirit in which our illustrious predecessors acted. The Office has no better words with which to conclude this submission. The World Court is as symbolic today as ever before of harmony and order through law. Eunomia remains the ultimate objective of our process.

Geneva, 14 May 2024

For the Director-General:

George Politakis
Legal Adviser
Director, Office of Legal Services

List of Annexes

The annexes to the ILO's Written Statement are set out below, in the order in which they are referred to in the text.

Annex No. 1 Letter of the ILO Director-General to all members of the Governing Body, dated 23 November 2023

Annex No. 2 Letter of the ILO Director-General to all Member States, dated 17 July 2023

Annex No. 3 Note for the consultation of the Officers of the Governing Body, dated 17 July 2023

Annex No. 4 Letter of the ILO Director-General to the Employer Vice-Chairperson of the Governing Body, dated 3 August 2023

Annex No. 5 Letter of the ILO Director-General to all Member States, dated 4 August 2023

Annex No. 6 Letter of the Worker Vice-Chairperson of the Governing Body to the Chairperson of the Governing Body, dated 9 August 2023

Annex No. 7 Letter of the ILO Director-General to all Member States, dated 10 August 2023

Annex No. 8 Letters of six national Employers' associations alleging lack of compliance with ratified Convention No 144

Annex No. 9 International Organisation of Employers (IOE), Note on procedural matters regarding the inclusion of an urgent item in the agenda of the Governing Body, dated 20 August 2023

Annex No. 10 Reply of the International Labour Office to the IOE Note, dated 29 August 2023

Annex No. 11 Letter of the ILO Director-General to all Member States, dated 31 August 2023

Annex No. 12 Letter of the ILO Director-General to all Member States, dated 12 September 2023

Annex No. 13 Letter of the ILO Director-General to all Member States, dated 15 September 2023

Annex No. 14 Letters of the ILO Director-General to all Member States, dated 26 and 29 September 2023

Annex No. 15 Letters of the ILO Director-General to all Member States, dated 11 October and 2 November 2023

Annex No. 16 Letter of the ILO Director-General to all Member States, dated 13 November 2023

Annex No. 17 Letter of the ILO Director-General to the President of the International Court of Justice, dated 13 November 2023

Annex No. 18 List of votes by show of hands taken by the Governing Body from March 2021 to March 2024

Annex No. 19 PCIJ, Series D, Acts and Documents concerning the Organisation of the Court, 1922/1936/1940

Annex No. 20 Letter of ILO Director to the Secretary-General of the League of Nations concerning the question of the revision of the Statute of the Permanent Court of International Justice

Annex No. 21 Minutes of the Conference regarding the Revision of the Statute of the Permanent Court of International Justice, September 1929

Annex No. 22 ILC, 73rd Session, 1987, Record of Proceedings, Provisional Record No. 24, paras 26–27

Annex No. 23 ILC, 76th Session, 1989, Record of Proceedings, Provisional Record No. 26, para. 21

Annex No. 24 Report of the Director-General, Office interpretations of international labour Conventions, GB.221/19/1, November 1982

Annex No. 25 Letters of the Assistant Director-General dated 6 May and 24 December 1958; of the Director of the International Labour Standards Division dated 9 October 1961; and of the Legal Adviser dated 28 October 1966

Annex No. 26 Minutes of the 122nd Session of the Governing Body (May-June 1953)

Annex No. 27 Office informal opinions concerning the Maritime Labour Convention, 2006 (MLC, 2006), dated 7 May 2010 and 22 July 2021

Annex No. 28 Letter of the ILO Legal Adviser dated 29 February 2016 to the Codification Division of the UN Office of Legal Affairs

Annex No. 29 Office informal opinions concerning Convention No. 89, dated 11 August 1955; Convention No. 143, dated 2 July 2010; Convention No. 183, dated 9 February 2001; MLC, 2006, dated 13 June 2022; Convention No. 188, dated 6 July 2017

Annex No. 30 Manual for drafting ILO instruments, 2006 (excerpts)

Annex No. 31 Office informal opinion concerning the Work in Fishing Convention, 2007 (No. 188), dated 8 December 2009

Annex No. 32 ILC, 100th Session, 2011, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 783–788

Annex No. 33 Strategic plan for engagement with United Nations system bodies and relevant regional organizations regarding the Indigenous and Tribal Peoples Convention, 1989 (No. 169), GB.335/POL/2, March 2019

Annex No. 34 ILC, 10th Session, 1927, Freedom of Association, Report and Draft Questionnaire

Annex No. 35 ILC, 112th Session, 2024, Report III (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 58–59

Annex No. 36 Draft International Covenants on Human Rights, Annotation prepared by the Secretary-General, A/2929, 1 July 1955

Annex No. 37 Draft International Covenants on Human Rights, Report of the Third Committee, A/3525, 9 February 1957

Annex No. 38 Digest of the Case Law of the European Committee of Social Rights

Annex No. 39 European Court of Human Rights, *Case of Humpert and Others v. Germany*, Judgment of 14 December 2023

Annex No. 40 Council Regulation (EC) No 2679/98 of 7 December 1998

Annex No. 41 Court of Justice of the European Union, *Roberto Aquino and Others v. European Parliament* (Case T-402/18), Judgment of 29 January 2020

Annex No. 42 Charter of the Organization of American States

Annex No. 43 Inter-American Charter of Social Guarantees

Annex No. 44 Arab Conventions No. 6 of 1976 on labour standards, No. 8 of 1977 on trade union rights and freedoms and No. 11 of 1979 on collective bargaining (excerpts)

Annex No. 45 North American Agreement on Labor Cooperation, 1993 (excerpts)

Photos on the right: 31st Session (1948) of the International Labour Conference held at San Francisco (from top)

1. ILO Director-General Edward Phelan addressing the Committee on Freedom of Association, 6 July 1948
2. The High School of Commerce, main venue of the Conference
3. Wilfred Jenks and staff
4. Fourth plenary sitting, Auditorium, High School of Commerce, 24 June 1948

INTERNATIONAL LABOUR CONFERENCE
CONFÉRENCE INTERNATIONALE du TRAVAIL
CONFERENCIA INTERNACIONAL del TRABAJO
DELEGATES' ENTRANCE