International Court of Justice

Request for Advisory Opinion by the International Labour Organisation

Right to Strike under ILO Convention No. 87

Written Statement of the International Organisation of Employers

16 May 2024

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I. EXECUTIVE SUMMARY

1. This Honourable Court has been requested to deliver an Advisory Opinion on the 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)?"*.

2. In the interests of clarity, the International Organisation of Employers ('IOE') wishes to identify at the outset: (1) those aspects of this question which are not contentious, (2) those elements which remain in dispute and (3) the somewhat vague premise of the question.

3. First, the existence and recognition of a right to strike *per se* is not contentious. The Employers in the International Labour Organisation ('ILO') have explicitly expressed their recognition of the right to take industrial action by workers and employers in support of their legitimate industrial interests.[1] Furthermore, the IOE does not challenge that a right to strike is recognised in the law and practice of many countries, albeit with very different scope, conditions and limits. Finally, the IOE does not dispute that certain international and regional instruments, explicitly or implicitly (as determined by competent regional and international bodies/courts), recognise a right to strike.

4. Second, the issues which remain in dispute are: (1) whether the right to strike is included in C87; (2) and consequently, whether the State parties to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. C87) are bound to respect such a right to strike; and (3) whether the ILO standards supervisory bodies are competent to supervise implementation of the right to strike for State parties to C87.

5. Third, the question posed by the ILO to this Honourable Court is somewhat vague as to whether *"the right to strike … under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)"* means:

    (a) a right to strike in abstract; or

[1] ILO, 'Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in Relation to the Right to Strike and the Modalities and Practices of Strike Action at National Level', March 2015 **[ILO Dossier Document No. 106]**.

(b) a right to strike as defined by the Committee of Experts on the Application of Convention and Recommendations ('CEACR') in terms of its scope, limits and conditions.

6. The IOE respectfully submits that regardless of which of these two potential meanings for the "right to strike" is considered, the answer to the question posed to the court is "no". That is, proper application of the rules of interpretation in the Vienna Convention on the Law of Treaties, 1969 ('VCLT') to C87 reveals that "the right to strike of workers and their organizations" is not protected by C87. Consequently, there are no obligations for State parties to C87 with respect to a right to strike in C87, and no competence for the ILO standards supervisory bodies to supervise a right to strike under C87.

7. With respect to possibility (a) above, that is, whether there is a right to strike in abstract contained in C87, the Employers respectfully submit that such a proposition is absurd. As is well known, C87 itself does not set any limits on a right to strike. However, the right to strike, by definition, cannot be absolute. Interpreting C87 as protecting a right to strike would be tantamount to establishing a licence to interfere with and violate the rights of others at will. Indeed, all existing regional and international instruments referring to a right to strike simultaneously define limits on its exercise or at least stipulate an alternative source for the regulation of its limits.

8. When considering possibility (b) above, that is a right to strike in C87 as defined by the CEACR in terms of scope, limits and conditions, it is necessary to note that the CEACR, in the absence of provisions in ILO Conventions addressing the right to strike, has taken its own initiative and unilaterally developed, purportedly by means of "interpretation"[2] of C87, detailed and wide-ranging rules on the scope, limits and conditions of the right to strike (CEACR in its General Survey 1994, para. 145: *"In the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject"*). These comments and observations on the right to strike, a major and contentious topic in industrial relations, are presented by the CEACR as a comprehensive, complete and self-

[2] The Employers disagree with the interpretative activity of the CEACR, which has resulted in reading a right to strike (not present there) into C87 and developing a detailed regulation for it. They therefore consider that terms such as 'views', 'comments' or 'observations' (instead of 'interpretations') better reflect the **subjective nature** of the CEACR's activity in relation to C87.

contained set of rules which must be complied with in full by C87 State parties. In terms of quantity, these rules could readily constitute their own extensive ILO Convention.[3]

9. The IOE considers that (i) the CEACR's extensive and detailed views on the scope and limits of the right to strike go far beyond proper application of the interpretative rules set out in the VCLT to C87; and that (ii) the CEACR's competence as a standards supervisory body does not extend to the authority to issue lawful determinations on the proper interpretation of C87. Such a prospect would be particularly objectionable in circumstances where the determinations issued by the CEACR amounted to a codification of a very sensitive and contentious area of labour law outside the ILO's constitutional tripartite procedure for standard setting.

10. When applying the VCLT to C87, one must first take into account Article 5 of the VCLT which makes clear that the VCLT is to apply to C87 (which is a *"*treaty adopted within an international organisation) *"without prejudice to any relevant rules of the organisation".* Article 5 therefore creates a *lex specialis* for the ILO's constituent instruments, conventions, decisions, resolutions and established practices. Three particularly important aspects of the ILO stand out in this context, namely, the ILO's *sui generis* structure requiring tripartite interaction and cooperation; the special importance attached to the preparatory work ("travaux préparatoires") for the interpretation of ILO standards; and the ILO's established practice of adhering to its constitutionally enshrined procedure for standard setting. These are important touchstones of analysis which must shape the correct approach to the Court's interpretative task.

11. Moving then to the VCLT's core rules of interpretation, Article 31(1) requires that interpretations have to made *"in accordance with the ordinary meaning to be given to the terms of the treaty in their context ..."* However, there is no mention of the terms 'strike' or 'right to strike' in C87 while other international and regional instruments do use the term 'strike'. Moreover, the text of C87 makes no reference to the scope or limits of the right to strike, nor to which organ or body might be competent for determining them. It

[3] *See* Annex A - CEACR Guidance on the Right to Strike in ILO Convention 87. There are around 60 CEACR rules and sub-rules on the right to strike covering definition of various forms of admissible strike; detailed rules regarding permitted restrictions, such as for essential services, public servants or crisis situations; prerequisites for strikes, such as advance notice and quorum and majority required for calling a strike; rules on picketing, occupation of the workplace and requisitioning of strikers; and admissibility of compulsory arbitration and sanctions.

is therefore not possible to interpret the ordinary meaning of the terms used in C87 in their context as encompassing a right to strike.

12. Article 31(1) of the VCLT also requires that the treaty has to be interpreted *"in the light of its object and purpose".* The Preamble of C87 confirms that the object and purpose of the adoption of C87 was to codify the freedom of association in the wider context of promotion of better working conditions and peace. The object and purpose of C87 give no indication that it was intended to protect the right to strike.

13. Applying Article 31(2) of the VCLT, there is also no evidence whatsoever of an agreement on the right to strike *"which was made between all the parties in connection with the conclusion"* of C87, or an instrument on the right to strike *"which was made by one or more parties in connection with the conclusion"* of C87 *"and accepted by the other parties as an instrument related to"* C87.

14. Further, there is no evidence of any *"subsequent agreement between the parties regarding the interpretation of [C87] or the application of its provisions"* pursuant to Article 31(3)(a) of the VCLT. On the contrary, various State parties to C87 at different occasions over the past decades have acknowledged that C87 does not expressly or impliedly include the right to strike. In particular, the 23 February 2015 ILO Governing Body ('GB') Government Group[4] Statement noted that the right to strike is "*not absolute*" and that "*it is regulated at the national level*". The Statement expressed a "*readiness to consider discussing*" modalities for its exercise in (as yet unspecified and unquantified) "*forms and framework that would be considered suitable*". The Government Group Statement does not amount to a 'subsequent agreement' on the right to strike in C87 but rather reflects a common understanding that the right to strike is not yet regulated, either in C87 or in other ILO Conventions.

15. In addition, there has been no *"subsequent practice in the application of [C87] which establishes the agreement of the parties regarding its interpretation"* pursuant to Article

[4] Regular members: Algeria, Germany, Angola, Argentina, Brazil, Bulgaria, Cambodia, China, Republic of Korea, United Arab Emirates, United States, France, Ghana, India, Islamic Republic of Iran, Italy, Japan, Kenya, Mexico, Panama, Romania, United Kingdom, Russian Federation, Sudan, Trinidad and Tobago, Turkey, Venezuela (Bolivarian Rep. of), Zimbabwe. Deputy members: Albania, Australia, Bahrain, Bangladesh, Belgium, Botswana, Brunei Darussalam, Burkina Faso, Canada, Colombia, Cuba, Dominican Republic, Spain, Ethiopia, Indonesia, Jordan, Lesotho, Lithuania, Mali, Mauritania, Norway, Pakistan, Netherlands, Poland, United Republic of Tanzania, Chad, Thailand, Uruguay.

31(3)(b) of the VCLT. The fact that numerous State parties to C87, according to the comments made by the CEACR over many years to this day, have not aligned their law and practice with all the CEACR's guidance on the right to strike and, in this context, have sometimes explicitly disputed that a right to strike derives from C87 is clear evidence of the absence of a State practice among C87 parties establishing their agreement with the right to strike in C87. In particular, the fact that a 'right to strike' exists at national level in many countries, albeit in very different forms, does not mean that this right is necessarily derived from C87. Further, the conclusions and recommendations of the Government Body Committee on Freedom of Association ('CFA') also do not constitute *"subsequent practice"* for the purposes of Article 31(3)(b) of the VCLT as they are not provided *"in the application of [C87]".*

16. Finally, recourse to supplementary means of interpretation, including the preparatory work to C87 pursuant to Article 32 of the VCLT, *"in order to confirm the meaning resulting from the application of* a*rticle 31"* of the VCLT shows conclusively that there was no intention to regulate the right to strike in C87 as the parties expressly intended to address it in the context of a later standard-setting process on arbitration and conciliation.[5] The preparatory work to C87 clearly reflects the 1948 decision of the International Labour Conference ('ILC'), which is the supreme legislative body of the ILO, to adopt a Convention on freedom of association without regulating a right to strike at the same time. Incidentally, the preparatory work of C87 also shows that C87 was not designed to be a detailed regulation of questions related to the freedom of association. Accordingly, the CEACR's detailed guidance on the right to strike is not compatible with the nature and intention of C87 as a "*concise statement of certain fundamental principles*".

17. Taken altogether, the result of the proper application of the VCLT's interpretative criteria leaves no doubt that C87 does not contain a right to strike, and that there are consequently no obligations in this regard for State parties to C87 that could be supervised by ILO standards supervisory bodies.

18. The IOE respectfully submits that this outcome does not represent a setback for international workers' rights nor any other kind of unfairness for workers. There is nothing

[5] *See* ILO, Minutes of the 102nd Session of the GB, June-July 1947, Appendix III **[ILO Dossier Document No. 146]**; ILC, 'Report VII - Freedom of Association and Industrial Relations', 1947 **[ILO Dossier Document No. 147]**.

preventing the ILO from recognising and regulating a right to strike through its constitutionally enshrined standard-setting procedures at any time. The ILO has all the necessary legal and institutional means at its disposal to reach a balanced and broadly accepted solution on the right to strike through standard-setting. Through its tripartite ILC, the ILO could adopt a Convention on the right to strike, including on its scope, its limits and its conditions without further delay. In fact, the Employers and other ILO constituents, on various occasions both historically and more recently, have spoken out in favour of a separate tripartite outcome or instrument (Convention or Recommendation) to deal with the right to strike.[6]

19. The ILO's standard setting procedures, which are designed to promote legal certainty, have been applied repeatedly and successfully since the ILO came into existence, on an extremely wide variety of topics in relation to which binding rules needed to be established. It is only through such a proper codification process that there is a guarantee, as envisaged by the ILO Constitution, that all ILO constituents can participate in the design of these rules. Moreover, it is only through the application of the ILO's proper standard setting procedures that any codification of the right to strike will be able to take into account the diverse industrial relations systems and other specificities of all member States.

20. The fact that the ILO, for various reasons, has not yet attempted to adopt a Convention on the right to strike, does not provide a justification for the CEACR, even if well-intentioned, to fill a perceived gap in C87 by developing a unilateral codification of rules on the scope and limits on the right to strike. To legitimise this purported progressive development of the right to strike by the CEACR would be an unacceptable impingement on State sovereignty and an attack on the principle of legal certainty.

21. The IOE trusts that the Court will recognise that there are clear rules and procedures in the ILO for the creation of binding standards which apply in the same manner to any subject matter for which binding standards are considered desirable. There cannot be exemptions from these rules and procedures for the right to strike just because this issue is considered

[6] *See* ILO, Minutes of the 253rd Session, GB. 253/PV(Rev.), 28 May 1992, p. I/16; ILO, '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', GB.349*ter*/INS/1, October 2023 **[ILO Dossier Document No. 32]**.

too contentious or cumbersome for codification in a Convention. The IOE trusts that this Honourable Court will remind the ILO that it cannot evade its responsibilities by delegating the competence for the creation of binding standards to a non-tripartite body, such as the CEACR, whose specifically mandated function does not include the development of new standards.

II. INTRODUCTION

22. Pursuant to paragraph 4 of the 16 November 2023 Order of the International Court of Justice ('Court'), the IOE hereby submits its written statement on the question presented by the ILO for an advisory opinion on the interpretation of C87 in relation to the right to strike.

23. Since 1920, IOE has been serving as the international secretariat for the Employers' group ('Employers'), one of the three constituents within the ILO. As the world's most extensive private sector network, it advocates for over 50 million companies, predominantly small and medium-sized enterprises, across 150 countries. The IOE takes a leading role in shaping the business perspective in crucial international discussions on labour and employment topics within UN forums and regional forums like G20 and G7. Notably, the IOE stands out as the sole global institution representing national employers' organisations in countries at various stages of development, including those facing significant economic challenges.

24. The IOE's position on the question *"Is the right to strike of workers and their organizations protected under C87?"*, as set out below, aims at preserving the proper process of international labour standard setting and the competence of the ILO tripartite constituents in this regard in order to ensure legal certainty, legitimacy and respect for sovereign decision making in the development of international law.

III. QUESTION FOR THE COURT

25. The Court has been requested by the ILO to respond to 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)?*

26. There are four important elements to this question which the Court may wish to consider.

27. First, the wording of the question suggests that C87 only applies to workers and their organisations. This is not the case. Unlike provisions in other international and regional instruments which focus only on the rights of workers, C87 guarantees the freedom of association and related individual and organisational rights for both workers and employers. C87 equally protects the freedom of association of workers and employers without favouring one side or another.

28. Second, the term 'right to strike' does not specify the type of strike concerned. The Court will be aware that there are very different types of strikes which exist in a plethora of national jurisdictions. For example, there are sympathy strikes,[7] political strikes,[8] wildcat strikes,[9] general strikes,[10] work stoppages,[11] go-slow strikes,[12] work-to-rule actions and sit-down strikes.[13] These varied types of strike action reflect the very diverse industrial relations systems and traditions in the 158 countries that have ratified C87. In answering the question requested, the Court will want to bear in mind that its guidance will have an impact on all of the various types of strikes and industrial relations systems around the world.

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[7] Cambridge Dictionary, 'Sympathy Strike': "*a situation where workers stop working to show their support for a group of workers who are on strike*".
[8] Oxford Reference, 'Political strike': "*strike action that is taken with the explicit aim of challenging the government or influencing its policy"*.
[9] Cambridge Dictionary, 'Wildcat strike': "*a sudden strike (= act of refusing to work as a protest) without any warning by the workers and often without the official support of the unions*".
[10] Cambridge Dictionary, 'General strike': "*a strike in which most workers in a country refuse to work until they are given higher pay or something else that they want*".
[11] Merriam-Webster, 'Work stoppage': "*concerted cessation of work by a group of employees usually more spontaneous and less serious than a strike*".
[12] Cambridge Dictionary, 'Go-slow': "*an occasion when employees work more slowly and with less effort than usual in order to try to persuade an employer to agree to higher pay or better working conditions*".
[13] Cambridge Dictionary, 'Sit down strike': "*a sit-down strike or protest is one in which people refuse to leave a place until their demands are listened to*".

29. Third, the Court's understanding of the term the "*right to strike of workers and their organisations*" must be seen in the context of the CEACR's supervision of C87. The present dispute cannot be viewed in isolation from the CEACR's comments on the right to strike, which constitute a comprehensive, but unilaterally devised, conglomerate of rules on the scope, conditions and limits of the right to strike to be incorporated within or protected by C87. The core dispute before the Court which is sought to be conveyed by the advisory opinion question is whether a "*right to strike of workers and their organizations*" that encompasses the amalgam of detailed and subjective rules developed by the CEACR is part of C87 or whether this is not the case and an ILO Convention on the right to strike would still have to be developed.

30. In order to help resolve this dispute, the Court is entitled to broaden, interpret and even reformulate the questions put in order to identify the issues arising in all their aspects by applying the legal rules relevant to the situation.[14] Accordingly, the IOE respectfully submits that for the ILO to receive a pertinent and effectual advisory opinion from this Honourable Court, it is now called upon to express its opinion on whether the right to strike as conceptualised in detail by the CEACR is "*protected*" by C87. The IOE suggests that this amounts to a unilateral codification of the right to strike through the backdoor outside of the established ILO standard setting procedures.

31. Therefore, even in the hypothetical event that the Court assumed that right to strike in abstract is contained in C87, this would not resolve the disputed about the CEACR views on the scope, conditions and limits of the right to strike, which have led the ILO to referring the advisory opinion question to this Honourable Court. In these circumstances this Honourable Court is invited to depart from the language of the question put to it in order to "*reflect the legal questions really in issue*".[15]

32. Finally, the Court is asked to give its view specifically on whether C87, rather than any other ILO instruments, national or international law, protects the right to strike for workers and their organisations. As can be seen from the array of sources in the ILO

[14] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, p. 87; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 [15]; *Legal consequences of the construction of a wall in occupied Palestinian territory*, Advisory Opinion, ICJ Reports 2004, p. 136 [37-38]; *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, Advisory opinion, ICJ Reports 2019, p. 95 [135].
[15] Ibid.

Office's dossier to the Court, there are explicit or implicit references to the right to strike in several international and regional instruments, as well as in national constitutions, laws and judicial decisions.[16] These references to a right to strike may be justified in their specific context. However, it is the IOE's position that this has no direct relevance to the issue in this case, which is whether or not the right to strike for workers and their organisations is protected by C87.

[16] Universal Declaration of Human Rights, 1948, art 20 **[ILO Dossier Document No. 283]**; International Covenant on Economic, Social and Cultural Rights, 1966, art 8 **[ILO Dossier Document No. 284]**; International Covenant on Civil and Political Rights, 1966, art 22 **[ILO Dossier Document No. 285]**; Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, art 11 **[ILO Dossier Document No. 286]**; European Social Charter (Revised), 1996, art 6 **[ILO Dossier Document No. 287]**; Charter of Fundamental Rights of the European Union, 2000, art 28 **[ILO Dossier Document No. 288]**; American Convention on Human Rights, 1969, art 16 **[ILO Dossier Document No. 289]**; Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, 1988, art 8 **[ILO Dossier Document No. 290]**; African Charter on Human and Peoples' Rights, 1981, art 15 **[ILO Dossier Document No. 291]**; Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, para 59 **[ILO Dossier Document No. 292]**; Arab Charter on Human Rights, 2004, art 35 **[Document No. 293]**; Charter of Fundamental Social Rights in the Southern African Development Community, 2003, art 4 **[ILO Dossier Document No. 294]**.

IV. ILO'S MANDATE, STRUCTURE AND PROCESSES

33. In order to answer the question that has been referred to it, the Court needs to fully understand the ILO's mandate, structure and processes and how the same informs, relates to and ultimately dictates the ILO's adoption and supervision of International Labour Standards. The Employers have therefore sought to assist the Court in its understanding of the ILO, and in particular, its mandate, structure and processes in respect of the setting and supervision of International Labour Standards, in this section.

A. The ILO

34. The ILO, founded in 1919, is a unique tripartite organisation which brings together, on an equal footing, Employer, Worker and Government representatives from all of its 187 member States.[17] Tripartism is one of the four fundamental principles on which the ILO[18] is based and the tripartite nature of the organisation has been widely considered to provide the ILO with a 'unique advantage'[19] and to provide its actions (and in particular, the International Labour Standards that it sets and supervises) with legitimacy.[20]

35. The ILO's main aim is to achieve social justice through promoting fundamental principles and rights at work, encouraging employment opportunities, enhancing social protection, and strengthening social dialogue on work-related issues.[21] To this end, the ILO develops policy recommendations, creates and supervises International Labour Standards, and devises technical programmes as part of its labour and social policy mandate.[22]

36. The setting and supervision of International Labour Standards is a key part of the ILO particularly, the ILC's mandate. International Labour Standards are defined as "*principles and norms concerning labour and related issues which take the form of Conventions and Recommendations adopted by the annual ILC of the ILO*".[23] To that end, the ILO has

[17] ILO, Member States.
[18] ILO, Declaration of Philadelphia, 1944, art 1(d) **[ILO Dossier Document No. 118]**.
[19] ILO, 'ILO Declaration on Social Justice for a Fair Globalization', 2008 (amended 2022) **[ILO Dossier Document No. 129].**
[20] *See* Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing 2013), p. 7.
[21] ILO, About the ILO; ILO, Declaration of Philadelphia, 1944.
[22] ILO, About the ILO.
[23] ILO, Glossary of Labour Administration and Related Terms, 1999, p. 4.

developed carefully sequenced balanced standard-setting and supervisory processes designed to obtain maximum input and participation from the tripartite constituents in its members States.

37. The ILO is primarily regulated and governed by the ILO Constitution,[24] which was first set out in Part XIII of the Treaty of Versailles 1919, and its Standing Orders and Rules.[25] Its aims, purposes, principles and mandate are as expressed and confirmed in the preamble to the ILO Constitution, the ILO Declaration of Philadelphia 1944[26] and the ILO Centenary Declaration for the Future of Work.[27]

38. Article 2 of the Constitution provides that the ILO consists of three main organs: (i) a General Conference (known also as the ILC); (ii) a Governing Body ('GB'); and (iii) an International Labour Office ('Office') controlled by the GB.[28]

1. *The International Labour Conference (ILC)*

39. The ILC is the highest decision-making organ of the ILO, which plays a role akin to the legislature, with regard to International Labour Standards; indeed, it is widely known as the *"International Parliament of Labour"*[29] and referred to as the ILO's *"supreme body"*.[30]

40. The ILC is the most representative organ of the ILO being composed of four representatives from each of the 187 member States, including two Government delegates, an Employer delegate and a Worker delegate.[31] The Employer and Worker delegates are selected in consultation with the most representative national employers'

[24] ILO, Constitution **[ILO Dossier Document No. 1].**
[25] *See* ILO, 'Standing Orders of the International Labour Conference (as amended)', 2021 **[ILO Dossier Document No. 55]**; ILO, 'Compendium of Rules applicable to the Governing Body of the International Labour Office', 2021 **[ILO Dossier Document No. 88]**.
[26] ILO, Declaration of Philadelphia, 1944**.**
[27] ILO, ILO Centenary Declaration for the Future of Work, 2019.
[28] ILO, Constitution, art 2.
[29] ILO, About the ILO.
[30] *See* ILO, 'The ILO Governing Body at a glance', February 2023, p. 2; ILO, 'ILC guide for the secretariat', May 2014, p. 1; ILO, 'Improving the functioning of the International Labour Conference and the Regional Meetings', March 2012, para 5; ILO, 'PR No. 1 - Report of the Chairperson of the Governing Body to the International Labour Conference for the year 2011-12', May 2012, p. 1/ 5; ILO, 'Report of the Working Party on the Functioning of the Governing Body and the International Labour Conference', March 2013, para 6.
[31] ILO, Constitution, art 3.

and workers' organisations.[32] Every delegate has equal voting rights on all matters under consideration by the ILC.[33]

41. During its annual session in June ('Session'), the ILC meets for two weeks to carry out the following functions in particular: (i) drafting and adoption of new International Labour Standards in the form of Conventions, Protocols and Recommendations;[34] (ii) supervision of the application of Conventions and Recommendations by member States at the national level; (iii) holding of recurrent discussions on the ILO's four strategic objectives;[35] (iv) election of the members of the GB (every three years); (v) adoption of the ILO biennial programme and budget (financed by contributions from member States); (vi) holding of general discussions on particular social and labour topics;[36] and (vii) deciding whether to include a subject on the agenda of the following Session.[37]

42. The ILC meets in tripartite committees[38] and in plenary sessions, with each delegate having the right to vote individually.[39] ILC Committees are largely created on an *ad hoc* basis, except for the Conference Committee on the Applications of Standards ('CAS'), which is a standing committee.[40]

43. It is the ILC (and only the ILC) that has the competence and authority under the ILO's Constitution to adopt International Labour Standards and/or to revise, abrogate or

[32] ILO, Constitution, art 3(5), which establishes the obligation for Members of the ILO to: "*undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries"*. Art 3(5) was interpreted by the Permanent Court of International Justice in an advisory opinion of 1922 (Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, Permanent Court of International Justice, Advisory Opinion, 31 July 1922) which still guides the ILC's tripartite Credentials Committee, which is in charge of scrutinizing nominations per art 3(9) of the Constitution.
[33] ILO, Constitution, art 4.
[34] Conventions are international treaties that, once adopted by the Conference, are open to ratification by Member States. Ratification creates a legal obligation to apply the provisions of the Convention in question. Recommendations, on the other hand, are intended to guide national action, but are not open to ratification, and are not legally binding. Protocols are a special type of Convention which can only be ratified by a country that has ratified - or ratifies at the same time - the Convention to which it is linked.
[35] Over a four-year cycle, the ILC carries out recurrent discussions on (i) fundamental principles and rights at work; (ii) employment; (iii) social protection; and (iv) social dialogue.
[36] ILO, About the ILC.
[37] ILO, Constitution, art 16(3).
[38] In which Governments, Employers and Workers are all represented with the exception of the Finance Committee (comprised solely of Governments) and the Selection Committee.
[39] ILO, Constitution, art 4.
[40] *See* paras. 63-72.

withdraw the same.[41] As an inherent part of this competence and authority the ILC, through the setting or revision of standards the ILC, through the setting or revision of standards, can clarify the meaning (and thus the legitimate interpretation) of any existing International Labour Standard.

44. The ILC has full autonomy to recognise, at the international level, particular labour rights or duties and to determine the scope, conditions and limits of their exercise. In this regard, the final clause of ILO Conventions, for instance Article 19 of C87, [42] provides for the GB to report to the ILC, whenever it considers it necessary to do so, on the application of the Convention concerned and to examine whether or not it is desirable for its revision, in whole or in part, to be placed on the agenda of the ILC.

2. The Governing Body (GB)

45. The GB is the executive body of the ILO and is composed of 28 persons representing Governments, 14 persons representing Employers and 14 persons representing Workers.[43] Article 7 of the ILO Constitution, provides that ten countries of *'chief industrial importance'*[44] have permanent Government seats in the GB, while the other 18 Government representatives are elected by the Government delegates at the ILC. Likewise, the Employer and Worker representatives are elected respectively by the Employer and Worker delegates to the ILC. The period of office of the GB is three years and the elections therefore take place on a triannual basis.

46. The GB regulates its own procedure.[45] In practice it meets three times a year to make decisions on various ILO matters, including:[46] (i) appointing the Director-General, who then carries out his or her functions according to the GB's instructions;[47] (ii) directing the

[41] ILO, Constitution, art 19(1). *See* also ILO, 'Standing Orders', arts. 44-52.
[42] ILO, C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87), art 19 *"At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part."*
[43] ILO, Constitution, arts. 2 and 7.
[44] Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States.
[45] ILO, Constitution, art 7.
[46] For a list of the GB's full duties, *see* ILO, 'Compendium of Rules', paras. 4-6.
[47] ILO, Constitution, art 8(1).

Office's activities;[48] (iii) setting the agenda of the ILC;[49] and (iv) the supervision of International Labour Standards.[50]

47. Usually, it is the GB who decides whether standards-related items should be placed on the agenda of the ILC,[51] be it the adoption, revision, abrogation or withdrawal of a Convention, Protocol or Recommendation.[52]

48. In deciding on a potential topic for standard setting, the tripartite constituents within the GB attempt, through negotiation and compromise, to reconcile any divergent interests. It is noteworthy that the GB, like the ILC, is driven by a desire for tripartite consensus, wherever possible.[53]

49. Once a decision on standard-setting has been taken by the GB either by agreement or by vote, it typically takes two years of written preparation and consultation, including discussion of the draft International Labour Standard at two consecutive sessions of the ILC.[54] As explained below, this process, known as the 'double discussion' procedure, involves discussion, negotiation and compromise between representatives of Governments, Employers and Workers. Adoption of a new International Labour Standard then requires a two-thirds majority in the final vote of the ILC.[55]

[48] Id, art 10.
[49] Id, art 14(1).
[50] Id, arts. 19(5)(e), 19(6)(d), 19(7)(b)(iv) and (v), 22, 24, 25, 26(2), 26(3), 26(4), 33, 34.
[51] Id, art 16(3). Note that the ILC itself may, by two-thirds of the votes cast by the delegates present, decide to include a subject on the agenda of the following session.
[52] Id, art 14(1); ILO, 'Compendium of Rules', arts. 5.1-5.4 and 6.2.
[53] ILO, 'Compendium of Rules', para 46: "*The Governing Body, whether meeting in plenary or in committees, takes decisions usually by consensus. The term "consensus" refers to an established practice under which every effort is made to reach without vote an agreement that is generally accepted. Those dissenting from the general trend are prepared simply to make their position or reservations known and placed on the record. Consensus is characterized by the absence of any objection presented by a Governing Body member as an impediment to the adoption of the decision in question. It is for the person chairing the sitting, in agreement with the spokespersons of the respective groups to note the existence of a consensus*."
[54] A single-discussion procedure is also possible. *See* ILO, 'Standing Orders', art 45; ILO, 'Handbook of Procedures Relating to International Labour Conventions and Recommendations (Centenary Edition 2019)', 2019, para 4.
[55] ILO, Constitution, art 19(2).

3. The Office

50. The Office is an ILO organ under the control of the GB and its functions, powers and duties are assigned to it by the GB and ILC.[56] Generally, the Office performs functions such as preparing the documents for the ILC, providing the tripartite constituents with technical assistance and publishing information on employment topics of international interest.[57]

51. The Office is not a tripartite body. Its officials, who are appointed by the Director-General, are *"exclusively international in character [and they] should not seek or receive any instructions from any governments or from any other authority external to the Organization"*.[58] It follows that the Office does not represent the views and interests of particular individuals or groups amongst the ILO's tripartite constituents and has a duty to be objective and impartial.

52. The Office's functions are primarily administrative and are intended to execute the decisions of the tripartite GB and the ILC.[59] The Office does not have any powers or duties other than those that have been directly assigned to it by the ILO Constitution, the ILC or the GB. In particular, neither the ILO Constitution nor the GB or ILC have conferred upon the Office any special competence to interpret International Labour Conventions. Therefore, Office informal opinions have no binding legal effect, remain of a purely administrative nature and are without prejudice to the views of the ILO standards supervisory bodies such as the CAS and ILC.[60]

B. The ILO Standard Setting Process

53. Standard-setting is one of the core activities that is of fundamental importance to the ILO.[61]

[56] Id, arts. 2(c) and 10.
[57] Id, art 10.
[58] Id, art 9(4).
[59] Id, art 10.
[60] ILO, Informal opinion.
[61] ILO, Centenary Declaration, art IV (A).

54. International Labour Standards are legal instruments adopted by the tripartite ILC that set out universally applicable principles and rights at work.[62] They can take the form of: (i) a Convention; (ii) a Recommendation; or (iii) a Protocol.[63] A Convention is a multilateral treaty that creates an international obligation to implement it for member States ratifying it. A Recommendation consists of non-binding international guidance and is not subject to ratification. In many cases, a Convention is accompanied by a Recommendation on the same subject which supplements the Convention by providing more detailed guidance. Recommendations can also be autonomous, meaning that they are not linked to a particular Convention.[64] A Protocol is a special type of Convention which can only be ratified by a country that has ratified, or ratifies at the same time, the Convention to which it is linked. Typically, a Protocol supplements or amends the respective Convention. Like Conventions, Protocols are legally binding upon ratification and entry into force.

55. Since its establishment, the ILO has adopted 191 Conventions, six Protocols and 208 Recommendations.[65] Among the 191 Conventions, C87 is one of the ten Conventions[66] recognised as *'fundamental'* by the 1998 Declaration on the Fundamental Principles and Rights at Work ('Declaration').[67] According to this Declaration, all ILO member States have an obligation to respect, to promote and to realise, five fundamental principles and rights contained in the ILO Constitution even if they have not ratified the related fundamental Conventions.[68]

56. ILO standard-setting is a well-established process involving the ILO's tripartite constituents. Typically, ILO standard-setting is conducted in the 'double discussion

[62] ILO, 'Glossary', p 4.
[63] ILO, Constitution, art 19; ILO, 'International labour standards - A glossary', November 2005.
[64] ILO, 'Rules of the game: an Introduction to the Standards-Related Work of the International Labour Organization', 2019, p. 18.
[65] ILO, Instruments.
[66] Namely, ILO, Forced Labour Convention, 1930 (No. 29); ILO, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); ILO, Right to Organise and Collective Bargaining Convention, 1949 (No. 98); ILO, **C100** - Equal Remuneration Convention, 1951 (No. 100); ILO, Abolition of Forced Labour Convention, 1957 (No. 105); ILO, Discrimination (Employment and Occupation) Convention, 1958 (No. 111); ILO, Minimum Age Convention, 1973 (No. 138); ILO, Occupational Safety and Health Convention, 1981 (No. 155); ILO, Worst Forms of Child Labour Convention, 1999 (No. 182); ILO, Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).
[67] ILO, 'ILO 1998 Declaration on Fundamental Principles and Rights at Work and Its Follow-Up', 10 June 2022 **[ILO Dossier Document No. 128]**.
[68] Ibid. Those five fundamental principles and rights are: (i) freedom of association and the effective recognition of the right to collective bargaining; (ii) the elimination of all forms of forced or compulsory labour; (iii) the effective abolition of child labour; (iv) the elimination of discrimination in respect of employment and occupation; and (v) a safe and healthy working environment.

procedure' over two consecutive ILC Sessions. However, a 'single discussion' at one ILC Session may be chosen in exceptional or urgent circumstances.[69] The 'double discussion' process can be broken down into the following seven stages.[70]

i. First, the GB decides on a topic for potential standard-setting to be put on the ILC agenda.[71]

ii. Second, the Office produces a law and practice report regarding the chosen topic along with a detailed questionnaire on the scope of any potential new International Labour Standard ('White Report'), which it sends to the Governments of all ILO member States at least 18 months prior to the opening of the ILC Session. The questionnaire aims to find out the ILO constituents' views on the possible content of the (proposed) new International Labour Standard and is formulated in such a way that the answers can be either "yes" or "no". Governments are requested in the questionnaire to consult the most representative national employers' and workers' organisations[72] and to include their views in their response but employer and worker organisations are free to send their views directly to the Office should they wish.

iii. Third, the Office analyses the questionnaire responses and sends a second report ('Yellow Report') at least four months before the first ILC Session, to be used as a basis for the first discussion at the ILC.

iv. Fourth, the content of the proposed instrument is discussed and negotiated at the ILC in the tripartite standard setting committees set up on an *ad hoc* basis for this purpose.

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[69] *See* ILO, 'Handbook of Procedures', paras. 3-4; ILO, 'Compendium of Rules', art 5.1.5: "*In cases of special urgency or where other special circumstances exist, the Governing Body may, by a majority of three fifths of the votes cast, decide to refer a question to the Conference for a single discussion with a view to the adoption of a Convention or Recommendation".* Examples of the single discussion procedure are: (i) P155 Protocol to the Occupational Safety and Health Convention; (ii) P29 Protocol to the Forced Labour Convention); (iii) R202 Recommendation on social protection floors; (iv) C185 Convention on Seafarers' identity documents convention); and (v) C188 Convention Work in Fishing Convention.

[70] *See* ILO, 'Standing Orders', art 46; ILO, 'Handbook of Procedures', para 4; ILO, 'The ILO supervisory systems – A guide for constituents', pp. 4-6.

[71] *See* further para 47.

[72] ILO, 'Standing Orders', art 46(1). The request for consultation was originally recommended by art. 2(f) of resolution of 1971 and added to the Standing Orders of the ILC in 1987. Further, Governments of member States that have ratified Convention No. 144 on Tripartite Consultation (International Labour Standards) of 1976 have an obligation to consult.

v. Fifth, following the first ILC discussion, the Office prepares a third report ('Brown Report') with the text of the proposed instrument and sends it for comments to Governments who are again requested to consult the most representative national employers' and workers' organisations.

vi. Sixth, the Office prepares the final report ('Blue Report') with the revised text of the draft instrument, based on the comments received from governments, employers' and workers' organisations, which is sent to governments at least three months before the second ILC Session.

vii. Finally, at the conclusion of the second ILC discussion, the draft instrument is presented in the ILC plenary for adoption, which requires a two-third majority from ILC delegates with voting rights.[73] In the plenary, governments have 50 percent of the vote, and employers and workers have 25 percent each. It should be noted that there is no automatism between a government's vote in favour of the adoption of a new Convention and its ratification of the Convention. On average, each ILO Convention has been ratified by 45 of its presently 187 member States, i.e. less than 25 % of its membership; the level of ratifications has been particularly low for instruments adopted since 2000.[74]

57. The standard-setting process is also used for formally revising a Convention either through:

i. the adoption of a new self-contained Convention that contains new amended provisions and still up to date provisions from the original Convention or by supplementing a Convention; or
ii. the adoption of a Protocol.[75]

[73] ILO, Constitution, art 19(2).
[74] 117 of the 187 ILO member States (i.e. 62%) have ratified 47 or fewer Conventions (i.e. 25% or less) of all 191 ILO Conventions. In Europe, 51 member States on average have ratified around 70 of all 191 ILO Conventions. In the Asia Pacific and Arab region, 39 member States on average have ratified around 22 of all 191 ILO Conventions. In the Americas, 35 member States on average have ratified around 50 of all 191 ILO Conventions. In Africa, 56 member States on average have ratified around 35 of all 191 ILO Conventions. The rate of ratification for conventions adopted since 2000 is even lower. Since 2000, only eight ILO Conventions have been adopted and they have been ratified on average by only 37 (i.e. 20%) of the 187 member States.
[75] *See* ILO, Constitution, art 14(1); ILO, 'Standing Orders', arts. 44-52; ILO, 'Compendium of Rules', arts. 5.1-5.4 and 6.2.

58. An example of the latter approach is the Protocol of 2014 to the Forced Labour Convention, 1930 ('P29'), which was adopted by the ILC in 2014 to address gaps identified in the Forced Labour Convention, 1930 (No. 29) ('C29').[76] In doing so, the ILC considered the results of the preceding Tripartite Meeting of Experts[77] on Forced Labour and Trafficking for Labour Exploitation in February 2013, which had agreed that C29 did not contain expressly or impliedly any reference to human trafficking in the preamble or body of the text. This meant that there was a gap in C29 that needed to be addressed through ILO standard-setting.[78] The Workers' spokesperson in the Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation stressed that:

> *This standard-setting approach was essential and could contribute to the adoption of systematic, coherent and coordinated methods at the international level […] It would be damaging to the ILO, as a tripartite organization, not to act in a field which came within its mandate, thereby running the risk of having obligations imposed on States by other international or regional organizations outside of the tripartite framework.* (emphasis added)[79]

59. P29 is illustrative of the fact that standard setting by the tripartite ILC is the most transparent and reliable means by which to address gaps identified in the ILO body of standards, as opposed to, for example, filling the gap through the comments and observations of ILO standards supervisory bodies, such as the CEACR.[80]

60. ILC standard setting is the only legitimate and constitutionally permissible procedure for developing internationally recognised labour standards at the ILO.[81] The relevant procedures and rules, which protect legal certainty and ensure that the interests and views of the ILO constituents are duly considered and can be freely negotiated, have been applied ever since the ILO came into existence, regardless of the topic to be regulated. Those rules and procedures entail a carefully balanced participatory process, which

[76] ILO, Forced Labour Convention, 1930 (No. 29) and ILO, Protocol of 2014 to the Forced Labour Convention, 1930.
[77] Experts who, unlike the CEACR, has been appointed by the tripartite constituents.
[78] ILO 'Final report - Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation', TMELE/2013/7, 2013, paras. 26-27.
[79] Id, paras. 40 and 122.
[80] *See* also, ILO, Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173); ILO, Maritime Labour Convention, 2006, as Amended (MLC, 2006), which revised and replaced 37 maritime labour Conventions.
[81] ILO, Constitution, art 19.

usually begins at the GB and ends at the ILC. This process enables all ILO tripartite constituents to engage in the negotiation and thus, the determination of, the nature and scope of relevant instruments according to their real needs. As a result, the instruments have the legitimacy conferred by tripartism (and the compromises and consensus-building that it entails) and are therefore of practical and lasting significance at the national level.

61. It would appear improper and constitutionally impermissible for the 'interpretation' of existing ILO Conventions to act as guise for the creation and promulgation of new International Labour Standards which have not been subjected to the rigorous tripartite process discussed above and yet, as will be seen, that is exactly what the CEACR have done through its comments and observations on C87.

C. The ILO Standards Supervisory System

62. The founders of the ILO recognised that for International Labour Standards to have any real meaning, they had to be effectively implemented in law and practice at the national level. To promote the effective implementation and application of ratified ILO International Labour Standards, the ILO developed a sophisticated system of accountability based on regular supervision through reporting,[82] and special supervision through the filing of complaints[83] and representations.[84] This section will primarily focus on regular supervision and the two regular supervisory bodies involved in it (the tripartite CAS and CEACR) but will also consider one related special procedure (the CFA procedure), which specifically deals with complaints in the field of freedom of association

[82] Id, arts. 19(5)(e) and 22.

[83] Id, art 26. A complaint can be brought by a Member State or the GB (of its own motion or on receipt of a complaint from a delegate to the ILC) if it considers that another member State is acting in breach of a ratified Convention. The GB may seek a response from the Government of the Member State concerned but if that is considered unnecessary or the response considered unsatisfactory, the GB will proceed to set up a Commission of Inquiry (usually made up of three individuals who are chosen in their personal capacity for their independence and expertise) to examine, report on the case and make recommendations. The Commission of Inquiry report is then published and the member States concerned must confirm whether they accept the recommendations or intend to refer the Report to the ICJ (which can affirm, vary or reverse any finding or recommendation of the Commission of Inquiry). Should a member State fail to carry out the recommendations of the Commission of Inquiry, the GB can recommend to the ILC *'such action as it may deem wise and expedient to secure compliance'*, *see* Article 33 of the ILO Constitution.

[84] Id, art 24. Any workers' or employers' organisation can make a 'representation' to the ILO alleging that a member State is not complying with or executing a ratified Convention. If they do so, the GB will establish a tripartite committee from its members to consider the case, seek a response from the Government of the member State concerned and if unsatisfied with the response, make the representation (and response) public.

and collective bargaining. A clear understanding of both the regular and special supervision procedures is of crucial relevance to answering the question before the Court.

1. Conference Committee on the Application of Standards (CAS)

63. In 1926, the ILC adopted a Resolution[85] to establish the CAS as a permanent tripartite body to discuss the implementation and practical application of ILO instruments in a tripartite setting at the ILC each session. The Resolution provided that:

> *Considering that the reports rendered by States Members of the Organisation under Article 408 of the Treaty of Versailles are of the utmost importance,*
>
> *And that careful examination of the information contained therein is calculated to throw light upon the practical value of the Conventions themselves and to further their general ratification,*
>
> *Recommends that a Committee of the Conference should be set up each year to examine the summaries of the reports submitted to the Conference in accordance with Article 408[…].*[86]

64. The CAS is thus a standing tripartite committee of the ILC consisting of ILC delegates representing governments, employers and workers.[87] The CAS is specifically responsible for the supervision of standards-related obligations of ILO member States and in particular, the application of ratified Conventions. In fulfilling that responsibility, the CAS discusses shortcomings in compliance with ratified Conventions with representatives of the Governments of the member States concerned. The CAS report, which contains the conclusions of those discussions, is then submitted to the ILC plenary for its adoption. Particular cases of non-compliance as found by the CAS are sometimes also discussed at the ILC plenary (itself the ILO's '*supreme body*')[88] are of paramount importance in the overall process of ILO standards supervision.

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[85] ILC, Record of Proceedings, 1926, Appendix VII, p. 429 **[ILO Dossier Document No. 73]**.
[86] Ibid.
[87] Every ILC delegate/adviser can register for the CAS; the ILC Standing Orders provide no numerical limits of participation in the CAS. There is therefore no need for nomination/selection of CAS members. *See* for example, ILC, Record of Proceedings, 2023, para 1.
[88] Compared to the CEACR, an external body, whose reports are only ever "noted" by the GB.

65. Article 23 of the ILO Constitution and Article 10(1)(a) of the ILC Standing Orders provide the mandate for the CAS to consider the following three matters:

> *(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).*[89]

66. First, the CAS discusses member States' compliance with their reporting obligations as required by the ILO Constitution. In particular, Article 22 requires member States to report on the measures taken to give effect to the provisions of the Conventions they have ratified. member States are required to report to the ILO on ratified fundamental and governance Conventions every three years and on all other ratified Conventions every six years.[90] Further, under Article 23(2), employers' and workers' organisations can comment on their governments' compliance with ratified Conventions. These comments constitute valuable independent and up to date information that assists in the proper supervision of implementation of ratified ILO Conventions at the national level.

67. Second, the CAS examines around 25 individual cases relating to the application of ratified Conventions by member States each year. The list of 25 cases is negotiated by the Vice Chairs of the Employers' and Workers' groups and formally approved by the CAS. The cases are selected based on various factors including geographical balance, the nature and seriousness of the situation and the quality of the information provided by the ILO tripartite constituents.[91] Every year, approximately a quarter of the cases discussed concerns the implementation of C87.[92]

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[89] ILO, 'Standing Orders', art10 (1)(a). *See* also id, art 10(2) "*The Committee on the Application of Standards shall also consider reports submitted by the Governing Body to the Conference for the Committee's consideration*".
[90] *See* ILO, 'ILO, 'Handbook of Procedures', p. 23.
[91] ILO, 'The Committee on the Application of Standards of the International Labour Conference: A dynamic and impact built on decades of dialogue and persuasion', 2011, p. 20 **[ILO Dossier Document No. 87]**.
[92] *See* Annex B - Table of CEACR Observations, Direct Requests, CAS cases regarding ILO Convention 87 and Right to Strike.

68. The basis for the CAS' examination of an individual case is the CEACR's observations on the national situation regarding the relevant ratified Conventions as contained in its annual General Report. The General Report itself is based on the information provided by the ILO's tripartite constituents through their reporting and submissions. During the CAS' discussion of the individual cases, governments, employers and workers have an opportunity to comment on the CEACR's observations as well as provide additional information relevant to the case concerned. In particular, the CAS discusses each case with representatives of the government concerned. In performing its functions, the CAS is not bound to accept or follow the observations of the CEACR as contained in its General Report or otherwise. Indeed, the CAS is free in its conclusions and these sometimes differ from the conclusions and recommendations made by the CEACR.

69. For each individual case discussed, the Vice Chairs of the Employers' and Workers' groups discuss and negotiate conclusions, which form part of the CAS report subsequently presented to and adopted by the ILC plenary. It should be noted that governments are not involved in the negotiation and drafting of the CAS' conclusions.[93] In 2015, the GB decided that:

> *[the] CAS should adopt short, clear and straight forward conclusions. What is expected from governments to better apply ratified Conventions should be clear and unambiguous. Conclusions could also reflect concrete steps agreed with the governments to address compliance issues. The conclusions should reflect consensus recommendations. Where there is no consensus there will be no conclusions. Divergent views can be reflected in the CAS record of proceedings.*[94] (emphasis added)

70. It is noteworthy that given the absence of consensus between workers and employers regarding the existence of a right to strike in C87, CAS' conclusions on C87 cases do not refer to the 'right to strike' or any aspects of its modalities or limits,[95] even if the CEACR has made comments on these issues in its relevant observations. The divergent views on

[93] This standing practice in the CAS has recently come under question by some Governments.
[94] ILO, 'The Standards Initiative - Appendix I - Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level', GB.323/INS/5/Appendix I, March 2015, pp.1-2 **[ILO Dossier Document No. 106]**.
[95] For example, general prohibition of strikes, essential services, negotiated minimum services, compensatory guarantees for striking workers, notice period and cooling-off periods for strikes, quorum and voting to call for a strike, picketing, occupation of the workplace, compulsory arbitration, penal sanctions against striking workers, dismissal for strike action and reinstatement of strikers, etc.

this topic, as expressed in the CAS' discussion, are nevertheless reflected in the CAS' record of proceedings. For example, as regards Guatemala's compliance with C87, the CEACR had made detailed comments requesting the Government to amend various provisions of the Labour Code in relation to the 'right to strike' purportedly in order to comply with Article 3 of C87.[96] Despite these CEACR's comments, the CAS, which discussed the case in 2022 and 2023, adopted conclusions that did not mention the 'right to strike' or any related issues.[97]

71. Thirdly, the CAS discusses the General Survey, which is an annual document, prepared by CEACR (with the assistance of the Office) on the basis of reports furnished by member States under Article 19 of the ILO Constitution and voluntary submissions from employers' and workers' organisations. General Surveys provide information on the law and practice in ILO member States regarding a particular ILO instrument (or a limited number of ILO instruments) selected by the GB each year. In General Surveys, the CEACR also gives its views about the meaning and relevance of provisions of the instruments examined. As explained above,[98] the CAS is not bound to accept or follow the views of the CEACR as contained in General Surveys.

72. C87 has been the subject of seven General Surveys to date.[99] The CEACR first mentioned the 'right to strike' in its General Survey 1959. Its most extensive comments on the 'right to strike' in the context of C87 are contained in the General Surveys of 1994[100] and 2012.[101] Unsurprisingly therefore, it was in the CAS discussion of the 1994 and 2012 General Surveys, that the Employers and a number of Governments openly and

[96] ILO, 'Observation (CEACR) - adopted 2022, published 111st ILC session (2023): Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Guatemala', 2022.
[97] *See* ILO, Individual Case (CAS) - Discussion: 2023, Publication: 111st ILC session (2023) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Guatemala', 2023.
[98] *See* para 68.
[99] ILO, 'Summary of Reports on Ratified Conventions (Article 22 of the Constitution)', 1953; ILO, 'Summary of Reports on Ratified Conventions (Articles 22 and 35 of the Constitution)', 1957; ILO, 'Summary of Reports on Ratified Conventions (Articles 22 and 35 of the Constitution)', 1959; ILO, 'Freedom of Association and Collective Bargaining - General Survey by the Committee of Experts on the Application of Conventions and Recommendations', 1973 **[ILO Dossier Document No. 233]**; ILO, 'Freedom of Association and Collective Bargaining - General Survey by the Committee of Experts on the Application of Conventions and Recommendations', 1983 **[ILO Dossier Document No. 234]**; ILO, 'Freedom of Association and Collective Bargaining - General Survey by the Committee of Experts on the Application of Conventions and Recommendations', 1994 **[ILO Dossier Document No. 235]**; ILO, 'Giving globalization a human face', 2012, ILC.101/III/1B **[ILO Dossier Document No. 236]**.
[100] ILC, Record of Proceedings, 1994, pp. 25/31-25/41.
[101] ILO, 'Report of the Committee on the Application of Standards', 2012.

comprehensively expressed their opposition to the CEACR observations and comments on the 'right to strike' in C87.[102]

2. Committee of Experts on the Application of Standards (CEACR)

73. In the same Resolution[103] that called for the establishment of the CAS, the ILC requested the GB to establish a committee of experts with knowledge of labour legislation and labour conditions to assist the ILC (and therefore the CAS) in examining the information on the application of standards received from the ILO tripartite constituents. The Resolution provides the basic terms of reference for the CEACR and states that:

> *Considering that the reports rendered by States Members of the Organisation under Article 408 of the Treaty of Versailles are of the utmost importance,*
>
> *And that careful examination of the information contained therein is calculated to throw light upon the practical value of the Conventions themselves and to further their general ratification,*
>
> *Recommends that a Committee of the Conference should be set up each year to examine the summaries of the reports submitted to the Conference in accordance with Article 408,*
>
> *And requests the Governing Body of the International Labour Office to appoint, as an experiment and for a period of one, two or three years, a technical committee of experts, consisting of six or eight members, for the purpose of making the best and fullest use of this information and of securing such additional data as may be provided for in forms approved by the Governing Body and found desirable to supplement that already available, and of reporting thereon to the Governing Body, which report the Director, after consultation with the Governing Body, will annex to his summary of the annual reports presented to the Conference under Article 408.* (emphasis added)[104]

74. Following this Resolution, the ILC decided that same session to establish an 'independent body' of experts to assist the CAS to "*bring into light the particular points to which the*

[102] *See* para 209.
[103] ILC. Record of Proceedings, 1926, Appendix VII, p. 429.
[104] Ibid.

attention of the Conference should be directed".[105] The Chairman of the Committee on the Examination of Annual Reports under Article 408 explained (emphasis added):

> "[…] *this Committee is in no sense a statutory committee […] it is purely a technical committee.* […] *The Committee will neither be invited nor authorised to express an opinion on the nature of the [Government's] reply or to pass a censure or to offer praise of the work of ratification in any nation – not at all. Its sole duty will be to register definitely what the facts are and to register those facts in a way which has hitherto been impossible because of the great volume of material with which we have to deal with […].*[106]

75. The Chairman further clarified that: "*[this committee] would have no judicial capacity, nor would it be competent to give interpretations of the provisions of the Conventions nor to decide in favour of one interpretation rather than of another.*" (emphasis added)[107] It follows that the CEACR has not been given a formal and/or explicit mandate to interpret Conventions, quite the opposite.

76. The purpose and rationale for the creation of CEACR remains valid today. Without changing its substance, the mandate of the CEACR was restated by the GB in 2015, as follows:

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

[105] ILC, Record of Proceedings, 1926, p. 239 **[ILO Dossier Document No. 71]**.
[106] Ibid.
[107] ILC, Record of Proceedings, 1926, Appendix V, p. 405 **[ILO Dossier Document No. 72]**.

> *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.* (emphasis added)[108]

77. The role of the CEACR is thus to consider the information received from the Governments of member States[109] as well as employers' or workers' organisations and, in light of this information, assess the extent of compliance with the relevant ILO Conventions. The CEACR's comments take the form of so-called direct requests for explanations or additional information sent directly to the Government concerned; or in cases of persistent or significant non-compliance, observations published in the annual CEACR General Report which is then presented to the CAS (as the body ultimately responsible for the supervision of standards-related obligations of ILO member States).[110]

78. As mentioned above,[111] the CEACR is also responsible for the production of a General Survey which examines the law and practice for one or more International Labour Standards.

79. The CEACR is currently comprised of 20 members appointed for their legal expertise and independence. CEACR members are appointed by the GB for renewable terms of three years. It should be noted that the CEACR's General Survey and Annual Report reflect the views of the members of the CEACR only and are not approved by ILO's tripartite bodies.

80. As indicated above, the CEACR is expected to function in full independence, objectivity and impartiality.[112] However, it is not a judicial body and nor does it function as a court.

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[108] ILO, 'The Standards Initiative - Appendix I', p.1.
[109] ILO, Constitution, art 22. It is noteworthy that for all Conventions, the GB has adopted report forms *"to which each State is to conform their reports"* and that the report forms therefore determine the information basis for the CEACR's examinations of compliance with ratified Conventions.
[110] *See* para 64.
[111] *See* para 78.
[112] ILO, 'Monitoring compliance with international labour standards: The key role of the ILO Committee of Experts on the Application of Conventions and Recommendations', 2019, p. 23.

The identification and appointment of new CEACR members follows an internal Office procedure which has recently been adjusted to provide for more transparency.[113] At the 347th GB Session (March 2023) the GB instructed the Office to make a call for candidatures for the CEACR, after a specific request of the Employers' Group who were concerned by the lack of transparency and tripartite involvement in the selection process.[114] It is noteworthy that only the Office conducts interviews and assesses prospective candidates for the CEACR and then submits it to the Officers of the GB (i.e. the Chairperson, who will be a Government representative, and the two Vice-Chairpersons who will respectively represent the employers and workers) for their consideration. The final proposal of the ILO Officers is then forwarded to the GB for endorsement.

81. Given the large volume of reports received each year (more than 2000 on ratified Conventions alone), the CEACR heavily relies on the assistance of the Office and, in particular, the International Labour Standards Department ('NORMES'). Indeed, NORMES prepares the draft CEACR General Report, as well as the draft General Survey, which the CEACR then discusses, amends (as required) and adopts at its two weeks meeting held in late November and early December each year. It should be noted that the Office has significant influence on the contents and orientations of the CEACR reports and, consequently, on the outcomes of ILO standards supervision. In particular, the Office ensures continuity and consistency in standards supervisory work irrespective of changes in the composition of the CEACR.

82. In relation to C87, the CEACR has over time developed broad, detailed and extensive comments and observations on the scope and limits of the 'right to strike' in the context

[113] ILO, Minutes of the 343rd Session of the Governing Body of the International Labour Office, GB.343/PV, November 2021, para 556.

[114] Id, para 531: "*The Employer spokesperson clarified that she had not suggested that the Director-General or the Office should no longer have a role in the appointment procedure; rather, she had proposed that the Director-General should play the important role of consulting the tripartite constituents. The group wished not to weaken the system, but instead to strengthen it by establishing a procedure that guaranteed acceptance of the experts and their impartiality. Her group was proposing that constituents should be consulted, not to make the selection process political, but because they might be able to provide additional relevant information about applicants*." *See* also para 544 "*The Employer spokesperson thanked the Workers' and Government groups for their spirit of compromise and welcomed the revised version of the draft decision, which contained adjustments that would bring the Committee of Experts' appointment process up to date and more in line with the principle of tripartism, and would also render it more transparent. She welcomed the new arrangements planned for advertising vacancies and selecting new members of the Committee. They represented important improvements that would ensure transparency and good governance, which were somewhat lacking in the current procedure*."

of C87 and insisted that governments comply with those comments and observations. The position of Employers and also some Governments[115] is that, in doing so, the CEACR has acted outside its competence and mandate.

83. In this context, the Employers would like to make the following observations:

i. The CEACR first mentioned a 'right to strike' in its third General Survey on the subject in 1959 and did so in only one paragraph and only in respect of public services.[116] Subsequently, the CEACR expanded its comments and observations on this matter to seven paragraphs in 1973, 25 paragraphs in 1983 and to a separate chapter of no fewer than 44 paragraphs in both 1994 and 2012.[117]

ii. In its 1994 General Survey, the CEACR recognised that: "*the right to strike is not explicitly stated in the ILO constitution or in the Declaration of Philadelphia, nor specifically recognized in Conventions Nos. 87 and 98*".[118] However, it stated that: "*in the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject.*"[119] This statement testifies to the CEACR's misunderstanding as to its mandate and role outlined above.[120]

iii. Despite strong disagreement from Governments[121] and Employers[122] on its comments and observations in the past decades, the CEACR has continued to

[115] *See* Annex C - Table of Countries Disagreeing with the CEACR's view on the Right to Strike in ILO Convention 87.
[116] ILC, Record of Proceedings, 1959, Report III (Part IV), p. 114, para 68 **[ILO Dossier Document No. 232]**.
[117] *See* Annex A - CEACR Guidance on the Right to Strike in ILO Convention 87.
[118] ILO, 'Freedom of Association and Collective Bargaining - General Survey', p. 62, para 142.
[119] Id, p. 64, para 145.
[120] *See* paras. 73-76.
[121] *See* Annex C - Table of Countries Disagreeing with the CEACR's view on the Right to Strike in ILO Convention 87.
[122] *See* for example ILC, Record of Proceedings, 1991, para 28, p. 24/6: "*ILO Conventions were frequently drafted in general terms, or with flexibility clauses which allowed a certain latitude in their implementation. No matter how desirable the expansion of social policy which the Experts might deem to be in conformity with the spirit of a particular Convention, it was inappropriate for the Experts to function as a supranational legislature if their interpretation was not within the contemplation of the tripartite Committee which drafted the Convention. It was in acting without restraint that the Committee of Experts might introduce the very legal uncertainty which it considered as undermining the " proper functioning of the standard-setting system of the ILO.*"; and ILC, Record of Proceedings, 1993, pp. 25/4 -25/5: "*Although they did not question the competence of the Committee of Experts within the framework of the supervisory system, they did not agree with all results of its work, and that they did openly and clearly […] More than 40 years ago the then Employers' spokesman, Pierre Waline, had clearly*

provide comments and observations on the 'right to strike' in the context of C87 in its General Report. For example, in its 2024 General Report, the CEACR made 65 observations on C87, out of which 55 (around 84%) dealt partly or wholly with the 'right to strike'.[123] The IOE which, *inter alia*, provides the secretariat of the Employers' group in the ILO, has repeatedly the Employers' disagreement with these CEACR's views. The IOE has called upon the CEACR to stop requesting Governments to bring their law and practice into conformity with the CEACR's comments and observations on the scope and conditions of the 'right to strike' in the context of C87.[124]

3. Committee on Freedom of Association (CFA)

84. After the adoption of C87 in 1948, the GB realised that - since the provisions of the ILO Constitution relating to annual reports, representations and complaints only applied to member States that had ratified Conventions.[125] There was a need to develop an additional procedure to supervise freedom of association and its application in member States that had *not* ratified C87 and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) ('C98'). This specialist procedure was intended to be complementary to, but not replace, the general supervisory procedures addressed above.

85. Therefore, in 1950, following an agreement between the Economic and Social Council of the United Nations ('ECOSOC') and the ILO, the ILC established a new body called the Fact-Finding and Conciliation Commission on Freedom of Association ('FCFA').[126] The mandate of the FCFA was to examine allegations concerning violations of freedom of

rejected the deduction of a detailed right to strike from Conventions Nos. 87 and 98.[…] *Developing the indication in paragraph 22 of the document, he considered that parties who had drafted standards were in the best position to determine their meaning: this could not lead to "clandestine modification of meaning", as the Conference Committee meets in public. The Committee of Experts should highlight and explain any new interpretations in the general part of its reports in its observations on cases, and in general surveys, so that they are more readily evident to everyone. Otherwise, States may ratify Conventions with no notice or indication from the wording or legislative history of detailed interpretations subsequently made and tending in some instances towards "optimal" labour standards. Too detailed interpretation was another factor discouraging ratification"*.

[123] ILO, 'Application of International Labour Standards', ILC.112/Report III(A), 9 February 2024.

[124] *See* Annex E - IOE Comments under Article 23.2 of the ILO Constitution on the Application in Law and Practice of ILO Convention 87.

[125] ILO, Constitution, arts. 24-34.

[126] ILO, 'Sixth Report of the International Labour Organisation to the United Nations', 1952, p. 60.

association against States (including those who were not members of the ILO, but were members of the UN), where the Government concerned agreed on the examination.[127]

86. Later in 1951, the CFA was created as a tripartite body of the GB. The CFA's mandate was to consider allegations against states who had not ratified any convention related to freedom of association. The CFA was initially intended to undertake a preliminary examination of allegations concerning violations of freedom of association and where appropriate make a referral to the FCFA.[128] However, in practice, the FCFA is hardly any longer used and its role and function have largely been taken over by the CFA.

87. The CFA is composed of an independent chairperson and three members and three deputies from each of Governments, Employers and Workers' groups, who participate in their personal capacity. The CFA's mandate is to:

> *Examine[] alleged infringements of the principles of freedom of association and the effective recognition of the right to collective bargaining enshrined in the Constitution of the International Labour Organization (Preamble), in the Declaration of Philadelphia and as expressed by 1970 ILC Resolution.* (emphasis added)[129]

88. The CFA meets before each of the GB's triannual meeting to review around 25 complaints from workers' and employers' organisations and provide conclusions and recommendations to the Governments concerned tailored to the specific factual context and national circumstances of each case examined. It is important to note the following:

    i. The legal basis for the conclusions of the CFA are the principles regarding freedom of association and collective bargaining in the ILO Constitution and Declaration of Philadelphia. It was clearly agreed and reflected in the introduction of the Compilation of decisions that the CFA does not interpret C87 or any other ILO Conventions.[130]

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[127] ILO, 'Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association - Annex I', para 4.
[128] ILO, 'Sixth Report of the International Labour Organisation to the United Nations', 1952, pp. 47-51, 169.
[129] ILO, 'Freedom of Association - Compilation of decisions of the Committee on Freedom of Association', 2018, para 1 **[ILO Dossier Document No. 282]**.
[130] ILO, 'Freedom of Association - Compilation of decisions', p. 1.

ii. Like the CEACR, the CFA receives confidential working papers with draft conclusions and recommendations prepared by the Office (and in particular, the NORMES department) for their examination at each session. The direction of the CFA decisions is therefore to a significant extent influenced by the preparation of the Office.

iii. The CFA's conclusions and recommendations are determined on a case-by-case basis, taking into account the concrete circumstances of the particular case and country.

iv. The CFA conclusions and recommendations cannot be considered as jurisprudence, as the CFA does not interpret Conventions and is not a judicial body and nor do CFA members act in any judicial capacity. Consequently, the conclusions and recommendations are not legally binding.

v. The conclusions and recommendations of the CFA are drafted specifically in response to the particular complaints made to the CFA against the countries concerned. Indeed, CFA decisions can follow, for the same topic, a different approach depending on the national circumstances and specificities of the case. They do not set any legal precedents.

89. CFA sessions are held in private, which means that only CFA members and the ILO staff from the NORMES department and, in particular, those who prepare the CFA's draft conclusions and recommendations can attend. There is clear difference in transparency between the CFA's discussions and decision-making processes behind closed doors on the one hand, and the sessions of the CAS on the other which are held in public, which are thoroughly documented (and made publicly available) through the records of proceedings of the ILC, and whose conclusions are formulated by Employer and Worker representatives in the CAS without any input from the Office.

90. In 2018, the Office produced the sixth edition of a publication called the *"Compilation of decisions of the Committee on Freedom of Association"* ('CFA Compilation').[131] This

[131] ILO, 'Compendium of Rules', Annex II **[ILO Dossier Document No. 90]**; ILO, 'Freedom of Association - Compilation of decisions', p. 1.

publication includes a selection of conclusions issued by the CFA in specific cases intended to guide Governments and national authorities in discussion and follow up actions.[132] Some of these conclusions refer to the specific cases from which they were taken, whereas others simply refer to the relevant paragraphs in earlier editions of the CFA Compilation (or more accurately, the Digest of decisions and principles of the CFA of the GB of the ILO, as it was then known). The CFA Compilation is a publication developed by the Office, not the CFA. Indeed, only the Introduction of the CFA Compilation was consulted and agreed by CFA members[133] and the publication as a whole has never been adopted or approved by the GB or the ILC.[134]

91. It is important to note that nowhere in the Introduction to the CFA Compilation is reference made to C87 or C98. Indeed, since the CFA has no mandate to supervise C87 (or any other Convention), even where the CFA is considering a complaint against a member States that has ratified C87, the complaint must be assessed by the CFA in terms of the relevant member States' conformity with the constitutional principle of freedom association, and not with C87. Indeed, in cases that may also raise issues regarding the application of C87 and where the country concerned has ratified C87, the standard practice of the CFA has been to include the following sentence in its conclusions:

> *The Committee requests the Government to provide information on all developments in respect of the above recommendations to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to which it refers the legislative aspects of the case.*[135]

92. While, on certain occasions, CFA recommendations have addressed or related to the 'right to strike', these non-binding recommendations were provided to guide governments to resolve an *ad-hoc* dispute, they were not meant as an 'interpretation' of C87, with both the interpretation and assessment of compliance with C87 being outside the mandate and competence of the CFA.

[132] Ibid.
[133] Id, pp. 1-3.
[134] ILO, Minutes - Institutional Section, GB.334/INS/PV, October-November 2018, para 411.
[135] *See* for example, ILO, '404th Report of the Committee on Freedom of Association', October-November 2023, CFA Case No. 3432, paras. 649 and 651(d).

93. In this context it is worth emphasising that, as far back as 1953, the Employers have pointed out that neither the Constitution nor the ILO Conventions include provisions on the 'right to strike'. The 'right to strike' should therefore only have been considered by the CFA as far as freedom of association was affected.[136]

D. Important Events

94. There are five events that are particularly relevant to the Court's understanding of the Employers' position on whether a 'right to strike' is protected under C87.

1. Cold War Period (1947-1989)

95. The Cold War was a very turbulent period for the ILO where a global geopolitical conflict between the two superpowers led to the emergence of three alliances: (i) the OECD industrialised economies; (ii) the Soviet bloc; and (iii) the developing countries known as 'Group of 77'.[137] While these three blocs each claimed to be promoting some form of 'social justice', they were divided over the content and the means to achieve it. Consequently, the need for unity (or at least, the appearance of unity) among the tripartite ILO constituents from Western countries (including Western business (or employers') organisations) was a priority which overshadowed and distracted from the very real disputes that existed among them, including in relation to C87 and the 'right to strike' and the role of CEACR in respect of the same.

96. In the first years of implementation of C87, the CEACR's comments and observations on the 'right to strike' in C87 were not controversially discussed because: (i) the CEACR's comments and observations were not codified; (ii) it was clear for all ILO's Constituents that the CEACR's comments and observations were not legally binding; (iii) the CEACR's comments and observations on the 'right to strike' were hardly accepted within the ILO, let alone outside of it; and (iv) there was a need for unity (or at least the

[136] ILO, Minutes of the 121st Session of the Governing Body, March 1953, p. 37.
[137] G77, 'About the Group of 77'. The Group of 77 is the largest intergovernmental organization of developing countries in the United Nations, which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development.

appearance of unity) for the reasons set out above.[138] However, the Employers raised their objections openly and vocally as of 1989, when the Employers realised the confusion that the non-binding CEACR's 'guidance' was creating among both the ILO's constituents and legal practitioners.[139]

97. In 1992, the IOE engaged with the International Confederation of Free Trade Unions ('ICFTU') to negotiate a joint document which, inter alia, set out: (i) the steps for both organisations to achieve constructive economic, social and political reform; and (ii) the role of the ILO in supporting dialogue with social partners.[140] Around the same time, the division within the Employers' group (as between the 'Free Employers', who were independent of their Governments, and the 'Communist Employers', who were not) was overcome and the Employers were better able to openly express their rejection of the CEACR's comments and observations on the 'right to strike' in C87 in the tripartite ILO bodies in which they were represented, in particular, in the CAS.[141]

2. The CEACR General Survey of 1994

98. The CEACR first mentioned a 'right to strike' in its third General Survey on the subject in 1959 and did so in only one paragraph and only in respect of public services.[142] Subsequently, the CEACR increasingly expanded its comments and observations in its General Surveys of 1973 and 1983. However, remarkably, in the General Survey of 1994, the CEACR's comments and observations on the 'right to strike' in the context of C87 were presented in a separate chapter of no fewer than 44 paragraphs.[143]

99. The 1994 General Survey demonstrated the CEACR's misunderstanding of, or disregard for, its mandate and role, which has regrettably persisted to date.

100. The Employers expressed their disagreement with the CEACR's observations and comments on the 'right to strike' in the context of C87, and the expansion of the CEACR's

[138] *See* para 95.
[139] ILC, Record of Proceedings, 1989, para 21, pp. 26/6, 26/35, 26/43 and 26/51.
[140] ILO, 'Report of the Tripartite Symposium on New Perspectives for Tripartism in Europe', GB 253/8/6, May-June 1992, para 5.
[141] IOE, 'A century building a powerful and balanced voice of business', 2021, p. 8; *see* paras. 100-106.
[142] ILC, 'Summary of Reports on Ratified Conventions (Articles 22 and 35 of the Constitution)', 1959.
[143] ILO, 'Freedom of Association and Collective Bargaining - General Survey'.

role in the CAS' discussion of the 1994 General Survey. For example, the Employers' members stated that they: *"absolutely could not accept that the Committee of Experts deduced from the text of the Convention a right so universal, explicit and detailed, as it had done in this part of the survey".*[144]

101. Furthermore, supporting the comments of the Employers' spokesperson, the Employers' member of the United States stated that:

> *considering the legislative history of these Conventions and the observations of the Experts in the 1950s, no one could have anticipated the extremely explicit and detailed interpretation now made by the Committee of Experts. […] With respect to Conventions Nos. 87 and 98, however, the Committee had moved away from this practice and also applied the principles of the Committee on Freedom of Association. By endorsing the conclusions of the Committee on the meaning of these Conventions, the Committee of Experts has subverted the supervisory machinery.* (emphasis added)[145]

3. 101st Session of the ILC, 2012

102. At the 101st session of the ILC in 2012, the CAS discussed the CEACR General Survey concerning the then eight fundamental Conventions, including C87.[146] This publication included a comprehensive description and defence of the CEACR's extensive comments and observations on the 'right to strike' in the context of C87.

103. During the General Survey discussion, the Employer members in the CAS highlighted the difference between the standards supervision by the CEACR and the CAS:

> *They recalled in that respect that the Committee of Experts was an independent body entrusted with examining the application of ILO Conventions and Recommendations by member States. However, overall responsibility for the supervision of ILO standards lay with the ILC, in which the governments, employers and workers from all member States were represented. The Committee of Experts therefore had a mandate to undertake the preparatory work in that context, but not to replace the*

[144] ILC, Record of Proceedings, 1994, p. 25/32, para 116.
[145] Id, pp. 25/35-25/36, para 128.
[146] ILC, 'Giving globalization a human face'.

> *tripartite supervision carried out by the Conference Committee on the Application of Standards. The Employer members emphasized that the supervision of standards, like all other ILO work, had to be at the service of the tripartite constituents and to reflect their tripartite needs.* (emphasis added)[147]

104. Regarding the CEACR's comments and observations on a 'right to strike' in C87, the Employers recalled the objections that they had expressed during the CAS' discussion of the 1994 General Survey:

> *While the Employer members acknowledged that a right to strike existed, as it was recognized at the national level in many jurisdictions, they did not at all accept that the comments on the right to strike contained in the General Survey were the politically accepted views of the ILO's tripartite constituents. […] The Employer members therefore objected in the strongest terms to the interpretation by the Committee of Experts of Convention No. 87 and the right to strike, to the use of the General Survey with regard to the right to strike and to being placed in such a position by the General Survey*. (emphasis added)[148]

105. Furthermore, the Employers emphasised that the CEACR's General Survey and General Report did not reflect the views of the ILO or the ILO tripartite constituents, stating that:

> *The General Survey was a guide to the Conference Committee to assist it with its work when supervising the application of ratified labour standards by member States of the ILO. The General Survey, like the report of the Committee of Experts, was not an agreed or authoritative text of the ILO tripartite constituents, namely, the Governments, Employers and Workers. Outside of the ILO, this important distinction was either misunderstood or forgotten and General Surveys were seen as being the position of the ILO, which they were not. The Employer members had, for many years, consistently stated this position concerning General Surveys and the reports of the Committee of Experts. The role of the International Labour Office was to serve its tripartite constituents to the best of its abilities. The ILO was the Governments, Workers and Employers. Both the General Survey and the report of the Committee of Experts were created with the assistance of the International Labour Office. The Governments, Employers and Workers were not involved in their creation or publication. The first opportunity for the Governments, Employers and Workers to*

[147] CAS, Extracts from the Record of Proceedings, 2012, para 61.
[148] Id, para 82.

> *consider these publications as groups was at the International Labour Conference.* (emphasis added)[149]

106. Furthermore, the Employers highlighted the risks of accepting the CEACR's comments and observations on the 'right to strike' for the whole of the ILO's established standards supervisory system, noting that:

> *There was no legal requirement for governments that had ratified Convention No. 87 to address the Committee of Experts' interpretation of the right to strike. The Employer members could not agree to the Committee of Experts' interpretation of the right to strike because of the risk that it would be misused.* (emphasis added) [150]

107. Due to their view that the CEACR's comments and observations on C87 and the 'right to strike' were illegitimate and served to undermine the ILO's established tripartite standard setting processes, the Employers' representatives within the CAS were unable to agree to the discussion of cases concerning C87 or referring to a 'right to strike' at the 2012 meeting of the CAS. In response, the Workers' representatives refused to discuss any case unless and until the Employers agreed to discuss cases which related to C87 and/or referred to a 'right to strike'. After numerous attempts to find a compromise, the negotiations between the Employers and Workers' Vice-Chairs irretrievably broke down, however, contrary to the Workers' assertion, the Employers did not, at any point, 'walk out' during negotiations.[151]

108. Consequently, no list of individual cases for discussion in the CAS was adopted in 2012 and the CAS' discussions were limited to: (i) cases of serious failure; (ii) the General Report and the General Survey of the CEACR; and (iii) the question of the observance by the Government of Myanmar of the Forced Labour Convention 1930 (No. 29).[152]

109. Given the failure to reach an agreement, the Employers emphasised that they remained supportive of the application of labour standards provided that there was respect for genuine tripartism of the ILO constituents and suggested the following way forward:[153]

[149] Id, para 145.
[150] Id, para 149.
[151] Id, para 151.
[152] Ibid.
[153] Id, para 153.

i. That the following clarification should clearly appear in all Office and CEACR documentation prepared for a debate and discussion by the ILC or the GB: [154]

The General Survey is part of the regular supervisory process and is the result of the Committee of Experts' analysis. It is not an agreed or determinative text of the ILO tripartite constituents. [155]

ii. An urgent review of the working methods and mandate of the ILO supervisory system (including its interaction with other areas of the ILO), including the CEACR, the CAS and the Office.

iii. That the Employer and Worker Vice-Chairpersons meet with the CEACR before they started their work each year and for the CEACR to have far greater interaction with Employers' and Workers' bureaux within the ILO in order to strengthen cooperation and governance. The CEACR should have a tripartite agreed framework in which to do its work, noting that in past years, the Employer members had proposed changes to the format of reports of the CEACR with a view to have tripartite views better reflected. More precisely, the Employer members proposed that there should be possibilities for Employers, Workers and Governments to set out their views on standards supervision-related issues (including on the application and interpretation of particular Conventions) in CEACR reports.

iv. An urgent review of the International Labour Standards Department of the Office was required. The role of ILO officials required respect for the tripartism and impartiality in their work. Their role was to support and facilitate the work of the ILO tripartite constituents, which required neutrality and balance. It required staffing with politically neutral international civil servants that supported the work of the CEACR not the CEACR supporting the work of the Office. Neutrality would help create legitimate and respectful international industrial relations between governments, employers and workers.

[154] Id, para 150.
[155] Id, p. 27/4.

v. Greater respect for the relationships with other international agencies to ensure that the views of the ILO were those of the tripartite constituents.[156]

110. The 2012 ILC session was an important event in that it reflected the Employers' strong and longstanding opposition to the 'right to strike' in C87 and the CEACR's (and the Office's) role in propagating the same. While it is regrettable that such incident occurred, it ultimately helped to elucidate the difference of opinions in respect of C87 and any 'right to strike' as well as the inconsistency between the CEACR's mandate and its practice.

4. Tripartite Meeting on C87 in relation to the right to strike and the modalities and practices of strike action at the national level, 2015

111. Following the events of the 2012 ILC, a wide-ranging discussion took place in the GB on the best way to address the 'right to strike' issue, as well as on how to strengthen the standards supervisory system.

112. At its 322nd Session (30 October – 13 November 2014), the GB decided, *inter alia*, to:[157]

i. Convene a three-day tripartite meeting in February 2015 on: (i) the question of C87 in relation to the right to strike; and (ii) the modalities and practices of strike action at the national level; and

ii. Place on the agenda of its 323rd Session, the outcome and report from this tripartite meeting on the basis of which the GB would take a decision on the necessity or not for a request to the ICJ to render an urgent advisory opinion concerning the interpretation of C87, in relation to the 'right to strike'.

[156] Id, para 153.
[157] ILO, 'The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards', GB.322/INS/5(Add.2), November 2014.

113. The Office prepared a detailed background document for the tripartite meeting, which contained a comprehensive analysis of modalities and practices of strike action at the national level.[158]

114. The Tripartite Meeting took place in February 2015 with the presence of 32 Government, 16 Employer and 16 Worker representatives.[159] At the beginning of the meeting, the Workers' and Employers' Groups presented their Joint Statement, which had been negotiated between the IOE and the International Trade Union Confederation ('ITUC'), to the Government Group.[160]

115. The Joint Statement begins with the sentence: "*The right to take industrial action by workers and employers in support of their legitimate industrial interests is recognised by the constituents of the International Labour Organisation.*" It continues to detail the following: (i) the mandate of the CEACR; (ii) CAS conclusions and the approach to deciding the list of cases to be discussed by the CAS; (iii) improvements of the functioning of the supervisory procedures (i.e. CFA, Art 24 representations, Art 26 complaints); and (iv) modalities for a new body to review ILO instruments, called the Standards Review Mechanism ('SRM').[161]

116. There is no mention in the Joint Statement of the 'right to strike' or C87 because there was (and is) no agreement between the Workers' and Employers' groups that there is a relationship between the 'right to strike' and C87, nor that C87 protects the 'right to strike'. However, it is clear - both from the Joint Statement and generally - that the issue at stake is not the existence or recognition of the 'right to strike' (or the right to take industrial action) at the national level but its inclusion under the scope of Convention 87. Employers and many Governments consider that the limits and conditions of any 'right to strike' must be discussed and agreed by ILO's constituents in a tripartite manner by setting a new standard or amending C87 to include the 'right to strike' within its remit,

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[158] ILO, 'Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised)', TMFAPROC/2015, 2015.

[159] ILO, 'The Standards Initiative - Appendix II - Final report of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level', GB.323/INS/5/Appendix II, March 2015 **[ILO Dossier Document No. 107].**

[160] ILO, 'The Standards Initiative - Appendix I', p. 1.

[161] Id, pp. 1-3.

whereas Workers consider that CEACR guidance is the only legitimate source of interpretation with no need for tripartite negotiations or discussions.[162]

117. The GB Government Group statement[163] that was also adopted at the Tripartite Meeting in 2015 indicates that the Governments' understanding is that while the 'right to strike' is linked to freedom of association, its scope and conditions are regulated at the national level (thus not at the ILO and not in C87 or the CEACR's comments and observations on the same). Moreover, even though the GB Government Group indicated its readiness to discuss the exercise of the 'right to strike' in the ILO, in the (unspecified) forms and framework that would be considered suitable, such substantive discussion has never taken place at the GB or ILC to date.

5. 349th bis and ter (Special) Sessions of the Governing Body, November 2023

118. In response to the Workers' request for a special session of the GB in November 2023 to discuss a referral of the 'right to strike' dispute to the ICJ, the Employers requested a special session at the same GB session to discuss standard-setting for a Protocol to C87 on the 'right to strike'.[164]

119. The IOE prepared extensive comments on the background papers prepared by the Office for the two sessions. In those comments the IOE (on behalf of Employers) argued that standard setting[165] is the most obvious, appropriate and logical step towards defining

[162] ITUC, 'Comments of the International Trade Union Confederation (ITUC) on the Office background report regarding the request of the Workers' group to urgently refer the dispute on the interpretation of Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution', 6 October 2023, pp. 8, 14-16 and 18 **[ILO Dossier Document No. 24]**.

[163] ILO, 'The Standards Initiative - Appendix II', p. 4**.**

[164] ILO, 'Letter signed by 14 regular members of the Employers' group to the Chairperson of the Governing Body, dated 12 September 2023', 18 September 2023 **[ILO Dossier Document No. 16].**

[165] IOE, 'Comments to the background report prepared by the Office titled "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"', 24 October 2023, **[ILO Dossier Document No. 25]**. *See* also Annex D - Table of Countries Supporting Addressing the Right to Strike Dispute through Standard Setting. In this context it is noteworthy that, in May 1992, the representative of the Government of Colombia in the GB proposed that the GB place a standard-setting item concerning the 'right to strike' on the agenda of the ILC. *See* ILO 'Agenda of the 81st (1994) Session of the Conference', GB.253/2/3(Rev.), May-June 1992, p. 9, paras. 35-38 and pp. 21-22. This proposal was supported by other governments representatives, for example, the Governments of Morocco and Venezuela. *See* ILO Minutes of the 253rd Session, GB. 253/PV(Rev.), May-June 1992, pp. I/12-I/13 and p. I/16, respectively.

authoritative ILO rules on the 'right to strike', and thus to resolve the dispute over the proper 'interpretation' of C87.[166] The IOE also stressed that standard-setting was linked to the ILO's core mandate and reflected the ILO's core values of tripartism and social dialogue and that only standard-setting would ensure that all ILO constituents could actively engage in the process, that any solution achieved was based on consensus or at least a broad majority, and that any outcome adopted was universally relevant and accepted.

120. In their proposal of November 2023,[167] the Employers proposed that the ILC adopt a legally binding instrument on the 'right to strike' or more broadly on industrial action, in particular a Protocol to C87. The objective of this Protocol would be to authoritatively determine a 'right to strike', as well as its scope and limits, in an International Labour Standard, and in this way put an end to the ongoing dispute about the 'right to strike' in existing ILO instruments and in particular, C87.

121. However, following the vote[168] on the Workers' request to refer the 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)"* to the ICJ, taken the day before the 349th GB session at which the Employers' proposal on standard setting was to be discussed, the discussion on the Employers' proposal was in effect rendered moot.[169]

[166] IOE, 'Comments to the background report prepared by the Office'.
[167] Ibid; ILO, Minutes of the 349th ter (Special) Session of the Governing Body of the International Labour Office, GB.349ter/PV, November 2023, para 9 **[ILO Dossier Document No. 33]**.
[168] ILO, Minutes of the 349th bis (Special) Session of the Governing Body of the International Labour Office, November 2023, GB.349bis/PV, paras. 145-146 **[ILO Dossier Document No. 31]**.
[169] *See* ILO, Minutes of the 349th ter (Special) Session, Annex IV.

V. APPLICATION OF THE VIENNA CONVENTION OF THE LAW OF THE TREATIES

A. The Key Articles from C87

122. The CEACR has drawn its interpretations on the conditions, scope and limits of the right to strike from the following provisions in C87:

> *Article 3(1): Workers' and employers' organisations 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.*
>
> *Article 10: In this Convention the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.*

123. The subsequent application of the treaty interpretation rules of the VCLT to these provisions will show that neither an abstract right to strike nor a right to strike as defined in detail by the CEACR can be derived from C87.

B. Article 5 Treaties constituting international organizations and treaties adopted within an international organization.

124. Article 5 of VCLT provides *"[t]he present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization*."

i. Article 5 applies to in respect of treaties adopted within an international organisation.[170]

[170] Rather than through the convening of a diplomatic conference; albeit *"the distinction between treaties adopted 'within' an international organisation and those adopted at a diplomatic conference may not be of real significance or may become blurred in practice"* since *"many international organisations…decide on pragmatic or logistical grounds whether to adopt the text of the treaty within the organisation or instead to convene a diplomatic conference"*. *See* Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Springer 2018), p. 94.

ii. It is not expected to be in dispute that Article 5 of the VCLT is here engaged: it is a matter of historical record that C87 was adopted within the ILO.[171] The Workers have previously also acknowledged that Article 5 applied to the dispute on whether C87 contains a right to strike.[172]

iii. Where Article 5 is applicable, although the usual rules of treaty interpretation continue to apply pursuant to the Articles 31 and 32 of VCLT, Article 5 offers further flexibility to the interpretative task. This is because Articles 31 and 32 apply *"without prejudice"* to the *"relevant rules"* of the organisation – so creating a *lex specialis* for the benefit of the international organisation. This general reservation was adopted to respect the peculiarities of international organisations and their methods of operation, and to protect their ability to capacity-build. It seeks to enhance the effective performance of these organisation and organs.[173]

iv. Although the phrase *"relevant rules"* was not expressly defined in VCLT 1969, it was so defined by Article 2(1)(j) in VCLT 1986 to mean *"in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organisation"* (emphasis added). It is submitted that this definition is equally applicable with regard to VCLT 1969.[174] Indeed, this definition accurately captures that *"relevant rules"* was intended to encompass settled practices: the phrase was introduced by the statement of the Drafting Committee Chairman, who referred to *"relevant rules"* as including *"unwritten customary rules"*.[175]

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[171] ILC, Record of Proceedings, 1948, pp. 268-269 **[ILO Dossier Document No. 163].**

[172] ITUC, 'The Right to Strike and the ILO: The Legal Foundations', March 2014, p. 69. The ITUC stated, *"The ILO is an international organisation and Convention 87 is a treaty adopted within the ILO. Therefore the reservation applies. It follows that, as a principle, the rules of the ILO take precedence over the rules contained in the VCLT."*

[173] Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg 2018), art 5, para 30.

[174] Id, para 15: *"the definition fully applies to the 1969 Convention as well"*. *See* also Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Springer 2018), p. 94. The learned authors' submissions are unsurprising: the point follows from the structural and textual identities between Article 5 VLCT 1969 and VCLT 1986 (notwithstanding some nuance – including in respect of the fact that the term in question is expressly defined in VCLT 1986).

[175] UN Conference on the Law of the Treaties, 'Extract from the Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)', A/CONF.39/C.1/SR.28, March-May 1968, p. 147. During the second Session, Sir Francis Vallat (United Kingdom) said: *"At the first session of the Conference his delegation had proposed…the addition of the words 'and established practices' after the word 'rules' in order to make it clear that the term*

v. The fact of Article 5 being particularly apposite to the "relevant rules" of the ILO is demonstrated by the ILO's comments on the International Law Commission's Draft Articles on the Law of Treaties 1966, the ILO pointed out the following areas of difference between its own rules and those laid down in the draft VCLT: authentication of Conventions, their revision, reservations and acceptance of obligations. The ILO expressed its understanding that *"these various categories of rules will continue to apply to the Constitution of the Organization and the instruments adopted within the International Labour Organisation, including international labour Conventions, even where they differ from the draft articles on the law of treaties."*[176]

125. There are three particularly important aspects of the ILO's *"relevant rules"*, which in turn shape the correct approach to the Court's interpretative task in the case at hand.

126. First, the ILO is grounded on tripartism. Tripartism is one of the four fundamental principles on which the ILO[177] is based and the tripartite nature of the organisation has been widely considered to provide the ILO with a 'unique advantage'[178] and to provide its actions (and in particular, the International Labour Standards that it sets and supervises) with legitimacy.[179] This means that tripartism arises not only as a matter of established practice but also, more fundamentally, as a structural feature of the ILO's constituent instruments including its Constitution. Tripartism in turn grounds the axiomatic and established practice by which the ILO functions through interaction between its constituents. The need for interaction between constituents is crucial to the ILO's legitimate functioning.[180] It is *a fortiori* crucial for finding sustainable and accepted answers to contested issues, such as the question of the right to strike in C87.

"rules" was not to be understood in too restrictive a sense. His delegation had not pressed that amendment to the vote, because, as the Chairman of the Drafting Committee has pointed out…the Drafting Committee had taken the view that the term 'rules' applied to both written and to unwritten customary rules." See UN Conference on the Law of the Treaties, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, April-May 1969, p. 4.

[176] Anne Trebilcock, 'International Labour Organization', in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Law of Treaties* (CUP 2016), p. 6.

[177] ILO, Declaration of Philadelphia (1944), art 1(d); *See* also Trebilcock, , p.7.

[178] ILO, 'Declaration on Social Justice for a Fair Globalization'.

[179] *See* Maupain, p. 7.

[180] For instance, ILO Conventions for their adoption require a majority of two-thirds of the votes cast in plenary by the delegates present at the International Labour Conference. Thus, adoption of an instrument is possible only with the support of employer and/or worker delegates, in addition to those from government.

127. Indeed, the axiomatic role of tripartism in the functioning and governance of the ILO is evident from C87 itself. As developed further below, C87 provides for a set of rights that apply to workers' and employers' organisations; and C87 was negotiated and passed in a final vote by the ILC, structured in the normal way, with government, employer and worker members all present and represented. It is the only ILC that has the competence and authority under the ILO's Constitution to adopt International Labour Standards and/or to revise, abrogate or withdraw the same.[181] It follows that the ILC has full authority and competence to clarify the meaning (and therefore the legitimate interpretation) of any existing International Labour Standard through standard setting as and if required. In fulfilling its interpretative role, the ILC is driven by a desire for tripartite consensus, wherever possible.

128. When considering the object and purpose of C87, tripartism – and tripartite interaction and cooperation in the course of standard setting – are a touchstone of analysis. To put the point another way, a correct understanding of the meaning of an ILO Convention like C87 requires the rights established to be understood within their organisational framework; as a result of which, principles are not to be dynamically evolved beyond the bounds of tripartite cooperation.

129. Second, a key rule within the ILO, which is closely related to tripartism, concerns the special importance attached to preparatory work. The special importance attached to such material arises in view of the tripartite interaction and cooperation involved in standard-setting, which the preparatory work elucidates.[182] Indeed, the observer of the ILO, Dr C. Wilfred Jenks, noted at the 1968-9 Vienna Conference that ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in the eventual Article 32 of VCLT.[183]

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[181] ILO, Constitution, art 19(1); ILO, 'Standing Orders', arts. 44-52.

[182] Indeed, this was stated in terms in the Report for the Governing Body, provided to the Governing Body prior to its decision on whether to refer the question in hand to this Court. *See* ITUC, 'The Right to Strike and the ILO'. Whilst ITUC itself notes that the Committee of Experts, on which it heavily relies, purports to recognise the need to *"take into account the Organization's Practice of examining the preparatory work…[which] is especially important for ILO Conventions in view of the tripartite nature…and the role that the tripartite constituents play in standard setting."* It is a different matter that, in reality, the CEACR does not adequately or appropriately do so.

[183] UN Conference, Official Records - First Session, A/CONF.39/11, March-May 1968, p. 37, para 12. Dr C. Wilfred Jenks, who was the ILO Director General from 1970-1973, mentioned that "*ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in the related article of the VCLT (article 28 at the tim*e)."

130. Third, since established practice forms part of *"relevant rules"*, the Court must be particularly careful to ensure it has correctly understood what the subsequent practice of the international organisation in question is. In particular, the Court should ensure that its analysis of subsequent practice adequately respects established practice – and, so, fidelity to the organisation's relevant rules (i.e. tripartite interaction and cooperation). Its analysis of subsequent practice for the purpose of Article 31(3)(b) should not sit inconsistently with those rules.

1. VCLT as Customary International Law: Retroactivity and General Application

131. Applicability of the VCLT is not hindered by the fact that not all State parties to C87 have ratified it, nor because the VCLT was adopted after C87, which might ostensibly be problematic given that by Article 4 of VCLT is not retroactively applicable. C87 has been ratified by 158 member States to date, but not by some countries of chief industrial importance (Brazil, China, India and United States of America).

132. However, the key rules of the VCLT, including Article 31 (the general rule of interpretation) and Article 32 (the rule on supplementary means of interpretation), also apply as customary international law.[184] This has been recognised by the ICJ and other international courts.[185] The rules in Articles 31 and 32 can therefore in principle also be applied to treaties concluded before the VCLT entered into force in 1980, and treaties between States that are not all parties to the VCLT, such as C87.[186]

[184] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, ICJ Reports 2000, p. 625 [37]; *Kasikili/Sedudu Island (Botswana/Namibia*), Judgment, ICJ Reports 1999, p. 1045 [18]; International Law Commission, Report of the International Law Commission – Chapter IV: Subsequent agreements and subsequent practice in relation to the interpretation of treaties, 2013, p. 17/18 (Conclusion 1. General Rule and means of treaty interpretation).
[185] Dörr, Article 31, para 6: "*The view of the ICJ that the Vienna rules of interpretation are without any distinction universally binding as customary international law is widely shared by other international courts, such as ITLOS, the ECtHR, the ECJ and the dispute settlement bodies of the WTO, as well as by many arbitral institutions and some national courts*".
[186] Id, para 7.

C. Article 31 General Rule of Interpretation

1. Article 31(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

133. The general rule of interpretation in Article 31(1) is a single combined operation, which considers all the elements of this Article simultaneously.[187]

134. As the WTO Appellate Body has described it, the process of analysis is *"an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise"*.[188] Thus, *"finding the ordinary meaning typically requires making a choice from a range of possible meanings. The immediate and more remote context is the next textual guide, with good faith and the treaty's object and purpose as further aids to this phase."*[189] This means it is erroneous to approach 'ordinary meaning' in Article 31(1) as if it is a separate, or even the sole, interpretative element, without reference to context and 'object and purpose'.

135. However, neither context nor 'object and purpose' are to be taken as a mandate for a general teleological approach;[190] as the ICJ emphasises in its jurisprudence, the interpretation must be based "*above all*" upon the text of the treaty.[191]

136. Thus, Article 31(1) interpretation as with Article 31 interpretation more generally is a *"process of progressive encirclement"*; and it is by *"cycling through"* each element that the interpreter *"iteratively closes in upon the proper interpretation"*.[192] Seen in this light, sequential analysis of the different phrases within Article 31(1), starting with 'ordinary meaning', simply reflects the need to start somewhere by reading the words of the treaty.

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[187] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya) Preliminary Objections*, Judgment, ICJ Reports 2017 [64]; Dörr, Article 31, para 38.
[188] WTO Appellate Body, 'China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products', WT/DS363/AB/R, 2009, para 399.
[189] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015), p. 222.
[190] Id, p. 2/55.
[191] Dörr, Article 31, para 39; *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, Judgment, ICJ Reports 2004, p. 279 [100]; *Territorial Dispute (Libyan Arab Jamahiriya/Chad),* Judgment, ICJ Reports 1994, p. 6 [41].
[192] *Aguas del Tunari v Bolivia* (ICSID ARB/02/03), Award of 21 October 2005, para 91, as considered in Gardiner, p. 2/55.

It does not mean there is any hierarchical or chronological preference between the elements in Article 31(1). Indeed, whilst the interpretation must be based "*above all*" upon the text of the treaty – as reflecting the parties' common intention – there is no hierarchy between the provisions of Article 31 as a whole, each of which is a valuable guide to the treaty's meaning.[193]

(a) Ordinary meaning

137. The "*ordinary meaning to be given to the terms of the treaty*" denotes the "*common intention of the parties*".[194] Ordinary meaning is the meaning that is regular, normal or customary; reflecting what a person reasonably informed on the subject matter of the treaty would make of the terms used.[195] In considering the ordinary meaning to be given to the terms of the treaty, it is appropriate to compare them with the terms generally or commonly used in order to convey the idea conveyed by those terms.[196]

138. First, in Article 3(1) of C87, the noun 'activities' is the object of the verb 'organise.' Beginning with a focus on only those words, whilst it is clear that Article 3 is concerned with the ability of an organisation to govern and order itself and conduct associated activities, the plain words (in isolation) leave an ambiguity as to the bounds of its right to do so.[197]

139. Second, 'organise' is defined by the Oxford English Dictionary as *"to arrange into a structured whole; to systematize; to put into a state of order…"* Similarly, Oxford Languages dictionary defines it as *"1. Arrange systematically; organise; 2. Make arrangements or preparations for (an event or activity)"*. The relevant ordinary meaning of *"organise",* then, although also somewhat ambiguous, appears to be for employers' and workers' organisations to be able to structure, arrange, systematise and/or order their activities; in other words, the meaning seems to be focused upon their right to formulate

[193] Dörr, Article 31, para 38.
[194] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) section 3, para 9.
[195] Dörr, Article 31, para 40.
[196] *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras: Nicaragua intervening)* [1992] ICJ Rep 351, para 380.
[197] *Competence of the General Assembly for the Admission of a State to the United Nations,* Advisory Opinion, ICJ Reports 1950, p. 8.

and prepare their activities.[198] This suggests that the focus of the word 'organise' concerns the ability of a relevant organisation to govern and order itself.

140. Third, 'activities' is defined by the Oxford English Dictionary as *"the state of being actively occupied; brisk or vigorous action; busyness; liveliness; vigour."* Oxford Languages Dictionary defines it as *"1. The condition in which things are happening or being done, 2. A thing that a person or group does or has done."* 'Activities' is caught by the verb 'organise'; so, the right being bestowed is one to formulate, prepare, systematise, arrange and/or order those things that it wishes to do. However, the 'activities' of workers' organisations covers a broad range of matters, with no clear or definite scope.

141. The matter would have been clear *if* the parties had included wording related to a right to strike in C87, e.g. if they had added to the sentence in article 3(1) of C87 the words "*to organise strike action*" or "*to engage in industrial action*" or similar (or, vice versa, had specified that "*the right to strike is not covered by this Convention*").[199] In the absence of possible more precise wording, the only reasonable conclusion is that the ordinary meaning of the terms "*to organise their … activities*", as such, does not provide a clear answer to whether those words cover a right to strike.

(b) Context

142. As is stipulated in Article 31(1), the ordinary meaning of treaty terms have to be interpreted "*in their context*".[200] The context will include the remaining terms of the

[198] The ITUC 2014 Document (ITUC, 'The Right to Strike and the ILO') notes that the term "*activities of an independent trade union"* in UK law includes strike action. However, plainly this does not mean the term *"activities"* in C87 (an international ILO convention with a specific object and purpose, passed at a specific time) necessarily must have the same meaning. Indeed, the argument simply disregards the context of C87 - as set out in subsequent paragraphs - which does not contain any limitations on the right to strike.

[199] Examples for both alternatives are, for instance (emphasis added): the International Covenant on Economic, Social and Cultural Rights (ICESCR), art 8 provides: *"1. The States Parties to the present Covenant undertake to ensure: "[…] (d)* ***The right to strike****, provided that it is exercised in conformity with the laws of the particular country"*; on the other hand, the Treaty on the Functioning of the European Union (TFEU), art 153 states *"1. […] the Union shall support and complement the activities of the Member States in the following fields: …. 5. The provisions of this Article shall not apply to pay, the right of association, the* ***right to strike*** *or the right to impose lock-outs."*

[200] *Young Loan Arbitration* 59 ILR 495: *"…the vagueness of the terms used in the English and French texts…cannot be eliminated by textual interpretation, the words to be construed must, under Article 31(1) of the Vienna Convention on the Law of Treaties, be interpreted 'in their context'".*

sentence and of the paragraph; the entire Article at issue; and the remainder of the treaty text including its preamble[201] and annexes – as well as the extrinsic context mentioned in Articles 31(2) and (3).[202] Interpretative value can also be found in the position of a particular word in a group of words or in a sentence, and of a particular phrase or sentence within a paragraph.[203]

143. The common intention of the parties regarding the terms of the treaty when seen *"in their context"* does clearly indicate that neither Articles 3 or 10, nor C87 more broadly, contain a right to strike. Instead, it is clear that the right to strike is outside their bounds. This is clear for the following nine reasons.

144. First, the phrase *"organise their activities"* refers back to both *"workers' and employers' organisations"* having the right to organise. The conceptual thread in Article 3 applies to employers and workers, and so a reasonable meaning ought to have equal value and applicability to both workers' and employers' organisations. The right that has this equal value is a right to organise which guarantees something to both workers and employers. The right to strike is plainly not such a right to organise with equal value. Instead, an obvious example of such a right, of equal value, is the right to come together in the first place and form a body which then has the right to order itself. However, the right to strike is not a right that is for the benefit of only one group.

145. Second, considering the key words in context, the right of workers' and employers' organisations to *"organise…their activities"* is but one part of a longer list, also including a right to *"draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration…and to formulate their programmes."* Article 3 provides a list of the rights that an organisation has once it has come together as a body,[204] and are required for the body to meaningfully exist and function as an association.

[201] *Case concerning Rights of Nationals of the United States in Morocco, France v United States*, Judgment, Merits, ICJ Reports 1952, p. 176.
[202] Villiger, pp. 110-111.
[203] Dörr, Article 31, para 44.
[204] Once it has enjoyed the right to establish itself and have members join pursuant to Article 2.

146. The conceptual thread running through Article 3 is therefore one about the ability of an organisation to organise *per se*. In other words, the process of an organisation being able to exist as a coherent and defined body, and for that organisation to then be able to order and govern itself. The reference to 'activities' in Article 3 must be read consistently with that conceptual thread.

147. Seen in this light, 'activities' does not seem to relate to *all* activities of workers organisations, but instead those concerning the ability of the organisation to come together as a coherent body, govern itself, and conduct activities amongst members. There are many examples of meaningful 'activities' of this type such as the organisation of meetings and conferences; the delivery of member services, such as legal advice and training; the advocacy for a legal framework that is conducive to workers' or employers' needs; or the implementation of campaigns to acquire new members – all of which are valuable, basic, and hard-won rights *per se*. In addition, all of these rights are internal to the organisations, in that they provide scope for the organisations to exist and conduct meaningful organisational activity, but without propagating a conflict of rights in society through social conflict and economic disruption, as strike necessarily does. This conception of activities therefore has a principled grounding, and a robust conceptual distinction that helps delineate 'activities'.

148. It is no argument in response to suggest that the ability to strike is so fundamental to workers' organisations that the reference to 'activities' in Article 3 must include it. First, such an argument is question-begging; it subverts the proper approach to analysis. It cannot be presupposed that the word 'activities', regardless of the context in which it is used, must extend to a right to strike in C87. Indeed, secondly, it is clear that not every workers' organisation does (or even wishes to have) the right to strike. For example, in many countries around the world, the right to strike is linked to collective bargaining. Workers' organisations that do not fulfil the requirements for collective bargaining may therefore have no right to strike; but will still stand to benefit from the broader set of rights to organise, self-govern, and conduct activities amongst members. Given that there are various other typical and significant activities of workers' organisations, such as those mentioned above,[205] it cannot be seriously argued that Article 3 does not make sense if it

[205] *See* para 147.

does not include strikes. Precisely because it is on the other end of the scale and has such significant impact on and the ability to curtail the rights of others, the right to strike needs to be treated separately (in another international instrument or in different provisions) – including because there is an obvious need to clearly identifying its limits and the role of states in regulating it.

149. Thus, the IOE's position leaves Article 3 as one which provides an effective right: for an organisation, once formed, to order itself so that it may meaningfully exists as an associative body between members. It is wrong to suggest that such an interpretation is inconsistent with the principle of effectiveness, or that the principle of effectiveness necessarily gives rise to a right to strike.[206] Indeed, that suggestion devalues the historic context of the hard won rights set out above (to come together, to self-govern, and to conduct activities amongst members) to suggest that, without a right to strike, the meaning of 'activities' is ineffective.

150. Third, in the face of the ordinary contextual meaning of the words as elucidated above, if the parties' intention had been to protect the right to strike, then one would have all the more expected the parties to include clear wording related to a right to strike in C87, e.g. words such as "*to take lawful action in respect of strikes*" or "*to engage in and respond to industrial action*".[207] Indeed, strikes and other issues of relevance in this context were well-known in 1947 and 1948, when C87 was established;[208] if the right to strike was at the very core of 'activities', then in order to avoid any misunderstanding it would have been natural to explicitly list the right to strike in Article 3(1).

[206] ITUC, 'The Right to Strike and the ILO', pp. 85-86.

[207] For instance (emphasis added): art 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides: *"1. The States Parties to the present Covenant undertake to ensure: "[…] (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country."*

[208] *See* ILC, Record of Proceedings, Report of the Committee on Freedom of Association, 1947, pp. 299-308 **[ILO Dossier Document No. 149]**; ILC, Record of Proceedings, Record vote on Resolution to place on the agenda of the next session of the Conference, 1947, p. 319 **[ILO Dossier Document No. 150];** ILC, Record of Proceedings, Report of the Committee on Freedom of Association, pp. 322-329 **[ILO Dossier Document No. 151]**; ILC, Record of Proceedings, Appendix X, Freedom of Association and Industrial Relations, 1947, pp. 561–578 **[ILO Dossier Document No. 152];** ILC, 'Resolution concerning the Agenda of the 1948 session of the International Labour Conference', 1947 **[ILO Dossier Document No. 153]**; *see* also ILO, Record of Proceedings, 1947 contains around 70 references to the terms 'strike,' 'strikers', 'lock-out' and 'right to strike'. There are also some 40 such references in ILO, Record of Proceedings, 1948.

151. It would not be reasonable to suggest that the omission of reference to a right to strike is meaningless *"since Article 3 does not specify any particular activities"*.[209] Article 3 does not need to specify activities since, as explained above, that is not the conceptual focus of this article. Instead, the reference to a right to *"organise…activities"* co-exists alongside a series of rights concerning the right of organisations to order themselves and conduct activities amongst members (i.e. to *"draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration…and to formulate their programmes"*).

152. Fourth, nothing in Article 10, which is essentially definitional, alters the analysis above; rather it corroborates the analysis above. Article 10 simply describes the type of organisation that has the right to associate and organise, in the manner described above; it does not alter the conceptual thread of the words. Indeed, reading Article 3 in light of the definition of organisation in Article 10 simply produces: *"[w]orkers' and employers' organisations [for furthering and defending the interests of workers and employers] 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."* This simply clarifies the sub-set of workers' organisations who benefit from the protections of C87 and Article 3, in respect of their right to associate and organise *per se*. The fact such organisations (trade unions) seek to "*further and defend the interests of workers"* is conceptually distinct from the existence of a right to strike.

153. Fifth, looking at the provisions of C87 as a whole, if the term '*activities*' were to include the 'right to strike', the scope and limits of that right should have been determined somewhere in C87. As even the CEACR has regularly pointed out, the right to strike is not an absolute and unlimited right.[210] It would not be meaningful to state a '*right to strike*' in an international instrument without at least indicating in a general manner what its scope and limits are, or who would be competent to determine its scope and limits.

    i. The lack of any specification of its scope and limits would suggest the right to strike is beyond the bounds of C87. Otherwise, the only other interpretation is that the right

[209] ITUC, 'The Right to Strike and the ILO', p. 78.
[210] ILO, 'Giving globalization a human face', para 119.

to strike is guaranteed by Article 3 as an unqualified and absolute right. It is manifestly absurd and unreasonable to suggest that the right to strike is an unqualified or absolute right, akin to peremptory norms e.g. the absolute prohibition against torture.

ii. Connected to this is the context that ILO Conventions are not only meant to provide binding instructions for action by State parties, but that the implementation of these instructions is meant to be supervised in the ILO standards supervisory procedure. However, the establishment of a right to strike in an ILO Convention without defining its limits or the institution responsible for defining these limits cannot be supervised.[211] As mentioned below, the preparatory notes proved that the intention was precisely to exclude the right to strike from C87, which explains why there is no reference at all to any limits or proportionality in the use of this powerful tool.

iii. The proposed interpretation produces a result that is manifestly absurd and/or unreasonable, such that the requirement for good faith precludes it.[212] The production of unreasonableness/absurdity indicates that, in reality, the right to strike is simply beyond the bounds of C87.

154. Sixth, it is well established that the preamble of a treaty is relevant context to its interpretation.

i. The Preamble of C87 states first as the object and purpose: *"to adopt, in the form of a Convention, certain proposals concerning freedom of association and protection of the right to organise".* It then refers to the ILO Constitution and the *"recognition of the principle of freedom of association"* as a means of improving conditions of labour and of establishing peace, as well as to the Declaration of Philadelphia (which is a part of the ILO Constitution) which reaffirms that *"freedom of expression and of association are essential to sustained progress".* The Preamble finally, and importantly for present purposes, mentions the principles regarding freedom of

[211] Also the CEACR realised this although it drew the opposite conclusion from this when it stated: *"in the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject*". *See* ILO, 'Freedom of Association and Collective Bargaining – General Survey', 1994, p. 64, para 145.
[212] ITUC, 'The Right to Strike and the ILO', p 10.

association that were adopted by the ILC at its 30th Session in 1947. It also mentions that these principles were endorsed by the UN General Assembly at its second session and that the General Assembly requested the ILO to continue every effort in order to adopt one or several international Conventions.

ii. It is necessary to identify what the *"unanimously adopted…principles"* by the ILC at its 30th Session are, *"which should form the basis for the international regulation."*[213] The Record of Vote shows that the ILC voted to place two separate matters on the agenda of the 30th Session: (i) *"the questions of freedom of association and the protection of the right to organise, with the view to the adoption of one or several Conventions at that Session,"* as distinct from (emphasis added) *"the Questions of the Application of the Principles of the Right to Organise and to Bargain Collectively."*[214] The distinction made is a conceptual one: between adopting a Convention on freedom of association and the right to organise, generally – as distinct from the subsequent and separate question, of how principles on the right to organise would be applied,[215] and on collective bargaining (a process that itself falls conceptually short of strike action as collective bargaining is distinguishable from going on strike). This shows that C87 was adopted with the presupposition: (i) that it was to focus on more general, basic associational rights; and (ii) of a conceptual distinction between freedom of association on the one hand, and specific types of trade union action against employers on the other. It is the right of "*workers*" to organise as different from the right of workers (or employers) to use collective action to defend their interests.

iii. Indeed, there was no mention in any of the principles adopted at the ILC's 30th Session of 'strikes' or industrial action.

155. Seventh, considering Articles 3 and 10 within the context of all the Articles of C87 as a whole, further corroborates that a right to strike is not found in Articles 3 or 10 and is outside the bounds of C87. Articles 2 to 10 are in Part I (*"freedom of association"*) and

[213] This analysis of preambular text is squarely part of the primary means of interpretation in Article 31; and not simply supplementary means of interpretation pursuant to Article 32 (notwithstanding its heightened importance for ILO Conventions).
[214] ILC, Record of Proceedings, 1947, p. 319.
[215] I.e., specific incidents of that principle and their implementation.

Article 11 is the sole Article in Part II (*"protection of the right to organise"*). Taken as a whole, it is clear that the context of C87 is about the creation of basic and sequential associational rights, regarding the ability of a workers' or employers' organisation to order itself and exist as a coherent entity, govern itself, and conduct activities amongst members.

i. **Article 2**: protects the right to establish and join organisations, in the first place. It is in that context that Article 3 then follows on, providing the rights for such organisations to organise themselves in a manner that enables them to function.

ii. **Article 4**: is, like Article 2, about the right of organisations to exist – in that they are protected from being dissolved or suspended by administrative authority.

iii. **Article 5**: concerns the right of individual organisations to in turn establish and join federations and confederations, and to affiliate (i.e. associate) with international organisations. It is therefore also about the right of relevant organisational bodies to establish themselves.

iv. **Article 6:** simply repeats the rights in Articles 2 to 4 in respect of federations and confederations.

v. **Article 7:** governs the acquisition of legal personality – a matter concerning the establishment of an organisation, and its self-governance. It also reiterates that the protections of Articles 2 to 4 must be substantive.

vi. **Article 8:** does not detail specific limits to the rights of employers' and workers' organisations (as might be expected if it contained a right to strike), but instead stipulates that the exercise of the rights under the Convention *"shall respect the law of the land".* Moreover, the general legal limit is further accentuated by reference to *"other organised collectivities".* The municipal law applying to 'other collectivities' (like NGOs, or hobby/sports organisations), may shed relevant light on the right of organisations to exist, self-govern or conduct activities amongst members, and its limits. However, it will not shed light on limitations to the right to strike – since the right to strike has no application to 'other organised collectivities' in society, more

broadly, like NGOs. Article 8(1) and the drafting by reference to 'other organised collectivities' therefore confirms that the right to strike (indeed, even the right to collective bargaining) is outside the scope of C87.

vii. **Article 9:** exempts the *"armed forces and the police"* from the scope of the Convention. However, this is a general provision regarding the ability of such security services to associate; it says nothing about the right to strike.

viii. **Article 11:** provides *"[e]ach Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."* This is an article of general statement concerning the right to organise for both workers and employers. In such a context, the phrase 'right to organise' is best elucidated in the manner set out above.[216]

156. The other contextual articles show that C87 sets out a sequence of rights, which is clearly about an organisation's functional ability to come into existence, exist as a coherent and legally recognised body, order and govern itself, and conduct activities amongst its members comparable to those of 'other organised collectivities'.

157. Eighth, it is well established that the title of a treaty is relevant context to its interpretation.[217] The title of C87 is *"freedom of association and protection of the right to organise convention"*. The focus of C87, per its title, is on the ability to associate, and protection of the right to organise; whilst, at the same time, there is no reference to a right to strike, or even to collective bargaining (cf. C98). This supports that the conceptual thread through Article 3 is as set out above;[218] and the right to strike is outside its bounds.

158. Finally, the form of words used in Articles 3 and 10 must be considered by reference to the organisational context of the ILO and its function. As ILO Conventions create obligations at the international level, it is essential that they use terms that are precise and

[216] *See* para 155.
[217] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, ICJ Reports 1996, p. 803 [47].
[218] *See* para 146.

unambiguous in legal systems worldwide. This means that C87, if it included rules on a right to strike, would have to provide definitions of strikes and their limits that are universally understood. The use of clear terms in ILO Conventions is particularly important for ILO member States to be able to decide whether to ratify them or not. Countries interested in ratifying C87 must be able to get at least a rough idea, from the text, of what their obligations are in the event of ratification. The fact that none of the relevant terms related to strikes is used in C87 and that it is not possible to derive the obligations provided by the CEACR from the text of C87 suggests that the right to strike is not within the scope of C87.[219]

(c) Object and purpose

159. The final words of Article 31(1) state that the treaty has to be interpreted "*in the light of its object and purpose*".

i. There exist various ways to determine the object and purpose of a treaty, which may be addressed in general clauses, the title, the preamble,[220] or may be derived from the type of the treaty or a reading of all its substantive provisions.[221] There is therefore substantive overlap with the sub-section above on identifying the contextual meaning of treaty provisions. That is wholly unsurprising and simply reflects the point above that Article 31(1) analysis is a single integrated operation.[222]

ii. The consideration of the object and purpose finds its limits in the ordinary meaning of the text of the treaty. It may only be used to bring one of the possible ordinary means of the terms to prevail, and cannot establish a reading that clearly cannot be expressed with the words used in the text.[223]

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[219] It would not be acceptable if these obligations only became clear from other sources, some of which are not easily accessible to the uninitiated, such as the CEACR comments or General Surveys on C87.
[220] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia),* ICJ Reports 2002, p. 625 [51].
[221] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, p. 177 [153]; Dörr, Article 31, para 55.
[222] *See* paras. 133-136.
[223] *Iran-US Claims Tribunal, Federal Reserve Bank of New York v Bank Markazi* Case A 28 (2000) 36 Iran-US Claims Tribunal Reports, p. 5 [58]: *"Even when one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text."*

iii. Subject to this textual boundary, it is now clear that in determining the object and purpose for Article 31(1), *"recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties"*.[224] Even if there remained doubt on this as a matter of general treaty interpretation, there is no scope for doubt in the context of C87 given the application of Article 5 of VCLT;[225] a consequence of which is to attach special importance to preparatory work in understanding the treaty's meaning.

160. The object and purpose of C87 was to create specific, basic, and sequential rights for employers and workers organisations to come together and exist as coherent bodies, govern themselves, and conduct activities within members. This is clear for five reasons.

161. First, it follows from all the provisions of C87 taken together.[226]

162. Second, this follows from the preamble of C87.[227]

163. Third, this follows from the title of C87.[228]

164. Fourth, this is evident from the preparatory work of C87,[229] including in particular the Chairman's comments shortly prior to the conclusion of the discussion on C87, and the Convention's vote to adopt Article 3. The Chairman stated, *"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."*(emphasis added)[230] This dovetails with the object and purpose identified from analysis of the text of C87 as a whole of creating

[224] International Law Commission, 'Guide to Practice on Reservations of Treaties', 2011, p. 359, Guideline 3.1.5.1.
[225] *See* para 129.
[226] *See* para 155.
[227] *See* para 154.
[228] *See* para 157.
[229] *See* para 129.
[230] ILC, Record of Proceedings, 1948, Appendix X, p. 477 **[ILO Dossier Document No. 164]**; ILC, 'Report VII - Freedom of Association and Protection of the Right to Organise', 1948, p. 84/85 **[ILO Dossier Document No. 158]**, the Office had concluded in similar terms: *"On the other hand, any proposed regulation purporting to regulate even the smallest problems which might arise in practice in each country would have obliged the majority of countries first to amend their national legislation, frequently with regard to points of detail, before they would be in a position to ratify the international Convention. And it is for this reason that* ***the Office has purposely refrained from proposing to the Conference any kind of "code or model regulations"*** *concerning freedom of association."* (emphasis added)

specific, minimum rights – not regulating the various manifestations of the right to organise or its practical implementation. Following the Chairman's comment, several States withdrew proposed amendments that had sought to establish conditions on the operations of workers organisations.

165. Fifth, this follows from the nature of the treaty as an ILO Convention. It is an established practice of the ILO that, when it wishes to establish worldwide rules on important social and labour topics, it does so through setting or revision of ILO Conventions and Recommendations. These procedures involve – and thus stress the importance of – wide tripartite participation in all steps.[231] After all, standard-setting, within the ILO's tripartite framework, is one of the core activities that is of fundamental importance to the ILO.[232] Where (i) an existing ILO Convention is felt to no longer regulate a particular issue in line with needs, or with adequate specificity, or where (ii) a new issue that is related to an existing ILO Convention is meant to be addressed, the ILO has in most cases (i) adopted a new Convention that revises an existing Convention, or (ii) adopted a Protocol that complements an existing Convention (respectively).

166. The ability to set standard through tripartite cooperation obviates the need for evolutive or 'creative' interpretation, as might otherwise be necessary in international organisations that have adopted conventions pertaining to human rights. The ability to set standards also obviates any incentive to seek to 'introduce' a right to strike although it does not exist in C87, for fear that such a right may otherwise not come into being within the ILO's treaty framework. This is because there is an available process that can and should be followed in order to welcome a nascent right through the front door by way of tripartite interaction and cooperation; and this in turn means there is no need to introduce it by the 'back door'.[233]

[231] *See* para 56.
[232] ILO, Centenary Declaration, art IV(A).
[233] In any event, such an approach (of bringing a right in through the 'back-door' because it is perceived to be important to include it) would more generally be inconsistent with the obligation to interpret in good faith, as it was clearly the common intention of the parties at the time of the treaty not to include the right.

167. Indeed, the ILO could for instance have adopted a Protocol to C87 on the right to strike,[234] or a new independent Convention on this topic as the Employers' Group has requested.[235] The position is not changed because the CEACR sought to develop itself rules on the 'right to strike' – since the CEACR too could and should have pointed out to the GB or the ILC any perceived 'gap' in ILO standards that it believed to exist; and suggested the initiation of a standard setting process on this item.[236] It should not have sought to fill that gap in a manner inconsistent with the relevant rules of interpretation.

(d) Conclusion on Article 31(1)

168. The process of 'progressive encirclement' is clear: the only reasonable interpretation of C87 (and particularly of Articles 3 and 10) is one that excludes the 'right to strike', as falling outside its bounds.

2. Article 31 (2) The context for the purpose of interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusions of the treaty

169. Article 31(2) mentions the entirety of the text of the treaty, as well as its preamble and annexes. It then proceeds to develop the understanding of 'context'[237] through subparagraphs (a) and (b), which refer to extrinsic context: agreements or instruments that are "*outside the treaty consensus but related to its development*".[238]

[234] As it happened with the Protocol of 2014 to the Forced Labour Convention, 1930, which was adopted by the ILC to address gaps identified in the Forced Labour Convention.
[235] ILO, 'Action to be taken on the request of the Employers' group'.
[236] The CEACR shows a problematic understanding of the competence of the ILO`s tripartite constituents in standard-setting and its own role in standards supervision when it states: *"In the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject."* ILO, 'Freedom of Association and Collective Bargaining - General Survey', para 145.
[237] Which might otherwise have been adequately captured through Article 31(1).
[238] Dörr, Article 31, para 62

i. An "*agreement relating to the treaty*", for the purpose of (a), may be one relating to the interpretation of certain treaty terms. As the term "*agreement*" is wider than *"treaty"*, it covers any contractual instrument and unwritten agreements.[239]

ii. As the agreement needs to be made by "*all the parties*", all the ratifying countries at the point of time of the conclusion of the treaty need to consent to the agreement. "*Parties*" to an ILO Convention are the ratifying member States represented by their governments; they are not merely member States who participated in the related standard-setting process and/or voted in the adoption of the Convention, without ratifying it afterwards.

iii. As regards the term "*in connection with the conclusion of the treaty*", Article 31(2)(a) does not specify more precisely at what moment in time the agreement must have been established. However, there is substantial consensus that it requires a certain temporal proximity to the process of conclusion.[240]

iv. Some commentators have observed that supplementary material (more traditionally considered as part of an Article 32 interpretative analysis) might also be regarded as extrinsic content for the purposes of Article 31(2). In this context, the more the material reflects growing agreement, the higher its interpretative value will be. Material derived from before the treaty was adopted will deserve particular attention (under Article 32) as being very *"close"* to the agreement of the parties.[241] Where such material tips over into reflecting an agreement or consensus of the parties, it will be considered extrinsic context under Article 31(2).[242] As outlined above in relation to Article 5 of the VCLT, it is already necessary to attach special importance to preparatory work in understanding the meaning of C87. In these circumstances, there is a reasonable basis to regard material from before the treaty was adopted as materials which may indicate consensus.[243] This is because such materials show why

[239] Villiger, para 18; Dörr, Article 31, para 66.
[240] Dörr, Article 31, para 65.
[241] Yves le Bouthillier, 'Article 32', in Oliver Corten, Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (OUP 2011), pp. 861-862.
[242] *Ambatielos (Greece v UK)* [1952] ICJ Rep at 28; *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3 at 65.
[243] Ian Siclair, *Vienna Convention on the Law of Treaties* (2nd ed, Manchester University Press 1984), p. 130: *"It has also been suggested that uncontested interpretations given at a conference by, for example, the chairman of a drafting committee may constitute an 'agreement' forming part of the 'context' of the treaty which is being*

the parties ultimately agreed what they did and may therefore be said to demonstrate a latent agreement, such that they ought to be considered under Article 31(2) as well as pursuant Article 32.[244]

170. There are two reasons why the extrinsic content pursuant to Article 32(1)(a) supports the interpretation reached above – by which the right to strike is outside the bounds of C87 (let alone Articles 3 and 10).

171. The first reason follows from a holistic assessment of the latent agreement that existed between all States in respect of Article 3 of C87. Article 3 was agreed in the form that it is in because States withdrew proposed amendments and proceeded to pass Article 3 once informed by the Chairman 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*." (emphasis added)[245] Thus, there was a latent agreement between the parties that Article 3 should only state certain fundamental principles; it should not enumerate anything beyond those axiomatic principles. That latent agreement shows the right to strike was outside the scope of Article 3 – a right to strike is neither a fundamental principle; nor a principle that properly lends itself to 'concise statement', since it must be regulated and qualified.

172. The second reason concerns the manner by which ILO Conventions, like C87, entered into force. Whatever date is considered to be the *"conclusion"* of C87, there is no evidence of any agreement the *"parties"* at the time of the conclusion of C87 (the UK and Norway) on the right to strike.

    i. Conventions like C87 enter into force one year after the registration of the second ratification. In line with this, *"conclusion of the treaty"* would be either (i) the point of time of the second ratification, i.e. the time when all conditions for the later entry into force are fulfilled; or (ii) the point of time of the actual entry into force, which

concluded. This is debateable. There can be no doubt that considerable weight should be attached to such interpretations…".

[244] UN Conference, Official Records - First Session, March-May 1968, A/CONF.39/11, p. 37, para 12. Dr C. Wilfred Jenks mentioned that: "*ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged" in the related article of the VCLT (article 28 at the tim*e)."

[245] *See* para 164.

is one year after the second ratification (Article 15(2)). The second ratification of C87 was registered on 4 July 1949 by Norway (after UK on 27 June 1949). C87 thus entered into force on 4 July 1950.

ii. The "*conclusion"* of C87 would thus be either 4 July 1949 or 4 July 1950. *"In connection with the conclusion"* would mean a period of temporal proximity to one of these dates.

iii. Whatever date is considered to be the *"conclusion"* of C87, there is no evidence of any agreement between the UK and Norway (the *"parties"* at the time of the conclusion of C87[246]) on the right to strike, made in connection with the conclusion of C87. Even if such an agreement on the interpretation of a right to strike in C87 had been made at the time, which is unlikely, it was not made public.[247]

173. It follows from this that the condition of Article 31(2)(a) is not met as there was no agreement supporting the interpretation of a right to strike in C87, or which could justify an interpretation according to which the right to strike is part of C87.

(b) Any instrument which was 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

174. An "*instrument which was made by one or more parties*" for sub-paragraph (b), can include agreements *inter se* between certain parties or unilateral statements, e.g. interpretative declarations upon ratification or accession.[248] The instrument must have been made "*in connection with the conclusion of the treaty*". What was said in this regard under Article 31(2)(a) above also applies here. Furthermore, the instrument must have been "*accepted by the other parties as an instrument related to the treaty*". This means

[246] Since Article 15(1) provides that C87 would only be binding on those members whose ratifications have been registered with the Director-General; mere adoption of the Treaty would not be enough for a State to consent to be bound by it, and so be a party per Article 1(1)(g) VCLT.
[247] Agreements that are not made in connection with the conclusion of the treaty but later on would not fall under Article 31(2)(a) but would have to be taken into account together with the context under Article 31(3)(a). So, any possible agreements regarding the right to strike made between UK and Norway or additional ratifying countries without a temporal proximity to the entry into force of C87 would be of relevance only in the context of Article 31(3)(a).
[248] Villiger, para 19; Dörr, Article 31, para 67.

that the other parties must at least have acquiesced in the instrument, which needs to be determined, *inter alia*, in good faith.[249]

175. There is no evidence whatsoever of an instrument on the right to strike made by UK and Norway - or indeed even any of the other participants who adopted C87 at the 31st ILC Session in 1948 but for whom the treaty came into force later, in connection with the conclusion of C87. Thus, this aspect of Article 31(2) does not get off the ground.

3. Article 31(3) There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions

176. The term "agreement" in Article 31(3)(a) is wider than a treaty in that it covers any contractual agreement, including agreements that are not in writing. However, it is important to emphasise that the agreement would have to be made between the parties, i.e. between all states that have ratified C87 after its entry into force. Article 31(3)(a) refers to a "subsequent agreement", i.e. an agreement that was made - with a certain time lag - after the conclusion of the treaty.[250] In the present case, this concerns agreements made after the entry into force of C87, i.e. sometime after 4 July 1950.[251] The establishment of a "subsequent agreement" is made more difficult by the fact that the number of parties to C87 has been steadily increasing over time. At present Convention 87 has been ratified by 158 member States.[252]

177. Further, for a subsequent agreement to be an authentic means of interpretation under Article 31(3)(a), it must specifically be an agreement "*regarding the interpretation of the treaty or the application of its provisions*".[253] As to whether there could possibly be said to be any subsequent agreement regarding the interpretation of C87 or the application of the provisions of C87, it is submitted that (1) there has been no such agreement; and (2)

[249] Ibid; Dörr, Article 31, para 68.
[250] Villiger, para 20; Dörr, Article 31, para 72.
[251] *See* paras. 168 (1.i-(1.iii.
[252] At present C87 has been ratified by 158 ILO member States; C87 entered into force on 4 July 1950 upon the ratifications by UK and Norway; the latest (159th) ratification was made by Guinea-Bissau and will enter into force on 9 June 2024.
[253] International Law Commission, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice to the interpretation of treaties', A/73/10, 2018, Conclusion 4(1), para 51.

any attempt to suggest that there could have been such an agreement is misconceived. As stated earlier, an agreement on a right to strike in C87 as such, without at the same time defining its scope and limits of at least determining who would be competent to define them, would be unfeasible and therefore absurd. On the other hand, an agreement on a right to strike, defined as an integrated set of approximately 60 detailed rules provided by the CEACR, would be completely unrealistic given the wide differences in industrial relations systems in ILO member States.

178. It should be noted that the CEACR's detailed rules, which in the view of the CEACR all have to be met simultaneously, cover: the definition of various forms of admissible strike; detailed rules regarding permitted restrictions, such as for essential services, public servants or crisis situations; prerequisites for strikes, such as advance notice and quorum and majority required for calling a strike; rules on picketing, occupation of the workplace and requisitioning of strikers; and admissibility of compulsory arbitration and sanctions.[254] The notion that there could be subsequent agreement on such matters is entirely academic.

179. Moreover, the material question here is not whether there is consensus or agreement as to a particular element of an asserted right to strike: the question is whether there is a subsequent agreement accepted by the coming ratifiers as to the content and meaning of C87.

180. It is submitted that there is no evidence whatsoever of any such "subsequent agreement" amongst States parties to C87, i.e. an agreement whereby a right to strike was recognised to be part of C87.

181. The contradictions and divergent views occasionally expressed by individual – or groups of – States parties to C87 regarding the derivation of a right to strike or certain aspects thereof from C87 suggest that there is not even a tacit agreement between the parties let

[254] Annex A - CEACR Guidance on the Right to Strike in ILO Convention 87. A summary form of the CEACR's detailed guidance on the right to strike, which some (wrongly) suggest deriving from C87 and are binding on the State parties to C87, is included as an Annex to this Written Submission for convenience. It can be readily seen that the wide ranging and detailed scope of these rules would readily make up the contents of a specific Convention on the right to strike if there was national agreement on their terms (which there is not).

alone a subsequent agreement which can be used as an authentic means of interpretation of C87.[255]

182. The following core propositions are illustrated by the examples provided chronologically below:

i. There is no subsequent Convention or other formal agreement among the parties that indicates that C87 includes a right to strike.

ii. The CAS' conclusions in C87 cases do not refer to the 'right to strike' as such or any aspects of its modalities or limits (e.g. general prohibition of strike, essential services, negotiated minimum services, compensatory guarantees for striking workers, notice period and cooling-off periods for strikes, quorum and voting to call for a strike, picketing, occupation of the workplace, compulsory arbitration, penal sanctions of strikers, dismissal for strike action and reinstatement of strikers etc.), even if the CEACR has made comments on these issues in its observations. It is emphasised, in this regard, that the CAS' conclusions, as part of the CAS' report, are adopted by the ILC, in which all member States of the ILO, including all State parties to C87, are represented.

iii. Despite disagreement from Governments and Employers on its comments, the CEACR, with the support of the Office, has relentlessly and uncompromisingly continued to provide observations on the 'right to strike' in the context of C87 in its General Report, as well in its reports on specific states. But, as can be seen from the many critical and divergent reactions from governments set out below, the views of the CEACR do not reflect anything resembling a subsequent agreement for the purposes of Article 31(3)(a). To the contrary, the CEACR's stance as regards the right to strike has resulted in more disagreement than agreement by parties to C87.

[255] Annex H - Table of CEACR Comments on the Right to Strike for Ratifying member States of ILO Convention 87.

iv. CFA conclusions and recommendations on the right to strike also do not reflect any kind of subsequent agreement by State parties to C87.[256]

1) <u>1951: Voluntary Conciliation and Arbitration Recommendation No. 92 of 1951</u>

183. In 1951 the ILC adopted the Voluntary Conciliation and Arbitration Recommendation (No. 92). The only provision to make any reference to a right to strike is paragraph 7, which states that "*[n]o provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike*".[257]

184. It is clear that the purpose of this provision is not concerned with the question of whether such a right is protected by C87, which is not mentioned at all. The purpose of the provision is simply to make clear that it is not intended to represent agreement about the extent of any right to strike. Furthermore, it is apparent from the negotiations that led to the Recommendation that paragraphs 4 and 6 were viewed as diminishing any right to strike.[258] Paragraph 7 (following those provisions) does no more than to preserve the *status quo*.

2) <u>1955: Discussion on Amendment of Article 22 Report Form for C87</u>

185. In 1955, a member of the Governing Body Committee on Standing Orders and the Application of Conventions and Recommendations proposed that the Article 22 report form[259] of C87 could be supplemented by including two additional questions relating to provisions in national legislation restricting the right to strike. The Committee noted, in this respect, that *"the Freedom of Association and Protection of the Right to Organise*

[256] *See* para 88; ILO, 'Freedom of Association - Compilation of decisions', para 1. As set out therein, the CFA is not responsible for supervising Convention No. 87, and cannot evince subsequent agreement as to its content.
[257] ILO, <u>Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)</u> **[ILO Dossier Document No. 126].**
[258] ILC, '<u>Industrial Relations</u>', 1951, p. 26. "*The Polish Government proposes to eliminate the provisions concerning the encouragement to the workers to abstain from strikes and lockouts during the process of conciliation or arbitration. Such obligations have been imposed on the workers in numerous capitalist countries, colonial or semi-colonial. Experience shows that these restrictions on the right to strike result in the suppression of that right, of which the free exercise constitutes a fundamental guarantee of social progress and trade union freedom. In encouraging such restrictions of the right to strike, the proposals of the Office are unsuitable and should be eliminated*."
[259] Report forms under Article 22 of the ILO Constitution are addressed to countries that have ratified the Conventions concerned; they are meant to help governments provide relevant information on the application of the ratified Conventions.

Convention does not cover the right to strike" and considered 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."*[260]

186. This clearly indicates a lack of subsequent agreement as to a right to strike in C87 in 1955. It is emphasised that even today, no question on the right to strike has been included in the Article 22 questionnaire for C87.

3) 1957: C105 Abolition of Forced Labour Convention, 1957 (No. 105)

187. In 1957, the ILC adopted the Abolition of Forced Labour Convention ('C105'). The only reference to "strike" is in Article 1, which states 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 […] (d) as a punishment for having participated in strikes*". [261]

188. The issue at stake was not the right to strike *per se*, let alone the subsequent agreement on a right to strike as part of C87, but rather the issue of not using forced labour as a consequence of taking part in strikes. This is especially clear from the following passage from the discussion in the ILC. [262]

189. Several members found this reference unacceptable on the grounds that many national laws prohibited strikes in certain sectors or during conciliation proceedings, and that in other countries trade unions voluntarily agreed to renounce the right to strike in certain circumstances. In reply it was pointed out by the Workers' members that the question at issue was not the right to strike, which they cherished. They agreed that strikes could be declared illegal in certain circumstances. All that they were asking was that the penalty for having participated in a strike should not be forced labour. Some members stated that

[260] ILO, 'The Standards Initiative - Appendix III - Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised)', GB.323/INS/5/Appendix III, March 2015, Part I, para 12 **[ILO Dossier Document No. 108].**
[261] ILO, Abolition of Forced Labour Convention, 1957 (No. 105) **[ILO Dossier Document No. 122].**
[262] ILC, 'Fourth item on the Ageda: Forced Labour', 1957, p. 8.

the penalty for taking part in an illegal strike might be imprisonment, which might involve hard labour.

4) 1959: CEACR General Survey

190. In 1959, the CEACR mentioned for the first time a 'right to strike' in its third General Survey on C87 in 1959 in only one paragraph and only with respect to public services.[263] In the discussion of the General Survey in the CAS, there were two unspecific references to the right to strike and strike respectively (by the Workers and the Government of the U.S.S.R) without reference to C87. These can in no way be regarded as a 'subsequent agreement' on a right to strike in C87.[264] The content of the CEACR's surveys is not negotiated or agreed upon by the parties of the Convention, as referred to in section 1,[265] and there have been important differences and objections to the opinions expressed by its experts.

5) 1970: ILC Resolution concerning Trade Union Rights and Their Relation to Civil Liberties

191. In 1970, the ILC adopted its Resolution on Trade Union Rights and their Relation to civil liberties. In so doing it stated that the right to adequate protection of trade union property is one of those civil liberties which are essential for the normal exercise of trade union rights. During the discussion on this agenda item, various members pointed out that *"while the right to strike was provided for in certain instruments adopted by other international organisations,* - such as the Covenant on Economic, Social and Cultural Rights and the European Social Charter - *no ILO instrument dealt with this right and the adoption of standards on this subject should be considered by the ILO."*(emphasis added)[266] Moreover, the *"Government member of the Lebanon ... pointed out that, although there was no ILO instrument guaranteeing the right to strike in absolute terms, the Committee on Freedom of Association had in many instances examined this right, but*

[263] ILC, Record of Proceedings, 1959, Report III (Part IV), p. 114, para 68.
[264] Id, p. 667, paras. 3 and 15.
[265] *See* para 71.
[266] ILC, Record of Proceedings, 1970, pp. 580 and 583, paras. 12 and 25.

always within the framework of national legislation."[267] These statements confirm that there was in 1970 no "*subsequent agreement*" on a right to strike in C87.

6) 1973: CEACR General Survey

192. The General Survey of 1973 saw some considerable expansion in the CEACR's comments on a 'right to strike'.[268] However, as shown by the reserved approach taken by governments in the discussion of the General Survey in the CAS, this was not a reflection of any "*subsequent agreement*" between states parties to C87 as to the nature or extent of the asserted right, and still less was it indicative that C87 included or entailed such a right:[269]

i. The Government of Switzerland noted that the right to strike was not covered under C87, as shown by the preparatory work leading to its adoption. [270]

ii. The Government of Japan also pointed out that *"there was no Convention or Recommendation or other decision of the International Labour Conference defining the extent of the right to strike in the public sector."* [271]

iii. Similarly, the Government of Cyprus *"considered that the position of a number of governments on this matter [the right to strike of public servants] was that they could not relinquish the sovereignty of the State"*. [272]

iv. Even the Workers seemed to recognise that the right to strike had not yet been addressed in an ILO Convention by stating *"[w]ith regard to the right to strike in general, the Workers' members considered that this weapon must be available to workers, and be expressly recognised in a Convention."*[273]

[267] Id, p. 590, para 65.
[268] ILO, 'Freedom of Association and Collective Bargaining – General Survey', 1973, paras. 107-111.
[269] ILO, Record of Proceedings, 1973, p. 544, paras. 26-27.
[270] Id, para 27.
[271] Id, para 26.
[272] Id, para 27.
[273] Id, para 25.

7) 1982: CAS Discussion

193. During discussion of Uruguay's application of C87 in 1982, the government of Uruguay noted that it found it "*surprising that the Committee of Experts expressed the hope that this Regulation would contain no provisions in contradiction to Convention No. 87, because neither the latter nor any other ILO Convention dealt with the right to strike.*" (emphasis added)[274]

8) 1983: CEACR General Survey

194. The General Survey on C87 and C98 of 1983 once again significantly expanded the CEACR's statements on the right to strike.[275] However, the discussion in the CAS on this aspect was even more subdued than in 1973.[276] Only one government, Tunisia, pointed out that:

> *however, that his Government was not in agreement with the Committee of Experts concerning the interpretation which the Committee had given to the concept of essential services. … In addition, he wondered whether it would not be useful to seek a better definition of the difficult and fundamental concept of the right to strike or to envisage a specific international Convention on this subject."* (emphasis added).

195. The silence on the part of the governments in this discussion was significant, as was Tunisia's unopposed critical stance towards a right to strike in C87. This makes plain that there was no tacit "*subsequent agreement*" to a right to strike in C87.

9) 1985: CEACR Observations on the German Democratic Republic (GDR), C87

196. In 1985, the CEACR noted the GDR position,[277] which it had made clear previously that no provision of C87 expressly mentions the right to strike, and that establishment by law

[274] ILC, Record of Proceedings, 1982, p. 31/47.
[275] ILO, 'Freedom of Association and Collective Bargaining – General Survey', 1983 paras. 199-126, 249, 351 and 364.
[276] ILC, Record of Proceedings, 1983, p. 544 and pp. 31/13-14, paras. 61/62.
[277] ILC, 'Report of the Committee of Experts on the Application of Conventions and Recommendations', 1985, pp. 147-149 (German Democratic Republic) **[ILO Dossier Document No. 165]**.

of the right to strike would be "superfluous". The report notes the basis of GDR's position in this regard as follows:

> *[…] the Government is repeating its previous arguments on the constitutional right of the unions to participation and co-management, which ensures that their interests are protected and that, as a rule, either disputes cannot arise or collective disputes are settled by resorting to special forms of co-management. According to the Government, this system and the possibility open to the unions of drafting legislation, which ensures that no laws are adopted without their agreement, make the establishment by law of the right to strike superfluous.*

197. In this way, the Government of the GDR provided another clear illustration of the absence of subsequent agreement on a right to strike in C87. The Government did so by stressing the importance of national specificities in the approach taken to the regulation of strikes, and the extent of any right to strike.

10) <u>1985: CEACR Observations on Colombia, C87</u>

198. The importance of national specificity and the relevance thereof to the regulation of strike action was also apparent from the position of the Government of Colombia, as indicated in the CEACR's observations on Colombia of the same year.[278] The CEACR noted as follows:

> *The Government does not comment on the prohibition of political activities by trade unions, but states that while the calling of a strike by a federation or a confederation in a whole sector of economic activity or the classification as essential of some services does little harm to developed nations, it is very harmful to countries that are trying to overcome the obstacles of underdevelopment. <u>It adds that the Convention does not deal with essential services.</u> It further explains that the power of the President of the Republic, under Act No. 48 of 1968, to terminate a strike seriously affecting the national economy by submitting the dispute to compulsory arbitration is not discretionary since it comes into play only subject to the*

[278] ILC, 'Report of the Committee of Experts on the Application of Conventions and Recommendations', 1985, pp. 129-133 (Colombia) **[ILO Dossier Document No. 172]**.

positive opinion of the Supreme Court (Labour Chamber). (emphasis added)[279]

11) 1985: CEACR Observations on Demark, C87

199. In 1985, the CEACR also published observations on Denmark.[280] It did so in rebuttal, once again, of a State's indication of the importance of its own specificities:

> *The Committee also takes note of the comments of the Danish Federation of Trade Unions (LO) and the Salaried Employees' and Civil Servants' Confederation (FTF) on the application of the Convention. […] These organisations […] mention situations in which the Government has taken legislative action to prevent or end strikes in certain sectors of the public service (namely those in which radio operators and engineers work). The Committee also takes note of the information furnished by the Government in reply to these comments. The Government explains in particular that its action to end the strike, which had already lasted four months, in the sector of wireless operators was necessary, since, because of the climatic conditions of the country, the prolongation of this strike would have had serious consequences. With regard to its action to prevent the strike in the engineering sector, the Government explains that a strike in this sector would have created conditions in which human life would have been endangered and would have led to considerable loss of property.* [281]

200. As is clear from this, Denmark's position was that the lawfulness of the strike concerned was to be determined by its own domestic law and, importantly, by C87. In line with the positions of the GDR and Colombia, Denmark's position here makes clear that as of 1985 there was nothing that could be regarded as a "*subsequent agreement*" between the parties to C87 on a right to strike in C87. The CEACR's unwavering insistence on the right to strike emanating from C87 cannot hide this fact.

[279] Id, p. 133.
[280] ILC, 'Report of the Committee of Experts on the Application of Conventions and Recommendations, 71st Session', 1985, pp. 136-137 (Denmark) **[ILO Dossier Document No. 173].**
[281] Ibid.

12) 1986: CAS Discussion – German Democratic Republic (GDR), Bulgaria and Ukraine's positions

201. During the discussion in the CAS in 1986, the Government of the GDR responded to the CEACR's comments in relation to the Syrian Arab Republic *"that the workers did not have the right to strike*", by noting that "*it should be recalled that no mention was made of the right to strike in any of the provisions of the Convention*".[282] The Government also noted as follows:

> *Further, the Committee of Experts had noted that the prohibition of strikes was not in conformity with Article 3 of the Convention. This conclusion was not based on the text of the Convention but rather should be considered as a personal interpretation of the Committee of Experts. Such a method of work should be rejected because it was in direct contradiction with the principle which required governments to report upon the instruments they had ratified. Any other conclusion would lead to uncertainty and legal insecurity which would dissuade new ratifications because States would be unable to know in advance the interpretations which would be given to the Conventions. Further, such interpretations were made by bodies like the Committee of Experts, which had no competence in these matters.* (emphasis added)

202. In the discussion of the CAS, "*[t]he Government members of Bulgaria and of the Ukrainian SSR, and the Worker member of Bulgaria noted their full support for the statements make [sic] by the Government members of the German Democratic Republic […]*."[283]

13) 1991: Colombian Governments' Letter to the ILO Director General

203. In a letter to the Director-General dated 9 October 1991, the Minister of Labour and Social Security of Colombia set out the position of the Government of Colombia as follows:

> *The right to strike is one of the basic safeguards of the working class. This has been recognised in the constitutions and legislation of countries having democratic systems of government, including Colombia. However,*

[282] ILO, Record of Proceedings, 1986, p. 31/33 **[ILO Dossier Document No. 246]**.
[283] Id, p. 31/34.

> *within the International Labour Organization itself, 72 years after its establishment, no Convention of this kind has been adopted. Various ILO bodies have made very praiseworthy efforts to extend the interpretation of the Conventions on freedom of association, the right to organise and collective bargaining and to deduce therefrom that the right to strike has in fact been dealt with in the Organization. However, this just remains the highly respectable viewpoint of some committees. In reality, Convention No. 87 only deals with the right of workers and employers to establish and join organizations; the right for such organisations to draw up their constitutions and rules and elect their representatives in full freedom without being liable to be dissolved or suspended by administrative authority; and their right to establish federations or confederations.* (emphasis added)[284]

204. As a consequence, the above letter requested *"that the proposal to adopt an international Convention concerning the right to strike be submitted for consideration to the Governing Body with a view to its inclusion in the agenda of the next session of the International Labour Conference."*

14) 1992: Colombian Government's Proposal for Standard-Setting on the 'Right to Strike' and Supporting Governments

205. During its 253rd session in May 1992, the Governing Body discussed the Government of Colombia's proposal for a standard-setting on the 'right to strike' on the agenda of the ILC.[285]

206. The Government of Venezuela supported the proposal of the Minister of Labour and Social Security of Colombia "*in view of the fact that the relevant ILO instruments, in particular Conventions No. 87 and No. 98, made no mention of the right to strike*". The Government of Venezuela recognised the importance of protecting the ability to strike and noted, in view thereof that "*[a]n international instrument on the right to strike was therefore essential*".[286]

[284] ILO, 'Agenda of the 81st (1994) Session of the Conference', GB.253/2/3 (Rev.), Appendix I.
[285] ILO, Minutes of the 253rd Session, 28 May 1992, GB.253/PV(Rev.).
[286] Id, p. I/12-I/13 and I/16.

207. Similarly, the Government of Morocco's representative referred to a 'legal gap' regarding the right to strike, as follows:

> *Since no instrument existed on the subject, there was a legal gap which had to be filled. Though the right to strike was granted to workers in a large number of countries, only a few countries had fixed the modalities of its implementation. It was essential to define the notion of the right to strike, since there was no such thing as an absolute right to strike. It was therefore important to define its limits, which concerned in particular the essential services.* (emphasis added)[287]

208. Despite these supportive statements, the Colombian Government's proposal did not receive sufficient support in the GB and was not pursued further. However, it is important to note that there was no objection in the discussion to standard-setting on the right to strike on the grounds that the right to strike was already included in the C87. The discussion provides, therefore, further indication that 45 years after the adoption of the C87 (and more than 30 years after the CEACR began to interpret a right to strike into the C87), there was no 'subsequent agreement' amongst States parties to C87 that C87 protects the right to strike.

15) 1994: CEACR General Survey on C87 and C98

209. In its 1994 General Survey, the CEACR recognised that "*the right to strike is not explicitly stated in the ILO constitution or in the Declaration of Philadelphia, nor specifically recognized in Conventions Nos. 87 and 98*".[288] It stated that "*in the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject.*"[289]

210. While in the discussion of the General Survey in the CAS, some governments supported this interpretation (Finland, Germany, Venezuela); others opposed it or expressed doubt as to whether the right to strike was regulated in C87:

[287] Ibid.
[288] ILO, 'Freedom of Association and Collective Bargaining - General Survey', 1994, p. 62, para 142.
[289] Id, p. 64, para 145.

> *The Government member of Belarus, recalling that Conventions Nos. 87 and 98 did not expressly cover the right to strike, stated that this right was always exercised even if it did not appear in national legislation. […]*
>
> *Agreeing that the right to strike was truly an essential corollary to the right to organize, the Government member of Portugal expressed, however, some doubts about certain developments in the survey concerning for example: the exercise of the right to strike in the public service, the maintenance of employment relations, sympathy strikes or strikes protesting against social and economic policy, procedures for strikes, lawful forms of strike action, sanctions in the case of illegal strikes and minimum services. In order to consider the principles put forward by the Committee of Experts as rules of international law, the Conference would have to adopt them according to the principle of tripartism. If a Convention were to be adopted, would all the rules elaborated by the Committee have to be included? Would States which had ratified Convention No. 87 adhere to the new standard?* (emphasis added)[290]

211. The discussion of the General Survey in 1994 thus reflected continued absence of "*subsequent agreement*" amongst State parties to C87 on a right to strike in C87.

16) 2011: CEACR Observations on the UK, C87

212. In observations concerning the UK in 2011, the CEACR reacted to immunities that UK domestic law provided in respect of civil liability for strikes and other industrial action (sections 223 and 224 of the Trade Union and Labour Relations Act). It noted that it had previously "*raised the need to protect the right of workers to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute, and to participate in sympathy strikes provided the initial strike they are supporting is itself lawful*".[291] The absence of agreement with the CEACR's position is entirely clear from the report itself, where "*[t]he Committee takes note of the Government's reiteration that it has no plans to change the law in this area*".[292]

[290] ILC, Record of Proceedings, 1994, pp. 25/40-41, paras. 144-148.
[291] ILC, 'Report of the Committee of Experts on the Application of Conventions and Recommendations', pp. 186-188 (United Kingdom) **[ILO Dossier Document No. 177]**.
[292] Id, p. 187.

17) 2014: CAS Discussion on Algeria, C87

213. During the discussion on the application by Algeria of C87 in the CAS in 2014, the Government of Algeria stated that "*the Convention did not deal with the right to strike."*[293] This is a particularly direct statement showing that there is continued absence of any "*subsequent agreement*" between the parties to C87 on the right to strike in C87.

18) 2015: Tripartite Meeting on C87 in relation to the right to strike and the modalities and practices of strike action at the national level, 2015

214. As one of the outcomes of the February 2015 Tripartite ILO meeting,[294] the GB Government Group (comprised of 32 governments) adopted a statement describing its position on the relationship between C87 and the right to strike. The statement provided, *inter alia,* that:

> *4. The Government Group recognizes that the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO. The Government Group specifically recognizes 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.*
>
> *5. However, we also note that the right to strike, albeit part of the fundamental principles and rights at work of the ILO, is not an absolute right. The scope and conditions of this right are regulated at the national level. The document presented by the Office describes the multi-faceted regulations that States have adopted to frame the right to strike.*
>
> *6. We are ready, right from this Tripartite Meeting, to consider discussing, in the forms and framework that will be considered suitable, the exercise of the right to strike. We believe that the complex body of recommendations and observations developed in the past 65 years of application of Convention 87 by the various components of the ILO supervisory system constitutes a valuable resource for such discussions, which will also be informed by the multi-faceted regulations that States and some regions have adopted to frame the right to strike.* (emphasis added) [295]

[293] ILC, Record of Proceedings, 2014, Part II/48.
[294] ILO, 'The Standards Initiative - Appendix II'.
[295] ILO, 'The Standards Initiative - Appendix I', p. 4.

215. For the avoidance of doubt, the 2015 GB Government Group's membership includes States which are not party to C87, and others which have not ratified it.[296] However, as regards those States which have ratified C87, forming part of the 2015 GB Government Group, this statement makes clear their position that whilst the 'right to strike' is linked to freedom of association, it is regulated by domestic law, and not by C87 (and still less on the basis of the CEACR's views in relation thereto). It should also be noted that the Government Group's indication of its readiness to "*consider discussing*" (in future) the exercise of the right to strike – which reflects its view that no existing Convention has yet provided for the right to strike – has not given rise to substantive discussion at the GB or the ILC to date.

Conclusion on subsequent agreements

216. In conclusion, numerous States Parties to C87 have, on various occasions, explicitly or implicitly stated that C87 does not include the right to strike. Some of the many public statements to this effect that have been made over time since C87 was concluded are set out in Annex F [297]and include clear declarations from an array of Governments as to the absences of protection for the right to strike in C87. See for example:

1) Algeria: "*the Government observed that the Convention did not deal with the right to strike",*[298]

2) Bangladesh: "*[t]he right to strike was not explicitly mentioned in Conventions Nos 87 or 98. Legal obligations must be explicitly stated in legislation or in a Convention; if there was no such statement, therefore, the legal obligation did not exist.",*[299]

[296] Regular members: Algeria, Germany, Angola, Argentina, Brazil, Bulgaria, Cambodia, China, Republic of Korea, United Arab Emirates, United States, France, Ghana, India, Islamic Republic of Iran, Italy, Japan, Kenya, Mexico, Panama, Romania, United Kingdom, Russian Federation, Sudan, Trinidad and Tobago, Turkey, Venezuela (Bolivarian Rep. of), Zimbabwe. Deputy members: Albania, Australia, Bahrain, Bangladesh, Belgium, Botswana, Brunei Darussalam, Burkina Faso, Canada, Colombia, Cuba, Dominican Republic, Spain, Ethiopia, Indonesia, Jordan, Lesotho, Lithuania, Mali, Mauritania, Norway, Pakistan, Netherlands, Poland, United Republic of Tanzania, Chad, Thailand, Uruguay.
[297] *See* Annex F - Table of Countries Supporting the View that Right to Strike is Not Covered by ILO Convention 87.
[298] ILC, Record of Proceedings, 2014, Part II/48.
[299] ILO, Minutes of the 349th bis (Special) Session, GB.349bis/PV, 10 November 2023, p. 14, para 48.

3) Germany: "*that no mention was made of the right to strike in any of the provisions of the Convention");*[300]

4) Sweden: "*one grey area surrounded the right to strike, which was not mentioned in Conventions Nos. 87 and 98 and had not been covered in the preparatory work")*;[301]

5) Türkiye: "*[w]hile his Government recognized the importance of safeguarding the right to strike as a fundamental labour right, it had reservations regarding the interpretation of Convention No. 87 in that respect",*[302]

6) Uruguay: "*[i]t was surprising that the Committee of Experts expressed the hope that this Regulation would contain no provisions in contradiction to Convention No. 87, because neither the latter nor any other ILO Convention dealt with the right to strike";* and [303]

7) Venezuela: "*the relevant ILO instruments, in particular Conventions No. 87 and No. 98, made no mention of the right to strike. …. An international instrument on the right to strike was therefore essential".*[304]

217. While it is possible that some governments may have changed their minds on whether or not the right to strike is included in C87 over time, the fact remains even to the present day, the State parties to C87 have clearly never agreed either explicitly or implicitly that C87 protects the right to strike. The CEACR guidance that there is a right to strike in C87 therefore cannot be based on a "subsequent agreement" according to Article 31(3)(a) of the VCLT.

[300] ILC, Record of Proceedings, 1986, pp. 31/33-32/33.
[301] ILO, Minutes of the 251st Session, GB.251/PV(Rev.), 12 November 1991, p. III/8.
[302] ILO, Minutes of the 349th bis (Special) Session, GB.349bis/PV, 10 November 2023, p. 13, para 43.
[303] ILC, Record of Proceedings, 1982, p. 31/47.
[304] ILO, Minutes of the 253rd Session, GB. 253/PV(Rev.), 28 May 1992, p. I/16.

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding interpretation

218. Article 31(3)(b) is similar to Article 31(2)(b) of the VCLT in that it requires active practice of some parties to the treaty. The *"subsequent practice"* should also be consistent rather than haphazard and it should have occurred with a certain frequency.[305]

219. Such subsequent practice may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions. Other conduct, including by non-State actors, does not constitute subsequent practice under Articles 31 and 32 of the VCLT.[306]

220. While the pronouncements of expert treaty bodies are not attributable to the state parties to the respective treaty and thus cannot as such constitute "*subsequent practice*",[307] they may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under Article 31, para. 3.[308] However, this result "*is not easily achieved in practice*" because "*it will often be difficult to establish that all parties have accepted, explicitly or implicitly, that a particular pronouncement of an expert treaty body expresses a particular interpretation of the treaty*".[309] This means that the interpretations of the CEACR on the right to strike in C87 – as such – cannot constitute "*subsequent practice*." Therefore, it would simply be wrong to argue that these interpretations and pronouncements have the necessary consistency and duration for the assumption of "*subsequent practice*". [310]

221. It should be further noted that, according to Article 31(3)(b), any "*subsequent practice*" must occur "*in the application of the treaty".* The parties must regard their conduct to fall within the scope of application of the treaty concerned and in principle to be required

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[305] Villiger, para 22.
[306] UNGA, 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties', A7RES/73/202, Annex, Conclusion 5(1).
[307] International Law Commission, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the interpretation of treaties, with commentaries', Yearbook of the International Law Commission, 2018, Vol II, Part Two, Conclusion 13(12), paras. 3 and 10; *see* also Dörr, Article 31, para 85.
[308] UNGA, 'Subsequent agreements and subsequent practice', Conclusion 13.3.
[309] International Law Commission, 'Draft Conclusions', Conclusion 13(3), para 12.
[310] Manfred Weiss and Achim Seifert, 'Der Streik im Recht der Internatioanlen Arbeitsorganisation', in Thomas Dieterich Martine Le Friant, Luca Nogler, Katsutoshi Kezuka, Heide Pfarr (eds), *Individuelle und kollektive Freiheit im Arbeitsrecht: Gedächtnisschrift für Ulrich Zachert* (Baden Baden: Nomos 2010), p. 138.

under that treaty. In other words, they must act for the purpose of fulfilling their treaty obligations; their subsequent conduct must be motivated by the treaty obligation.[311] This means that parties to C87, when recognising a right to strike or applying certain rules on the scope and limits of the right to strike must do so for the purpose of applying C87 in the interpretation of C87. Further, while there may be certain limited example where governments have adapted their law and practice *following* comments by the CEACR on the right to strike, in majority of other situations the right to strike, including law and practice on its scope and limits, have been recognised long *before* the adoption, or at least the ratification, of C87 by the countries concerned. It is therefore exceedingly difficult to try to assert in these cases in these majority situations that the parties' practice with regard to the right to strike is attributable to C87 and the respective comments and observations by the CEACR.

222. For the avoidance of any doubt, the IOE maintains that any implementations of the CFA conclusions and recommendations by the States parties to C87 do not constitute *"subsequent practice"* for the purposes of Article 31(3)(b) VCLT as they are not provided *"in the application"* of C87. This is based on the fact that CFA does not have the competence to supervise C87, and that it makes its recommendations and conclusion irrespective of ratification of C87 by the countries concerned.

223. In any case, the only "*subsequent practice*" which is of relevance in the context of Article 31(3)(b) is that "*which establishes the agreement of the parties"* regarding the interpretation of the treaty. The practice, even if only some parties participated in it, must be accepted by all the parties, ie. the parties as a whole.[312] If not every party has participated in the practice, there must be at least good evidence that the other, inactive parties have endorsed it. "*Agreement*" therefore seems to require, at a minimum, acceptance by State parties, even if tacit, that is evidenced at the very minimum by the absence of any disagreement.[313] In other words, the "*subsequent practice*" must at least have been acquiesced in by the other parties and no other party must have raised an

[311] Dörr, Article 31, para 81.
[312] Id, para 87.
[313] Id, para 88; *Kasikili/Sedudu Island case* [1999], ICJ Rep 226, paras. 46 and 83; *Delimitation of the Continental Shelf between Nicaragua and Colombia (Preliminary Objections)* [2016], ICJ Rep 100, para 44 (in this case, the ICJ, despite the absence of objections from the other parties, nevertheless did not assume the existence of an agreement in the sense of Article 31(3)(b).

objection.[314] In this context, where the subsequent practice is said to consist of the conduct of organs of an international organisation, it is only relevant if it is not counteracted by acts or representations of the parties to the treaty in question.[315]

224. As can be seen in the subsequent sections, while many governments remained silent, there was indeed frequent disagreement, by governments as well as by national (and international) courts, with the CEACR interpretations, both as regards a right to strike as such in C87 and the CEACR`s detailed rules regarding the scope and limits of the right to strike. This disagreement was either *explicitly* expressed, for instance the derivation of a right to strike or rules on its scope and limits from C87 was contested, or *implicitly* through long-standing consistent non-observance of the CEACR's interpretations on the right to strike.

i. Subsequent Practice by Governments

225. A major source for assessing if there has been "*subsequent practice*" in the application of C87 "*which establishes the agreement of the parties*" to C87 regarding the interpretation of a right to strike in C87 is government reports.[316] Relevant parts of these reports are reflected in the CEACR's comments on C87. Every year the CEACR makes comments on the fulfilment by State parties to ILO Conventions of their obligations under these Conventions. These comments take the form of observations or direct requests. Observations are generally used in more serious or long-standing cases of failure to fulfil obligations and they are published in the CEACR's annual report. Direct requests are not published in the CEACR's annual report but are communicated directly to the government concerned. Observations and direct requests as of 1989 are available online on the ILO NORMLEX website.[317]

[314] Villiger, para 22.
[315] Dörr, Article 31, para 87.
[316] Governments of States that have ratified C87 are obliged under Article 22 of the ILO Constitution to send reports on the application of C87 to the CEACR every three years and upon special request by the CEACR. On a voluntary basis, employers' and workers' organizations may complement this information by making their own submission to the CEACR.
[317] ILO, NORMLEX.

226. In its latest report (made in 2023 and published in 2024), the CEACR made almost 600 observations on ratified Conventions.[318] In addition, it made hundreds of direct requests. Out of the 65 observations on C87, 55 (or around 84 %) deal partly or wholly with the right to strike. Out of the 43 CEACR's 2024 direct requests to governments under C87, 35 (or around 81 %) deal with the 'right to strike'. Of these 35 direct requests, 13 deal exclusively with the right to strike.

227. While for some countries, the comments on the right to strike are only addressed in an observation and for others only in a direct request, for many countries, comments on the right to strike are addressed both in observations and direct requests.[319]

228. The table provided in Annex H contains a list of CEACR comments on the right to strike for all 158 ILO member States that have ratified C87 since 1989. The comments are organised alphabetically by the four regions (Africa, Americas, Asia and Europe). The first column indicates the country and the year it ratified C87. The second column indicates the years in which the CEACR made specific observations and direct requests on particular issues indicated in the third column. The fourth column provides extracts of selected CEACR comments. These comments reflect either government disregard for CEACR comments on the right to strike over many years, or government doubts regarding a right to strike in C87 and the related CEACR interpretations.

229. It is clear from these CEACR comments that there is hardly any other topic in connection with C87 on which the CEACR has addressed so many and such comprehensive comments to governments in which it points out deficits in implementation as on the right to strike. This in itself can be interpreted as a first indication that there is no "*subsequent practice*" in the application of C87 which establishes the agreement of the parties on the interpretations of a right to strike.

[318] ILO, 'Application of International Labour Standards 2024 - Report of the Committee of Experts on the Application of Standards and Recommendations', February 2024, ILC 112/Report III (A).
[319] The Employers have repeatedly noted in recent years that there is hardly any difference in substance between observations and direct requests, *see* for instance ILC, 'Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution)', February 2023, para 88.

230. In line with this finding, it emerges that extremely few of the 158 State parties to C87 have never been the subject of a CEACR comment regarding the right to strike in the period between 1989 until 2023. However, even for these countries it cannot be fully excluded that their practice on the right to strike is not in line with the related CEACR guidance and that governments may be in disagreement with them. The reason for this is that the CEACR's information basis for its compliance assessments may not be always complete. Information at the disposal of the CEACR is primarily contained in reports received from governments that have ratified C87. It is a fact, however, that government reports are often not received or that the information contained in them is insufficient. In particular, many developing countries find it difficult to comply with their reporting obligations. Moreover, it may not always be clear to all governments that they are expected to provide information on their law and practice on the right to strike: neither the text of C87, nor any question in the report form for C87 refers to the right to strike.[320]

231. Moreover, the table shows that in a significant number of cases, governments over decades to date have ignored the CEACR comments, which demonstrates their clear lack of acceptance of the CEACR comments in respect of the right to strike in C87. While in some cases the CEACR comments have been tacitly ignored, in other cases governments have been more outspoken. For example, they have insisted that their laws and practices regarding the right to strike are in line with C87, freedom of association or national needs, or sometimes they have even openly denied that a right to strike can be derived from C87.

232. While many State parties to C87 have practices in place that in one or more respects meet the conditions of the CEACR's comments on the right to strike, there are nevertheless numerous cases where the practice of ratifying countries has not complied with one or more of the CEACR's rules on the right to strike over a considerable period of time. It is therefore unimaginable to assert that governmental conduct relating to the CEACR's guidance on the right to strike arising out of C87 amounts to subsequent practice establishing the agreement of the parties regarding the interpretation of C87 for the purposes of Article 31(3)(b) of the VCLT. On the contrary, even if viewed through the

[320] In order to assist governments in collecting and providing relevant info on the application of ratified Conventions, the ILO has made available to them report forms containing questions regarding the individual provisions of the Conventions concerned.

lens of acquiescence, the absence of certain State parties expressly opposing guidance issued by the CEACR in relation to the right to strike in C87, cannot be said to amount to agreement with such an interpretation in circumstances where the State party has consistently shown a deviating practice over a significant period of time.

233. What is striking in this context is the proactive role of the CEACR in 'pushing' parties to C87 to accept its views on the right to strike. As far as can be seen, it has never been States parties to C87 that have claimed that certain common strike practices in their countries derive from C87 and have sought to encourage their adoption by other ratifying countries. Obviously, the States parties to C87 have little interest in creating a common practice for the right to strike and related agreements.

234. Also noticeable is the repetitive and persistent way in which the CEACR relays the same comments and recommendations on the right to strike year after year. It seems quite possible that many countries, to the extent that they occasionally follow the CEACR's recommendations and adapt their law and practice on the right to strike, do so not because they believe they are fulfilling an obligation under C87, but to avoid any reputational damage caused by their constant annual appearance in the CEACR's report. This reputational pressure may in part be exacerbated by economic pressure insofar as the awarding of trade preferences by certain countries and regional groups is based on CEACR's compliance assessments, including as regards C87 and the right to strike.

235. Lastly, even where governments of State parties to C87 occasionally take account of the CEACR's comments on the right to strike, new implementation issues on other aspects of the right to strike constantly arise in the CEACR's comments. While it seems clear that at no time in the past there has been a "*subsequent practice*" among the parties establishing their agreement regarding the recognition of the right to strike and related rules in C87, there is not even a tendency towards such a subsequent practice establishing an agreement.

236. The following concrete examples from the four ILO regions (Africa, Americas, Europe and Asia) where governments have persistently failed to implement CEACR's recommendations on the right to strike, illustrate the sheer scale of the absence of a

"*subsequent practice*" establishing agreement amongst State parties to C87 with the CEACR's guidance on this topic.

Africa

237. There are 55 countries in the African region which have ratified C87. The CEACR has issued comments on the right to strike for 52 countries of them, i.e. for all ratifying countries except for the following three: Guinea Bissau (C87 will enter into force only in June 2024), Sierra Leone and Sudan.

238. CEACR comments on the right to strike have often been repeated for several years: for 36 out of the 52 countries, the CEACR has repeated its comments for more than ten years. This suggests absence of agreement by State parties to an obligation under C87 to recognise and apply rules on the right to strike. Even when comments on specific right to strike issues were discontinued, it was not always clear if this meant that the government had accepted the CEACR's recommendations and implemented the comments.[321]

1) Algeria: From 2009 to 2023, the CEACR has addressed to the government comments on restrictions of the right to strike, notably as regards essential services and compulsory arbitration.[322] To date, none of the requested changes have been implemented by the country.

2) Angola: The CEACR has issued comments in the form of direct requests on restrictions of the right to strike (forms of strikes, notably work to rule and go-slow strikes; strikes by military staff; voting quorum in strike ballots; requisitioning of workers; imposition of sanctions; sympathy and general strikes; minimum service; suspension of the right to strike; compulsory arbitration) from 2003 to 2023.[323]

[321] It should be noted that the CEACR usually notes 'with satisfaction' the correction of law and practice in line with its earlier comments.
[322] Algeria, CEACR Observations, 2009-2023.
[323] Angola, CEACR Observations, 2003-2023.

3) Benin: The CEACR has commented on restrictions of the right to strike and the scope of essential services as early as 1989 and has repeated them until to 2023.[324]

4) Burkina Faso: The CEACR has issued comments on the right to strike (power of public authorities to requisition workers) from 1997 to 2023.[325]

5) Burundi: From 1998 to 2023, the CEACR has issued comments on voting requirements for initiating a strike, the limitation of the length of strikes, sympathy strikes and compulsory arbitration respectively.[326]

6) Cabo Verde: The CEACR has issued comments on minimum services from 2003 to 2023.[327]

7) Comoros: The CEACR has commented on the requisitioning of workers in strikes in the private and public services from 1990 to 2023.[328]

8) Djibouti: For no less than 23 years, from 1996 to 2023, the CEACR has addressed to the government comments on the right to strike of public servants, as well as the power of requisitioning of workers.[329]

9) Egypt: Since 1994 and 2016 respectively, the government has been requested by the CEACR to align its legislation with regard to the scope of essential and public services, as well as in relation to the duration of a strike. In 2020, these comments still had not been implemented by the Egyptian Government.[330]

10) Equatorial Guinea: For 19 years, from 2004 to 2023, the Government has received comments from the CEACR on the scope of essential services and public services.[331]

[324] Benin, CEACR Direct Requests, 1989-2023.
[325] Burkina Faso, CEACR Observations, 1997-2023.
[326] Burundi, CEACR Observations, 1998-2023.
[327] Cabo Verde, CEACR Direct Requests, 2003-2023.
[328] Comoros, CEACR Direct Requests, 1990-2023.
[329] Djibouti, CEACR Observations, 1996-2023.
[330] Egypt, CEACR Observations, 1994-2023.
[331] Equatorial Guinea, CEACR Direct Requests, 2004-2023.

11) Eritrea: 18 direct requests have been addressed by the CEACR to Eritrea concerning strike voting and the majority required, from 2002 to 2023.[332]

12) Ethiopia: The Government has been repeatedly asked by the CEACR to adjust its legislation on strike voting/quorum from 2005 to 2023, and on the definition of essential services and on compulsory arbitration from 1989 to 2023.[333] These CEACR requests have never been addressed by the government.

13) Guinea: The CEACR has regularly issued comments on compulsory arbitration from 1989 to 2022.[334]

14) Madagascar: The CEACR has issued successive comments to the Government on compulsory arbitration and on the requisitioning of workers from at least 2010 to 2022. There is no evidence of these comments being implemented or followed up in any way by the Madagascan Government.[335]

15) Malawi: The CEACR issued comments from 2006 to 2021 on essential services.[336]

16) Nigeria: The CEACR has issued altogether 21 observations from 1989 to 2021 on the issue of compulsory arbitration.[337]

17) Sao Tome and Principe: From 2000 to 2023, the CEACR has issued observations and direct requests on several issues, namely the majority required for calling a strike, minimum services and essential services.[338]

[332] Eritrea, CEACR Direct Requests, 2002-2023.
[333] Ethiopia, CEACR Observations, 2005-2023.
[334] Guinea, CEACR Observations, 1989-2023.
[335] Madagascar, CEACR Observations, 2010-2023.
[336] Malawi, CEACR Observations, 2006-2021.
[337] Nigeria, CEACR Observations, 1989-2021.
[338] Sao Tome and Principe, CEACR Observations, 2000-2022.

18) Seychelles: From 2000 to 2022, 11 observations have been issued by the CEACR concerning the majority required for calling a strike, as well as other restrictions on the right to strike.[339]

19) South Africa: The CEACR has issued comments on the arrest of strikers from 2015 to 2023.[340]

20) Tunisia: The CEACR has issued observations from 1977 to 2023 on "*the incompatibility between the Convention and the obligation of first-level trade union organizations to obtain the approval of the central workers' confederation before declaring a strike*".[341]

21) Yemen: 15 observations have been issued by the CEACR on the imposition of certain requirements in order to hold a strike from 2001 to 2023.[342]

22) Zambia: As a final example for the general dismissive practice in the African region, the CEACR has addressed to the government comments on essential services and imprisonment in connection to a strike from 2000 to 2022.[343]

The Americas

239. In Latin America and the Caribbean, 31 member States are bound by C87. The only three countries to which so far, no comments on the right to strike have been addressed by the CEACR are Saint Kitts and Nevis, Saint Lucia and Suriname.

240. As regards the other 28 State parties to C87 in the region, there are numerous examples where CEACR comments regarding obligations on a right to strike in C87 have been ignored. While several governments did declare their willingness to implement the

[339] Seychelles, CEACR Observations, 2000-2022.
[340] South Africa, CEACR Observations, 2015-2023.
[341] Tunisia, CEACR Observation, 2004.
[342] Yemen, CEACR Observations, 2001-2023.
[343] Zambia, CEACR Observations, 2000-2022.

CEACR's requests regarding the right to strike in C87, their practice has not followed these declarations.

1) Antigua and Barbuda: Almost every year since 1989 to date, the CEACR has requested the government to reduce the list of essential services in the Labour Code.[344] Even though the Government made some changes to the legislation in 2009, they were not considered satisfactory by the CEACR. In 1995, the Government stated that *"In its opinion the Antigua legislation in relation to the right to strike is in conformity with the principles of freedom of association and the limitations would be in the interest of a civilized and orderly society",* which reflects open disagreement by the Government with the CEACR with regard to its obligations on the right to strike in C87. Other long-standing CEACR comments, without the country having taken the required action concerned the issue of strike ballots, compulsory arbitration, sympathy strikes and sanctions for strikers.

2) Barbados: Since 1993, the CEACR has been requesting the Government to amend section 4 of the Better Security Act, 1920, as regards sanctions for strikers.[345] Even though the Government has stated its intention to amend the law, the law has remained in force unchanged to this day, which ultimately cannot be interpreted as anything other than non-acceptance of commitments to the right to strike in C87.

3) Belize: From 1995 to 2023, in both direct requests and observations, the CEACR has issued comments on essential services and compulsory arbitration.[346]

4) Colombia: The CEACR has issued comments on the need to change the legislation on essential services for many years.[347] Yet, the Government has still has not taken the remedial action requested by the CEACR. A related Bill was transmitted to the House of Representatives on 24 July 2019 and discussed by its Standing Committee for Dialogue on Wage and Labour Policies in February 2020 which stated that *"there*

[344] Antigua and Barbuda, CEACR Observations, 1998-2011.
[345] Barbados, CEACR Observations, 1993-2023.
[346] Belize, CEACR Observations, 1995-2023.
[347] Colombia, CEACR Observations, 2007-2023.

is currently no tripartite consensus to carry out the legislative amendments requested by the workers' federations with regard to strikes […]."

5) Dominican Republic: Since 1990 until today, there have been regular CEACR comments on essential services and compulsory arbitration.[348]

6) Ecuador: The country has received comments from the CEACR on its new Constitution (adopted in 2008) which stipulates that collective labour disputes must be referred to conciliation and arbitration tribunals in all cases since 2009. In addition, the CEACR has been asking the Government for many years to take steps to repeal or amend the law on the legislation essential services; the determination of minimum services by the Ministry of Labour in case of disagreement between the parties in the event of a strike; the denial to federations and confederations of the right to strike; or the imposition of prison sentences for participation in unlawful work stoppages and strikes.[349] Since 2014, the comments have concerned the new penal code, which provides for prison sentences for stopping or obstructing public services.

7) Guatemala: From 2010 to 2016, the CEACR made observations to the Government on non-compliance with the right to strike, such as the majority required for declaring strikes, the possibility of imposing compulsory arbitration in the public transport sector and in services related to fuel, the prohibition of strikes for the purpose of inter-union solidarity, as well as labour, civil and penal sanctions applicable to strikes involving public officials or workers in specific enterprises.[350] Although the Government announced the partial amendment of some related legislation in 2016, it did not follow up its announcement with action. Therefore, the CEACR continued its observations in 2017 to 2023.

8) Jamaica: The CEACR has requested the Government to amend legislation on compulsory arbitration in observations from 1990 to 2014 and in direct requests from

[348] Dominican Republic, CEACR Observations, 1990-2023.
[349] Ecuador, CEACR Observations, 2009.
[350] Guatemala, CEACR Observations, 2010-2016.

2015 to 2022.[351] While, in 2003, the Government indicated that it was considering the CEACR's request to amend the legislation, the latter has remained unchanged to date.

9) Mexico: From at least 2010 to 2021, the CEACR has issued comments regarding the right to strike of public officials who do not exercise authority in the name of the State, as well as on the possibility of requisitioning workers in a strike.[352] The Mexican Government has still not taken the remedial action requested by CEACR.

10) Trinidad and Tobago: Since at least 1989 to 2022, the CEACR, in 24 observations, has been requesting the Government to take steps to amend the Industrial Relations Act on the majority required for calling a strike an essential services.[353] In 2002, the Government's report declared that:

> *the Tripartite Committee established to review the Industrial Relations Act has reviewed these sections and has agreed that these provisions are in keeping with the cultural and legislative environment of the country and are, therefore, in no way objectionable to the parties in the collective bargaining process. The Tripartite Committee does not view these provisions as a deterrent to the Government's conformity with Convention No. 87.*" (emphasis added)[354]

11) Venezuela: The CEACR has also issued comments on Venezuela regarding the determination of essential services and compulsory arbitration from at least 2009 to 2022.[355] Action to implement these comments does not seem to have been taken yet by the Venezuelan Government.

[351] Jamaica, CEACR Observations, 1990.
[352] Mexico, CEACR Observations, 2010-2021.
[353] Trinidad and Tobago, CEACR Observations, 1989-2022.
[354] Trinidad and Tobago, CEACR Observation, 2002.
[355] Venezuela, CEACR Observations, 2009-2022.

Asia

241. In the Asia and Pacific region, 21 member States have ratified C87. The CEACR has addressed comments related to the right to strike to all countries except to the following one: Republic of Korea.

242. There were a number of Governments that, despite receiving repeatedly comments from the CEACR over many years, did not change their national law - and thus did not accept obligations - related to the right to strike in C87.

1) Australia: the country ratified C87 in 1973 and has been receiving comments from the CEACR requesting them to repeal legal provisions banning strikes since 1998. Despite these repeated comments up till 2019, the Government replied:

> *it is considering the Committee's request, but that no further measures have been taken in respect to these provisions at this stage. It also states that no action has been taken under the relevant provisions for 40 years.* (emphasis added) [356]

2) Bangladesh: The government, from 2005 to 2022, has consistently received CEACR comments regarding restrictions of the right to strike, such as: ballot requirements; the possibility of prohibiting strikes which last more than 30 days, which are considered prejudicial to the national interest, or which involve a public utility service; as well as penalties of imprisonment for participation in unlawful strikes.[357] From 2007 to 2022, the CEACR also commented on Bangladeshi legislation forbidding the expulsion by a trade union of members who refused to take part in an illegal strike, a matter that according to CEACR must be left to each trade union regulation.[358] These comments have not been implemented by the Bangladeshi Government.

3) Cambodia: Since 2006, the government has been repeatedly requested by the CEACR to amend section 326(1) of the Labour Law regarding minimum services.

[356] Australia, CEACR Observations, 1998-2019.
[357] Bangladesh, CEACR Observations, 2005-2022.
[358] Bangladesh, CEACR Observations, 2007-2022.

The government indicated that it *"would consider defining minimum services narrowly"* and *"would consider empowering the Arbitration Council or another independent arbitrator to determine minimum services under Trade Union Law"*. Nevertheless, according to the most recent CEACR comment in 2021, the Government still has not amended its law in line with the CEACR comments for more than 15 years.[359]

4) Fiji: From at least 2009 to 2020, the CEACR repeatedly issued observations on the need to limit compulsory arbitration to essential and public services and on the condition that compulsory arbitration needs to be requested by both parties, as well as on the imposition of a penalty of imprisonment for unlawful strikes.[360] The Fiji government opposed these requests by arguing that *"the said laws are necessary for the preservation of the fragile economy during industrial disputes"*. As a result, it has not yet implemented the CEACR comments.

5) Indonesia: Despite receiving repeated requests from the CEACR since 2007 to amend the legislation to ensure sanctions for strike action imposed under the relevant provisions of the Manpower Act are not disproportionate to the seriousness of the offence, the government has not amended its respective laws in line with the CEACR comments.[361]

6) Japan: From 1989 to 2021, the CEACR issued multiples comments on the limitation of the right to strike in essential or public services and on compensatory guarantees. The Government indicated that the Supreme Court of Japan had held that the prohibition of strikes by public servants was constitutional and that despite the comments of the CEACR and also the conclusions in related CFA case 2114 in relation to public school teachers, the Government *"has decided to retain the current restrictions on the workers' fundamental rights"*.[362] It is worth noting that in 2002 the CEACR lamented that despite the long series of observations pertaining to Japan *"the situation has not evolved significantly"* and that the Japanese Government "*has*

[359] Cambodia, CEACR Observations, 2009-2021.
[360] Fiji, CEACR Observations, 2009-2020.
[361] Indonesia, CEACR Observations, 2007-2022.
[362] Japan, CEACR Observations, 1989-2021.

decided to retain the current restrictions on the workers' fundamental rights". Moreover, from 2011 to 2021, the CEACR issued further comments on Japan's legislative provisions requiring approval for a strike from a higher-level workers' organisation.

7) Pakistan: The CEACR provided observations to Pakistan since 1991 regarding certain restrictions on recourse to the right to strike under sections 32 and 33 of the Industrial Relations Ordinance which in the CEACR's view were not in full conformity with the requirements of C87. In its 1997 observation, the CEACR noted that the Supreme Court of Pakistan indicated that *"in the absence of statutory backing, these employees would not have the right to strike or participate in go-slows and that the Government could provide reasonable restrictions in this respect through statutory rules under section 26 of the Industrial Relations Ordinance (IRO)."* In other words, the Supreme Court clearly indicated that the right to strike was duly governed by national law and that it did not recognise obligations in this regard under C87.[363]

8) Philippines: From 1998 to 2020, the CEACR commented on the imposition of sanctions for lawful strikes and the need for proportionality with respect to sanctions imposed in situations of illegal strikes. To date, these comments have also remained unaddressed by the government.[364]

Europe

243. While all the 51 countries in the Europe and Central Asia region have ratified C87, only the following four ones have not been as of 1989 the subject of a CEACR comment on the right to strike: Austria, Ireland, Italy and Luxembourg.

1) Albania: While the Government has changed its law/practice in response to certain CEACR's observations and direct requests regarding the right to strike (e.g.

[363] Pakistan, CEACR Observations, 1997.
[364] Philippines, CEACR Observations, 1998-2020.

sympathy strikes), it has consistently ignored these recommendations to date regarding essential services (transport and public television service; since 1996).[365]

2) Bosnia-Herzegovina: The Government has to date made no serious attempts to meet the CEACR's direct requests on the minimum service since 2002.[366]

3) Bulgaria: While the Government has changed its legislation in response to certain CEACR's observations and direct requests regarding the right to strike (e.g. right to strike of civil servants), it has consistently refused to date to do so as regards the following issues: (i) the majority required to call a strike (since 1991); (ii) the requirement to indicate the duration of a strike (since 1991); and (iii) a minimum service of 50% of the amount of transport services in strikes in the railway transport in since 2002.[367] The Government has not only not addressed the CEACR recommendations but provided concrete reasons why it does not agree with the related CEACR observations on the right to strike and will maintain the present national regulations. The CEACR observations indicated that:

> *[w]hile noting the Government's reply which states that the provisions of the Act are liberal in character and any attempt to amend it may infringe its democratic approach, […] The MTITC […]defends the need for such provision by referring to the rights of passengers, arguing that they should be able to travel by rail transport regardless of the interests of the trade union organizations.* (emphasis added)[368]

4) Czech Republic: The Government has consistently refused to date to change its legislation in response to CEACR's direct requests regarding the right to strike as regards the majority required to call a strike since 1996.[369] The Government has not only not addressed the CEACR's recommendations on this point but has provided concrete reasons why it does not agree with the related CEACR's observations on the right to strike and will maintain the present national regulations.

[365] Albania, CEACR Observations, 1996.
[366] Bosnia-Herzegovina, CEACR Direct Requests, 2002-2023.
[367] Bulgaria, CEACR Observations, 1991-2023.
[368] Bulgaria, CEACR Observation, 2020.
[369] Czech Republic, CEACR Direct Requests, 1996-2023.

The Committee note[d] that the Government indicates in its report that it considers the condition of consent of a least two-thirds of the voters to be reasonable since a strike is a serious and ultimate measure, and adds that it is necessary to prevent a strike to be declared by a small number of workers which would imply that the majority of workers – who would prefer to continue the negotiations – is submitted to the decision of a minority, given the serious economic consequences and impact on workers a strike can have. (emphasis added)

5) Denmark: The Government has consistently refused to date to change its legislation in response to CEACR's direct requests regarding the right to strike as regards the following issue: right to strike of certain public servants since 1998.[370] The government has not only not addressed the CEACR recommendations on this point but has provided concrete reasons why it does not agree with the related CEACR interpretations on the right to strike and will maintain the present national regulations.

The Committee notes that the Government reiterates in its report that civil servants in Denmark have favourable conditions of employment including a favourable pension scheme, and that giving teachers the right to strike would require a major change of the system so as to maintain the balance of the total set of employment conditions for civil servants, which does not seem expedient, since the employment of teachers as civil servants was discontinued in 1993 for new appointments and the number of teachers employed under the Civil Servant Act is continuously decreasing due to retirement (at present 10,684 teachers are employed as civil servants; in six years, this group is expected to include approximately 2,500 persons and will eventually become extinct. (emphasis added) [371]

6) Germany: While the Government has changed its legislation in response to certain CEACR's comments regarding the replacement of strikers, it has consistently refused to date to do so as regards the right to strike of public servants since 1989.[372] The government has not only not addressed the CEACR's recommendations but provided concrete reasons why it will not implement the related CEACR's position on the right to strike.

[370] Denmark, CEACR Direct Requests, 1998-2023.
[371] Denmark, CEACR Direct Request, 2013.
[372] Germany, CEACR Direct Request, 2013.

The Committee notes the Government's indication that in its decision of 12 June 2018 (Case No. 2 BvR 1738/12), the Federal Constitutional Court held, contrary to the 2014 judgment of the Federal Administrative Court, that: (i) for civil servants, irrespective of their duties, the strike ban amounts to an independent traditional principle of the career civil service system (Berufsbeamtentum) within the meaning of Article 33(5) of the Basic Law, which justifies an overriding of freedom of association; (ii) this is closely linked to the civil service principle of alimentation (Alimentationsprinzip), according to which civil servants are paid salary commensurate with the civil service position, and also to the duty of loyalty, the principle of lifetime employment and the principle that the legal relationship under civil service law (including remuneration) must be regulated by the legislature; (iii) there is no need for an express legal provision concerning a strike ban for civil servants; (iv) the strike ban for civil servants in Germany is consistent with the principle of interpreting the Basic Law in a manner compatible with international law […]. (emphasis added)[373]

7) Hungary: The Government has consistently refused to date to change its legislation in response to CEACR's observations regarding the right to strike as regarding minimum services in public transport and postal services since 2015.[374]

The Government has not only not addressed the CEACR recommendations on this point but has provided concrete reasons why it does not agree with the related CEACR interpretations on the right to strike and will maintain the present national regulations.

In the Government's view, by regulating the extent of sufficient services in respect of two basic services that substantially affect the public and thus creating a pre-clarified situation, the legislature promoted legal certainty in the context of the exercise of the right to strike. The level of sufficient services was determined seeking to resolve the potential tension between the exercisability of the right to strike and the fulfilment of the State's responsibilities to satisfy public needs.[375]

[373] Germany, CEACR Observation, 2021.
[374] Hungary, CEACR Observations, 2015-2022.
[375] Hungary, CEACR Observation, 2021

8) Iceland: The Government has consistently refused to date to change its legislation in response to CEACR recommendations (observation) regarding the right to strike as regards to essential services (fishing industry), compulsory arbitration since 2003.[376]

The Government has not only not addressed the CEACR's recommendations on this point but has provided concrete reasons why it does not agree with the related CEACR's comments on the right to strike and will maintain the present national regulations.

> *The Committee takes due note of the Government's comments on the importance of the fishing industry in the Icelandic economy and that its justification for the adoption of both Acts - and in particular the prohibition of the right to strike - is solely based on the economical weight of the sector. Concerning Act No. 8/2001, the Committee notes the Government's comment to the effect that the strike began in the course of the capelin-fishing season, that a large part of the capelin quota remained to be caught and that therefore vital economic interests were at stake; Act No. 8/2001 was thus adopted to avoid substantial damage to the national economy. In respect of Act No. 34/2001, and in particular the economic impact of the six-week strike, the Committee notes the Government's comment that if the strike would last much longer it would have serious consequences for the country's economy […] the Government also indicates that the damaging effects of the strike were already beginning to become evident […] and therefore that it was necessary to take measures to prevent a major economic disruption*. (emphasis added)[377]

9) Kazakhstan: The Government has consistently ignored CEACR requests to adapt its law and practice on penal sanctions to carrying out peaceful strikes since 2017. [378]

10) Malta: The Government has consistently refused to date to change its legislation in response to CEACR recommendations (observations) regarding the right to strike as regards to compulsory arbitration since 1989.[379] The government has not only not addressed the CEACR recommendations on this point but has provided concrete

[376] Iceland, CEACR Observation, 2003.
[377] Iceland, CEACR Observation, 2003.
[378] Kazakhstan, CEACR Observations, 2017-2022.
[379] Malta, CEACR Observations, 1989-2021.

reasons why it does not agree with the related CEACR interpretations on the right to strike and will maintain the present national regulations.

> *[T]he Government also indicates that while the discussion on these issues is still ongoing, there exists a consensus of agreement amongst the social partners represented in the Council that the repeal of the provisions of the Industrial Relations Act relating to resort to arbitration at the request of one of the parties in a trade dispute is premature.*[380]

11) Norway: The government has consistently refused to date to change its legislation in response to CEACR recommendations (observations) regarding the right to strike as regards to compulsory arbitration, essential services (oil industry and other sectors) since 1989.[381]

12) The government has not only not addressed the CEACR recommendations on this point but has provided concrete reasons why it does not agree with the related CEACR interpretations on the right to strike and will maintain the present national regulations.

> *As regards the effects of disputes in the oil industry, the Government refers to information provided in relation to Cases Nos. 1255 and 1389. In the Government's view this information established that intervention was justified by reason of the widespread economic dislocation which would result from a prolonged dispute in the oil industry, and by reason of the safety problems which could be engendered, or exacerbated, by a protracted work stoppage. In its report, the Government also provides detailed information relating to the circumstances which in its opinion justified legislative intervention in the public sector (1984 and 1986) and in the chemical industry (1985) […] While noting the Government's statement in its report that the interference by the authorities in the right to strike in order to restrict or prohibit it is compatible with the Convention in the event that the strike is liable to cause considerable economic losses with a harmful effect on society or third parties and that the oil industry should, in this respect, be considered to be an essential service, […] The Committee takes note of the Government's observations that governmental intervention in strikes can only take place if the Norwegian Parliament (Stortinget) adopts a law and that this does not happen with*

[380] Malta, CEACR Observation, 1998.
[381] Norway, CEACR Observations, 1989-2008.

regard to any collective labour dispute at the discretion of the public authorities, but rather after a careful evaluation of the impact of a strike on the life, health or personal safety of the population. The health surveillance authorities monitor the situation closely and only when it is reported from them that life and health is endangered, is a proposal of compulsory arbitration is put before Parliament. An exception from this has been the oil conflict which would cause a full stop in all Norwegian oil production which would have a devastating impact on volatile and already extremely high oil prices. As for the strike in the elevator service which ended through compulsory arbitration in 2006, the Government indicates that it had lasted for nearly six months and had given rise to safety concerns due to the lack of repairs and maintenance. The Government adds that in 2006, acts imposing compulsory arbitration have been adopted in conflicts in the insurance and financial services sector (Acts Nos 10 and 18 of 16 June 2006). Another intervention took place in the public sector involving the police, Food Safety Authority and Institute of Public Health. (emphasis added)[382]

13) Romania: While the Government has changed its legislation in response to certain CEACR's observations and direct requests regarding the right to strike (e.g. compulsory arbitration), it has consistently refused to date to do so as regards the following issues: (i) statutory prohibition/suspension of payment of wages to civil servants during strikes since 2008; and (ii) minimum services since 2008.[383] The government has not only not addressed the CEACR recommendations but provided concrete reasons why it does not agree with the related CEACR interpretations on the right to strike and will maintain the present national regulations. The CEACR noted that*:*

the Government's indication […] that salary deductions during the strike may be imposed without infringing the principles related to the exercise of trade union freedom.[384]

14) Russian Federation: The Government has consistently refused to date to change its legislation in response to CEACR's observations regarding the right to strike regarding restriction of the right to strike for civil servants since 2007.[385] The

[382] Norway, CEACR Observations and Direct Requests, 1989-2011.
[383] Romania, CEACR Direct Request, 2008; CEACR Observation, 2008.
[384] Romania, CEACR Observation, 2022.
[385] Russian Federation, CEACR Comment, 2012.

Government has not only not addressed the CEACR recommendations but provided concrete reasons why it does not agree with the related CEACR interpretations on the right to strike and will maintain the present national regulations.

> *The Committee notes that the Government reiterates that the right to strike of the following categories of workers is restricted: workers of the federal courier communications and the municipal employees, as well as certain categories of railway workers. The Government considers that the restrictions imposed on the right to strike of certain categories of workers do not contradict international standards. It refers in this respect to Article 8(2) and (1)(c) of the International Covenant on Economic, Social and Cultural Rights and points out that, under these provisions, a State may impose prohibition on the exercise of the right to strike by members of the armed forces, the police, or the administration of the State, as well as other persons, if necessary, in a democratic society in the interests of national security, public order, or for the protection of the rights and freedoms of others. The Government stresses that nothing in this Article shall authorize States parties to Convention No. 87 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 […] The Government refers, in particular, to section 3(1) of the Law on State Civil Servants, which defines State Civil Service as a type of service carried out by citizens at their respective governmental positions aimed at executing the authority of various State bodies. Therefore, the prohibition of strikes in the civil service is due to its specific functions, which should be uninterrupted to guarantee the exercise of the authority of various state bodies. The Government points out that this prohibition affects civil servants irrespective of the specific level and category of their position as all civil servants contribute individually and collectively towards the public aim of the civil service, through which the authority of the State is exercised. Likewise, the legislation prohibits the exercise of the right to strike by municipal civil servants, who exercise authority in the name of municipal bodies*. (emphasis added)[386]

15) Spain: The government has consistently refused to date to change its legislation in response to CEACR's direct requests regarding the right to strike as regards the following issue definition of minimum services since 1990.[387]

[386] Russian Federation, CEACR Observation, 2012.
[387] Spain, CEACR Direct Requests, 1990-2022.

16) Switzerland: The Government has consistently refused to date to change its legislation in response to CEACR recommendations regarding the right to strike as regards the restriction of the right to strike for public officials in certain cantons since 2006.[388] The government has not only not addressed the CEACR recommendations but provided concrete reasons why it does not agree with the related CEACR interpretations on the right to strike and will maintain the present national regulations. The Government has also explicitly challenged that a right to strike derives from C87. The CEACR noted that:

> *[t]he Government wished to point out […] that it is not in a position to be seized of the matter because recognition of the right to strike in general and for the personnel of the cantons and communes in particular does not derive from the Convention.*[389]

17) Tajikistan: The Government has consistently refused to date to change its legislation in response to CEACR's direct requests regarding the right to strike as regards to majority required for calling a strike since 2008.[390]

18) Turkmenistan: The Government has consistently refused to date to change its legislation in response to CEACR recommendations regarding the right to strike as regards to compulsory arbitration since 2012.[391] The Government has not only not addressed the CEACR recommendations but provided concrete reasons why it does not agree with the related CEACR interpretations on the right to strike and will maintain the present national regulations. The CEACR noted that "*the Government considers the Committee's request to be beyond the scope of the Convention […].*"

19) Turkey: The Government has consistently refused to date to change its legislation in response to CEACR's observations and direct requests regarding the right to strike as regards the following issues: (i) suspension of strikes since 2004; (ii) sympathy strikes since 2014; (iii) definition of minimum services since 2014; and prohibition of right to strike for public servants since 2000.[392] The Government has not only not

[388] Switzerland, CEACR Observations, 2006-2022.
[389] Switzerland, CEACR Observation, 2006.
[390] Tajikistan, CEACR Observations, 2008-2023.
[391] Turkmenistan, CEACR Direct Requests, 2012-2018.
[392] Turkey, CEACR Observations, 2000-2023.

addressed the CEACR recommendations but partly also provided concrete reasons why it does not agree with the related CEACR interpretations on the right to strike and will maintain the present national regulations. The CEACR noted that:

> *the Committee notes that the Government once again indicates that the decision of the President to postpone a strike is taken within its context and the rationale is clearly indicated in it, hence this authority is exercised within clearly stated boundaries.*[393]

20) United Kingdom: The government has consistently refused to date to change its legislation in response to CEACR comments (observations and direct requests) regarding the right to strike as regards the following issues: (i) return of striking workers to their workplace after the strike since 1989; and (ii) majority requirements for strike ballots in particular public services since 2015.[394] The government has not only not addressed the CEACR's recommendations but partly also provided concrete reasons why it does not agree with the related CEACR's view on the right to strike and will maintain the present national regulations.

> *The Committee takes note of the Government's indication that it has no plans to change the law in this area as it considers it essential under its system of decentralized industrial relations that it should remain unlawful for a trade union to organize any form of secondary industrial action. […] The Government however maintains that it is not appropriate to support the view that an employer must never dismiss employees under any circumstances when they take protected industrial action*.[395]

21) Ukraine: The government has consistently refused to date to change its legislation in response to CEACR's observations regarding the right to strike as regards to the prohibition of right to strike for public servants since 2012.[396] The government has not only not addressed the CEACR's recommendations but provided concrete reasons why it does not agree with the related CEACR's view on the right to strike and will maintain the present national regulations. The Committee notes that *"the Government reiterates that public servants are prohibited from exercising the right*

[393] Turkey, CEACR Observation, 2023.
[394] United Kingdom, CEACR Observations and Direct Requests, 1989-2023.
[395] United Kingdom, CEACR Observation, 2008.
[396] Ukraine, CEACR Observations, 2012-2023.

to strike and that a new legislation on Public Service, which will enter into force on 1 January 2013, contains provisions to the same effect."[397]

Conclusion on executive and legislative subsequent practice

244. It is significant that the changes proposed by the CEACR which are discussed above and which have been comprehensively ignored and / or roundly rejected by a plethora of Governments across the world would not require the States concerned to expend significant resources for their implementation. The proposed changes could readily have been implemented by the respective Governments without a significant adverse impact on their national budget if they had agreed with the CEACR's guidance on the right to strike in C87. However, the fact that so many Governments have adopted a consistent practice over many years of not complying with or not implementing CEACR recommendations, shows that the respective Governments do not agree with the CEACR's guidance even if they do not always express such disagreement publicly.

245. In any case, in view of the blatant and persistent disregard of CEACR recommendations on the right to strike by a significant number of State parties to C87, compliance by certain State parties with certain CEACR recommendations on the "right to strike" cannot be regarded as establishing "the agreement of the parties" to the related CEACR's comments for the purposes of Article 31(3)(b) VCLT.

ii. Subsequent Practice by National Courts

246. Irrespective of subsequent government practice, it appears that, according to the information available, the national courts of only 12 State parties, out of the 158 that ratified C87, have made reference to CEACR's interpretations on the right to strike in their judicial decisions.[398] There are however several specific examples where national courts have expressly disagreed with the CEACR's guidance on the right to strike.

[397] Ukraine, CEACR Observation, 2012.
[398] ITCILO, Right to Strike - Compendium of Court Decisions.

1) Norwegian Supreme Court

247. The first example is demonstrated by the Supreme Court of Norway, which considered the validity of a ban on strikes in the oil industry via compulsory arbitration of 1 July 1994.[399] The Supreme Court held that the practice of using compulsory pay tribunals to resolve labour disputes when justified by substantial public interests did not conflict with general principles of law of a constitutional nature. In relation to the relevant ILO Conventions, in particular C87, the Supreme Court noted that the CEACR's guidance with regard to the right to strike had not been established with binding effect, and that Norway had never accepted that the use of compulsory pay tribunals - when significant public interests so dictated - should be contrary to the C87.

2) German Federal Constitutional Court

248. The second example concerns the German Federal Constitutional Court, which declared that the ban on strike action for civil servants was an independent and traditional principle of the career civil service system in the sense of Article 33(5) of the German Constitution.[400] The Court stated that while the fundamental right of labour coalitions is guaranteed without explicit reservation, it can be restricted by the conflicting fundamental rights of third parties and other rights with constitutional status. The decision of the Federal Constitutional Court conflicted with the CEACR's comments on the right to strike for civil servants, as reflected in its various objections regarding Germany's adherence to C87.

249. The examples set out above clearly illustrate that the CEACR's comments on the 'right to strike' have been challenged by national courts in several countries that have ratified C87.

[399] Supreme Court of Norway, Judgment of 10 April 1997 (Rt 1997/580).
[400] German Constitutional Court, BVerfG, 'Headnotes to the Judgment of the Second Senate of 12 June 2018', file no. BvR 1738/12, paras. 1-19.

iii. Subsequent Practice by the ILO

250. It has been recognized that subsequent practice of international organizations can also be relevant *"subsequent practice"* in the sense of Art 31(3)(b).[401] The ICJ has referred to such practice of UN organs, such as the Security Council or the General Assembly, or organs of specialised UN agencies.[402]

251. In this context, the practice of the ILO bodies, i.e. the ILC, the GB and the Office could be considered.

1) The ILC has never adopted a position regarding a right to strike in C87. On the contrary, the annual reports of the CAS, which are adopted by the ILC and can therefore be attributed to the ILC, reflect considerable opposition by the Employers and governments with regard to the CEACR's views on a right to strike.

2) The GB has neither taken a position as regards a right to strike in C87. A case in point is the Government group statement of 2015 which insisted that the right to strike is regulated at national level (and thus not in C87). As regards the reports of the CFA, which are adopted by the GB, and which contain references to a right to strike, the Employers have repeatedly pointed out that the CFA has no mandate to supervise C87 and thus cannot make authoritative statements on whether a right to strike is contained in this Convention. Moreover, CFA conclusions and recommendations, as they are specific to concrete situations, vary from one case to the next. The adoption of the CFA reports therefore does not constitute a practice of the Governing Body on the right to strike in C87.

3) The Office, in its standards-related advice to member States, follows the views of the CEACR. The Office itself has no power to decide on the correct application of ILO standards. Therefore, one cannot speak of a practice of the Office on a right to strike in C87 from the outset.

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[401] Dörr, Article 31, para 86.

[402] *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*, p. 22 [22]; *Legal consequences of the construction of a wall in occupied Palestinian territory*, p. 149-150 [27-28]; *Legality of the Threat or Use of Nuclear Weapons*, p. 241 [27].

252. It should be pointed out that the CEACR, the CFA, Art 24 committees or ILO tripartite meetings in themselves are not organs of the ILO and that their views and decisions can only be attributed to the ILO if their views have been adopted by the competent ILO organs.

253. In any case, the practice of organs of international organizations is only relevant in the context of Article 31(3)(b) VCLT if it is not counteracted by acts or representations of the parties to the treaty in question.[403] Therefore, even if there existed an "*ILO practice on the right to strike in C87*", the long-standing and ongoing disregard and opposition by many State parties to C87 with regard to the CEACR recommendations regarding a right to strike, as illustrated above, shows that the requirement of the *"agreement of the parties"* with regard to the interpretation of the right to strike in C87 is not fulfilled.

Conclusion on judicial subsequent practice

254. To conclude, there is no evidence of any subsequent practice in the application of C87 that would establish the agreement of the parties on the interpretation of a right to strike in C87. Further, there is no subsequent practice in the application of C87 establishing the agreement of the parties that the CEACR's comments as to the right to strike flow from C87. There is accordingly no relevant subsequent judicial practice evidencing an agreement on the interpretation of C87 for the purposes of Article 31(3)(b).

(c) Any relevant rules of international law applicable in the relations between parties

255. The relevant rules of international law correspond to the notion of the sources of international law as set out in Article 38(1) of the ICJ Statute,[404] in particular international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; and the general principles of law recognized by civilised nations. Article 31(3)(c) only allows rules to be used for the purposes of interpretation that are "*applicable in the relations between the parties*", namely those treaties for whom the treaty under

[403] Dörr, Article 31, para 87.
[404] Villiger, para 25.

interpretation is in force or those rules which are binding on the parties by virtue of customary international law or the general principles of law.[405] This means that in practice, the only treaty which is relevant when considering the proper interpretation of C87 is the International Covenant on Economic, Social and Cultural Rights ('ICESCR').

256. At the outset, the IOE wish to clarify that it would be erroneous to construe the general statement of this Honourable Court in the *Namibia* case that *"an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"*[406] as meaning that consideration of the right to strike in the context of C87 should be regarded as an evolving interpretative framework. This statement was made in the context of a specific treaty in relation to which the intention of the parties, reflected by reference to the objects and purpose, made clear that an intertemporal approach to interpretation was appropriate due to the use of the phrase "sacred trust of civilisation" and the need to take into account the development of the legal principle of "self-determination" which had occurred subsequent to the League of Nations era.[407] The generic statement in the *Namibia* case therefore does not operate to extend the Court's role pursuant to Article 31(3)(c) and certainly does not favour the adoption of an evolutive interpretation in relation to the right to strike in C87. Notably, the right to strike already existed in the established lexicon of comparative law at the time C87 was drafted and the intention of the drafters, was very clearly not to incorporate the right to strike within that Convention.

i. <u>International Conventions</u>

257. Reference was already made under Article 31(3)(a) – 'subsequent agreement' - to Article 8 of the ICESCR, which implores State parties to undertake to ensure "*(1)(d) [t]he right to strike, provided that it is exercised in conformity with the laws of the particular country."*

[405] Dörr, para 103; Villiger, para 25.
[406] *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Reports 1971, p. 31 [53].
[407] Gardiner, pp. 294-295.

258. Article 8(d) of ICESCR is the most explicit universal regulation of the right to strike. The ICESCR has been even more widely ratified than C87 (171 ratifications versus 158 ratifications). Unlike other international or regional instruments which expressly mention a right to strike, only the ICESCR has as its State parties all the States parties to C87. Article 8(2) of the ICESCR permits the imposition of lawful restrictions on the exercise of the right to strike by members of the armed forces, the police or the administration of the State. This is admittedly similar to Article 9 of C87 and CEACR's guidance which allows for the guarantees provided for in C87 to be limited by States for the armed forces and police but not for "*the administration of the State*".

259. Apart from that, there are, however, important divergences between the CEACR guidelines on the 'right to strike' and the guarantee of the right to strike in Article 8(1)(d). In particular, Article 8 only guarantees the exercise of right to strike *"in conformity with the laws of the particular country.*" This is very different to the CEACR's comments an observation which seek to amendment of national laws to ensure full conformity to CEACR's guidance. Moreover, a number of State parties to C87 have made reservations to the ICESCR as regards the scope and limits of the right to strike under Article 8 which are <u>not</u> compatible with the CEACR interpretations on the right to strike in C87.

260. For example, Japan reserved its right to restrict the right to strike for fire service personnel;[408] Kuwait reserved its right to forbid strikes;[409] Mexico reserved its right to restrict Article 8 pursuant to its constitution and national laws;[410] Norway made a reservation regarding the right to strike so as to allow compulsory arbitration;[411] and

[408] UN Treaty Collection, '<u>International Covenant on Economic, Social and Cultural Rights</u>', 16 December 1996, Chapter IV-3, Japan : "*4. Recalling the position taken by the Government of Japan, when ratifying the Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise, that `the police' referred to in article 9 of the said Convention be interpreted to include the fire service of Japan, the Government of Japan declares that `members of the police' referred to in paragraph 2 of article 8 of the International Covenant on Economic, Social and Cultural Rights as well as in paragraph 2 of article 22 of the International Covenant on Civil and Political Rights be interpreted to include fire service personnel of Japan.*"

[409] Id, Kuwait: "*The Government of Kuwait reserves the right not to apply the provisions of article 8, paragraph 1 (d).*"

[410] Id, Mexico: "*The Government of Mexico accedes to the International Covenant on Economic, Social and Cultural Rights with the understanding that article 8 of the Covenant shall be applied in the Mexican Republic under the conditions and in conformity with the procedure established in the applicable provisions of the Political Constitution of the United Mexican States and the relevant implementing legislation*."

[411] Id, Norway: "*Subject to reservations to article 8, paragraph 1 (d) to the effect that the current Norwegian practice of referring labour conflicts to the State Wages Board (a permanent tripartite arbitral commission in matters of wages) by Act of Parliament for the particular conflict, shall not be considered incompatible with the right to strike, this right being fully recognised in Norway*."

Trinidad and Tobago reserved the right to restrict the right to strike of those engaged in essential occupations.[412]

261. Therefore, although all the ratifying C87 member States are also parties to the ICESCR, these reservations regarding Article 8 of the ICESCR demonstrate that there is no agreement by all the State parties to C87 that the CEACR guidelines on the right to strike emanate from C87.

ii. Customary International Law

262. Supporters of a 'right to strike' in C87 claim that the right to strike' has become part of customary international law ('CIL').[413] Generally speaking, two conditions are considered for the recognition of customary international law: (a) a general practice accepted by States and (b) this practice must stem from a sense of legal obligation.[414]

263. On this basis, it is argued that:

> *the international right to strike qualifies as CIL […], based on the existence of widespread State practice in which ratification or conformity reflects opinio juris, a genuine sense of obligation under international law. In addition to Convention 87 having been ratified by more than 80 percent of ILO Member States, the right to strike as an integral part of FOA is an element in broader ILO documents that obligate all countries, including those like the U.S. that have not ratified the Convention. Relatedly, the right is recognized through the two previously mentioned U.N. Covenants whose language expressly incorporates the guarantees provided for in Convention 87. The right is further established in prominent decisions from transnational courts, and in domestic legal frameworks around the world (constitutions, statutes, and high court decisions), reinforcing the argument that widespread respect from governments is based on a sense of legal obligation. Further, the broad-based evidence from domestic legal*

[412] Id, Trinidad and Tobago: "*In respect of article 8 (1) (d) and 8 (2), the Government of Trinidad and Tobago reserves the right to impose lawful and or reasonable restrictions on the exercise of the aforementioned rights by personnel engaged in essential services under the Industrial Relations Act or under any Statute replacing same which has been passed in accordance with the provisions of the Trinidad and Tobago Constitution*."
[413] James J. Brudney, 'The Right to Strike as Customary International Law', The Yale Journal of International Law, Vol. 46:1, 2021, p. 56.
[414] International Law Commission, 'Report on the Work of its Seventieth Session – Chapter V: Identification of Customary International Law', 2018, pp. 90-91.

> *frameworks indicates that ratification reflects not simply formal commitment but active compliance by governments.*[415]

264. There remain open questions and doubts regarding whether the right to strike forms part of CIL which make it unsuitable for creating legal certainty regarding the right to strike in the ILO.

265. First, there is the question of what is meant by "*the general practice accepted by States*" in the context of the right to strike. Is it asserted that there exists in CIL a vague principle that there is a right to strike and, if so, is this an absolute right? Or is it asserted that the detailed and complicated guidance on the nuances of the right to strike set down by the CEACR are somehow reflective of CIL?

266. Secondly, how can States' be said to have a "*sense of legal obligation*" in relation to the right to strike in circumstances where a number of States have previously only been able to agree "*to consider discussing in the forms and framework that will be considered suitable, the exercise of the right to strike*"?[416] This is hardly an expression by those States of feeling bound by a general practice in relation to the modalities of the right to strike. Indeed, the extent to which there is non-compliance, and even outright disagreement, by States with CEACR's guidance (as outlined above) also demonstrates that the majority of States cannot be said to feel bound by a sense of legal obligation as to the scope and limits of the right to strike as defined by the CEACR.

267. The IOE submits that the mere fact that the right to strike exists in many countries in very different forms is not a basis for recognising the right to strike as CIL, let alone for bringing the right to strike within the scope of C87 by recognising it as CIL. There is enormous diversity among national laws and practices in the area of industrial action owing to the correlative diversity of industrial relations practices and industrial dispute settlement systems in member States. C87 recognises that the armed forces and the police do not enjoy freedom of association and consequently neither a right to strike. Even under the CEACR's expansive definition of the right to strike, there are identified categories of workers that do not have a right to strike (e.g. public servants; workers in essential

[415] Brudney, p. 56.
[416] ILO, 'The Standards Initiative - Appendix I', p. 4.

services). Due to these vast differences in national practice, suggesting that there is a general 'right to strike' which is part of CIL, is such a vague proposition that no concrete conclusions or behavioural instructions for governments can be drawn from it.

268. There is even less evidence which exists to indicate that the scope and limits of the right to strike in CIL correspond to the scope and limits of the right to strike as defined by the CEACR. Other international instruments, such as the two UN Covenants (the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights), recognise that the scope and limits of the right to strike must be consistent with national laws. CIL could hardly go beyond these two near universally accepted covenants. Recognising a 'right to strike' as part of CIL would ultimately be tantamount to recognising an empty shell of a concept, which erodes legal certainty and undermines sovereignty.

269. Moreover, as it has been pointed out earlier, there is nothing to prevent the ILO from recognising and regulating a 'right to strike' through its ordinary standard-setting procedures. The ILO is competent in this area and could adopt a Convention on the right to strike, its scope and its limits, at any time. The fact that the ILO, for various reasons, has not yet attempted to do so does not provide a justification to impose vague notions of a "right to strike derived from CIL" on the States Parties to C87.

270. For the reasons set out above, there is no basis for recognising a right to strike to the extent and within the limits established by the CEACR as part of CIL.

(d) In Dubio Mitius

271. While not part of the general rule of interpretation in Article 31, the principle *in dubio mitius*, also known as the principle of restrictive interpretation, has been considered as a subsidiary principle of treaty interpretation. According to this principle, treaties are to be interpreted in favour of State sovereignty, that is to say, where a treaty's provisions are

open to doubt, the interpretation that entails the lesser obligation for sovereign States is to be selected.[417]

272. The IOE submits that the application of the general rules of interpretation contained in Article 31(1)-(3) establish that the 'right to strike' is not protected by C87 and this conclusion is corroborated by the rule *in dubio mitius*.

273. Any purported interpretation of C87 which seeks to incorporate the extensive comments of the CEACR on the 'right to strike' which are not supported by the State parties to C87 would clearly constitute an infringement on the sovereignty of those States. In circumstances where there are immediately available ILO procedures to establish international rules on the 'right to strike' and the possibility for member States to decide on whether to enter obligations in this regard thus restricting their sovereignty, an interpretation that excludes the CEACR'S guidance from the scope of C87 is clearly preferable pursuant to the principle of *in dubio mitiu.*

274. To conclude, there do not appear to be any rules of international law applicable in the relations between the parties within the meaning of Article 31(3)(c) to support the contentions that (1) the right to strike is protected by C87 or (2) the CEACR's interpretations in relation to the 'right to strike' may be said to emanate from C87.

(e) Article 31(4)A special meaning shall be given to a term of it is established that the parties so intended

275. A special meaning goes beyond the ordinary meanings of a term. Special meanings can often be found in specialised treaties and reflect the autonomy of the parties. There is no evidence that the parties to C87 have given the term *"activities"* in Article 3 of C87 a special meaning that would correspond to a 'right to strike' let alone an unqualified right to strike of the type advanced by others. No 'right to strike' is found based on Article 31(4).

[417] Dörr, Article 31, para 33.

D. Article 32 Supplementary Means of Interpretation

276. Article 32 provides that:

> *[R]ecourse may be had supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*

277. There is no recognised definition in international law of *travaux préparatoires,*[418] however the material must illuminate a common understanding – and so can only qualify as preparatory work if it was (at least at one stage) present in negotiating process and available to negotiators collectively. It must also directly relate to the treaty under consideration.[419]

278. Recourse to supplementary means may ordinarily be in two cases: (i) either in order to confirm the meaning resulting from the application of Article 31; or (ii) to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.[420]

279. Recourse to the supplementary means of interpretation is far more liberal than usually perceived. That is *a fortiori* here because, pursuant to Article 5 of VCLT, the supplementary means have special importance attached to them when interpreting ILO Conventions. A primary incident of this is that when interpreting ILO Conventions like C87, it is particularly justified to identify object and purpose and extrinsic context from common understandings evidenced by preparatory work – as indicated above.[421] A secondary incident is that, irrespective of their role in Article 31 analysis, the role of supplementary means in either confirming or clarifying the interpretation produced through Article 31 is particularly crucial for C87.

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[418] Dörr, Article 32, para 11.
[419] Id, para 19.
[420] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43 [160].
[421] *See* paras. 142-167.

280. If Article 32 does not *"confirm"* the tentative interpretation posited by Article 31, then the preparatory work must lead to a revisiting of the general rule, to find a permissible interpretation that is capable of confirmation.[422] The investigation may also lead to the conclusion that there is an ambiguity that has hitherto gone unnoticed.[423] To put the same point another way, if the Article 32 analysis contradicts the Workers' position in respect of Article 31, then it is unlikely that the proper interpretation of Article 31 is that which the Workers suggest. The Court must then look at Article 31 with fresh eyes and to the extent it finds ambiguity, resolve this in such a way that it is ultimately capable of confirmation by reference to the supplementary means.

281. IOE's position in respect of the application of Article 32 analysis is as follows:

i. Primarily, it is helpful for confirmation of the unambiguous interpretation arising from Article 31, as set out above, from which it is already clear that a right to strike is incompatible with Articles 3 and 10 specifically, and C87 generally.

ii. Alternatively, were the Court to find the result ambiguous or unreasonable based on Article 31, then it is required to consider Article 32.

iii. Ultimately, Article 31 can only be properly confirmed in accordance with the position that the IOE advances.

282. The supplementary means show not only that there was no intention to include a right to strike in C87; but rather there was an express choice to leave the question of rights to strike outside the bounds of C87. Thus, neither the terms *"organise…their activities"* nor *"defending and furthering the interests of workers"* provide a basis for the suggestion otherwise. This is clear for the following five reasons; the first four of which focus on the preparatory works to C87 in 1947 and 1948.

283. First, preparatory reports on C87, prior to the ILC, corroborate that a right to strike is outside the bounds of C87 as a whole.

[422] Dörr, Article 32, para 20.
[423] Id, para 31.

284. As usual in ILO standard-setting procedures, the Office prepared and sent out to governments of member States a report containing a questionnaire on the scope and nature of the envisaged new instrument on freedom of association and the right to organise. The questionnaire included questions regarding: the desirability and form of international regulation; the establishment of organisations of employers and workers, the functioning of these organisations; the dissolution and suspension of these organisations, federations, confederations and international organisations of employers and workers; guarantees relating to federations and confederations; the legal personality of organisations, the responsibilities of organisations; guarantees of the exercise of the right to organise; and the establishment of agencies for the purpose of ensuring respect of the right to organise.[424]

285. One of the questions (Question 3(c)) related to the establishment of workers' organisations, sought clarity on the following:

> *Do you consider that it would be desirable to provide that the recognition of the right to association of public officials by international regulation should in no way prejudge the question of the right of such officials to strike?*

286. In a subsequent report, the Office analysed the initial responses that it received from 19 governments.[425] The Office summarised the responses to the above question, noting the response of most countries was that the right to strike was not relevant to the proposed Convention:

> *To the question whether the provision should be included to the effect that the recognition of the right of association of public officials does not prejudge the question of their right to strike—Question 3 (c)—Australia, Austria, Belgium, Bulgaria, Canada, Denmark, Ecuador, Finland, France, Hungary, India, Switzerland, Union of South Africa and United States reply in the affirmative, while the United Kingdom states that it does not object if it is thought to be necessary. China's reply omits any answer to this particular question, and Mexico answers in the negative. Both the Netherlands and Sweden consider that this Convention should not be concerned with questions relating to the right to strike, and the United States, while replying in the affirmative, considers that it would be undesirable to attempt to resolve this problem under this Convention. Most*

[424] ILC, 'Questionnaire, Freedom of Association and Protection of the Right to Organise', 1948, p. 15 *et seq* **[ILO Dossier Document No. 157]**.
[425] ILC, 'Report VII - Freedom of Association and Protection of the Right to Organise', 1948.

> *countries, therefore, 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.* (emphasis added)[426]

287. Further government responses, that were received later on, were published in a supplementary report.[427] While most governments agreed with the substance of the proposed question, i.e. that the right of freedom of association of public officials should in no way prejudge the question of the right to strike of such officials, some governments felt that freedom of association was thematically different from the right to strike and should therefore not be addressed in C87. For example, the Italian government felt that the right to strike was fundamentally different from the conception of freedom of association.[428] Similarly, the Norwegian government stated that the question of the right to strike must be kept strictly apart from the question of freedom of association. The Norwegian government maintained that the right to strike, not only of public officials, but of all employees, had no bearing on the question of freedom of association. Therefore, the question of the right to strike should be dealt with in connection with a separate instrument, concerning conciliation and arbitration.[429]

288. The Office reached the following conclusions from this:

> *It may be observed, in this latter connection, that the Governments were also consulted on the question whether it would be desirable to provide in the international regulations that the recognition of the right of association of public officials should in no way prejudge the question of the right of such officials to strike. 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.* (emphasis added)[430]

[426] Ibid, p. 67.
[427] ILC, 'Report VII (Supplement) - Freedom of Association and Protection of the Right to Organise', 1948, p. 8 **[ILO Dossier Document No. 159]**.
[428] Id, p. 11.
[429] Id, pp. 11-12.
[430] ILC, 'Report VII - Freedom of Association', p. 87.

289. As such, the Office concluded on the basis of its analysis of government responses that the right to strike would not be addressed in C87 for the simple reason that it would be addressed in the latter standard-setting on conciliation and arbitration.[431]

290. Second, discussions of C87 at the International Labour Convention, prior to its adoption, are particularly significant for Article 32 analysis. As discussed above,[432] the more the material reflects growing agreement the higher its interpretative value will be – indeed, material before the treaty was adopted will deserve particular attention (under Article 32) as being very *"close"* to the agreement of the parties.[433]

291. These discussions emphatically show that a 'right to strike' is outside the bounds of C87 - let alone Articles 3 and 10 of C87.

1) It seems from the Record of Proceedings that the issue of the 'right to strike' was not raised in the discussion of C87 at the ILC in 1948 – neither in the discussion of Article 3;[434] nor the new definitional provision in Article 10. These two Articles nevertheless form the basis of ITUC's suggested interpretation. The decision not to discuss the right to strike was in line with the intention expressed in the preparatory Office report.[435]

2) To the contrary, shortly prior to the conclusion of the discussion on C87, and the Convention's vote to adopt Article 3, the Chairman stated, *"...that the Convention*

[431] The failure to regulate the right to strike in the latter standard-setting on conciliation and arbitration actually does not alter the fact that there was no intention to address it in the context of C87; there is no justification to re-introduce the right to strike in C87 by way of interpretation.
[432] *See* para 169 1.iv.
[433] Le Bouthillier, Article 32.
[434] ILC, Record of Proceedings, 1948, Appendix X, p. 477; in the discussion of Article 3, some amendments were presented to include in the text a reference to national legislation; it is not clear from the Record of Proceedings if these amendments concerned the right to strike. In any case, none of them was discussed as they were all withdrawn. Only an amendment proposed by the Argentine government may have concerned the right to strike. However, according to the Record of Proceedings it was also withdrawn on the understanding that it could be brought up again during the discussion on Item VIII of the agenda (conciliation and arbitration). In the preparatory report, it was said that the Convention would not relate to the right to strike, which was a question which would be considered in connection with Item VIII.
[435] Ibid.

was not intended to be a "code of regulations" for the right to organize, but rather a concise statement of certain fundamental principles (emphasis added)*"*[436]

3) Thus, C87 was not conceived as a detailed regulation of questions related to freedom of association. The attempt to introduce a right to strike into C87 is belated, and incompatible with the axiomatic nature and intention of C87 as a *"concise statement of certain fundamental principles".*

4) The fact that States withdrew any amendments to Article 3 when informed by the Chairman of C87's intention, and was then adopted by near unanimity (127 in favour, 0 votes against, and 11 abstentions) emphasises the significant support by member States to the Convention in the above understanding of a *"concise statement of certain fundamental principles".* [437] Indeed, it seems it is precisely because C87 was intended as a concise statement regarding only a limited set of basic principles, and was not intended to go into contested and highly disputed matters such as the right to strike (let alone an unqualified right to strike), that it passed with near unanimity.

292. Third, as discussed above,[438] even as far back as the 30th Session of the ILC, which *"unanimously adopted…principles"* that *"should form the basis for the international regulation"*, the ILC distinguished between the freedom of association and protection of the right to organise, on the one hand; and principles of the right to organise and bargain collectively. The distinction shows a conceptual separation, from its very origins, as between freedom of association on the one hand; and the specification of more nuanced rights on the other, such as collective bargaining - which does not *per se* equate to the right to strike.

293. Fourth, although the Voluntary Conciliation and Arbitration Recommendation (No. 92) adopted by the ILC in 1951 contains references to strikes and lockouts, which was put

[436] Id, p. 477; ILC, 'Report VII - Freedom of Association and Protection of the Right to Organise', p. 84/85. The Office had concluded in similar terms: *"On the other hand, any proposed regulation purporting to regulate even the smallest problems which might arise in practice in each country would have obliged the majority of countries first to amend their national legislation, frequently with regard to points of detail, before they would be in a position to ratify the international Convention. And it is for this reason that* ***the Office has purposely refrained from proposing to the Conference any kind of " code or model regulations"*** *concerning freedom of association."* (emphasis added)
[437] ILC, Record of Proceedings, 1948, pp. 268-269.
[438] *See* para 154.ii.

onto the agenda by the 30th Session of the ILC alongside and distinct from the Freedom of Association and Right to Organise Convention - this simply presupposes that if the right to strike at all came within the scope of C87, there would be explicit mention of the word 'strikes' or 'lockout'. Further, if it had been included as within the scope of C87, then there would likely be a link or reference within the Voluntary Conciliation and Arbitration Recommendation to C87 such as in preambular text. There is no such mention.

294. Fifth, supplementary means under Article 32 extends beyond preparatory works, and includes comments by state parties supporting the view that the right to strike is not covered in C87. There is a plethora of consistent commentary, over time, reflecting the widespread view of States parties that the right to strike was never intended to be part of C87, and is still not understood to be.

295. In Annex F, a table sets out excerpts of statements from 14 States whose governments have explicitly stated that they do not consider the right to strike to be covered by C87, or have expressed reservations about such understanding. These 14 States are geographically spread around the world, and include OECD and developing economies: Algeria, Bangladesh, Belarus, Colombia, Cyprus, German Democratic Republic (as it then was), Japan, Morocco, Nigeria, Sweden, Switzerland, and Türkiye. A representative sample of comments include:

1) Colombia (1991): "*The right to strike is one of the basic safeguards of the working class. This has been recognized in the constitutions and legislation of countries having democratic systems of government, including Colombia. However, within the International Labour Organization itself, 72 years after its establishment, no Convention of this kind has been adopted. … In reality, Convention No. 87 only deals with the right of workers and employers to establish and join organizations; the right for such organizations to draw up their constitutions and rules and elect their representatives in full freedom without being liable to be dissolved or suspended by administrative authority; and their right to establish federations or confederations."*[439]

[439] ILO, 'Agenda of the 81st (1994) Session of the Conference', Annex I, p. 21.

2) Nigeria (1992): "*Concerning item (3) on the right to strike he felt that the subject was a delicate one and he was not convinced of the need for entrenching that right in a Convention* (implying therefore that a Convention already entrenching this right did not exist). *"*[440]

3) Japan (1973): "*The Government member of Japan replied that, as pointed out in the report of the Fact-Finding and Conciliation Commission on Freedom of Association relating to the case of Japan, there was no Convention or Recommendation or other decision of the International Labour Conference defining the extent of the right to strike in the public sector.*"[441]

4) Switzerland (1987): *"Under Convention No. 87 public servants were guaranteed the right to organise but that right to strike was not covered. He referred in this connection to the preparatory work leading to the adoption of Convention No. 87."*[442]

296. In Annex G, a table sets out a compilation of excerpts from governments' statements delivered during the sessions of the GB and ILC, calling for continued social dialogue as the means to solve the dispute on the right to strike. This demonstrates the inappropriateness of interpreting C87 so as to include a right to strike, in circumstances where an expansion of the rights contained in C87 should not occur without tripartite interaction and co-operation. Any expansion of rights without such social dialogue would not be legitimate by reference to the ILO's processes and rules, which are of particular importance given Article 5 of VCLT. The States and entities included in the table include country groupings of substantial size (Arab Group,[443] ASEAN Countries,[444] Asia and Pacific Countries)[445] and Bangladesh, Botswana, Brazil, Cameroon, China, Colombia,

[440] ILO, Minutes of the 253rd Session, GB. 253/PV(Rev.), 28 May 1992, p. I/17.
[441] ILC, Record of Proceedings, 1973, p. 544, para 26.
[442] Id, para 27.
[443] Algeria, Egypt, Comoros, Djibouti, Iraq, Jordan, Lebanon, Saudi Arabia, Tunisia, Qatar, Somalia, Sudan, United Arab Emirates and Yemen.
[444] Brunei, Burma (Myanmar), Cambodia, Timor-Leste, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam.
[445] Afghanistan, Australia, Bahrain, Bangladesh, Brunei Darussalam, Cambodia, China, Fiji, India, Indonesia, Iran, Islamic Republic of Iraq, Japan, Jordan, Kiribati, Republic of Korea, Kuwait, Lao People's Democratic Republic, Lebanon, Malaysia, Maldives, Republic of, Marshall Islands, Mongolia, Myanmar, Nepal, New Zealand, Oman, Pakistan, Palau, Papua New Guinea, Philippines, Qatar, Samoa, Saudi Arabia, Singapore, Solomon Islands, Sri Lanka, Syrian Arab Republic, Thailand, Timor-Leste, Tuvalu, United Arab Emirates, Vanuatu, Viet Nam and Yemen.

Indonesia, Iran, Japan, Jordan, Lesotho, Pakistan, Paraguay, Poland, Russian Federation, Sudan, Tunisia, Türkiye, United Arab Emirates, Zimbabwe.

Conclusion on Article 32

297. Taking a step back and synthesising the supplementary materials above: in the view of ILO constituents at the time, the question of freedom of association and the question of the right to strike were separable from each other. Government responses show that there was no willingness to address a right to strike in the context of freedom of association, neither in the private nor in the public sector.

298. As the right to strike was not raised in the discussion of C87 at the ILC, and all States agreed and withdrew amendments to Article 3 on being reminded of the intention of C87 (as setting out *"certain fundamental principles"*), the inescapable conclusion is that there was a clear intention not to regulate or address the right to strike in C87. The application of the interpretation rules in Article 32 VCLT therefore supports the position reached through the Article 31 analysis above.

299. It is respectfully submitted by the IOE that to interpret C87 otherwise would be impermissible as it would require this Honourable Court to conduct a wholesale rewriting of the text of C87 in a manner that would constitute a subversion of the intention of C87's parties.[446]

[446] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya),* Preliminary Objections, ICJ Reports 2017, Dissenting Opinion of Judge Bennouna; *Kasikili/Sedudu Island (Botswana/Namibia),* ICJ Reports 1999, Declaration of Judge Higgins [2]; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Judge Bedjaoui [5].

VI. WIDER IMPLICATIONS

300. Aside from the application of the general rules of interpretations under the VCLT, this Honourable Court will be well aware that its advisory opinion will have wider implications beyond the right to strike and C87, i.e. on future international labour standards and the ILO in general. There are some important contextual elements that the Court may wish to consider in this regard.

301. First, the right to strike is only one type of industrial action. In the wider context of industrial relations between employers and workers, there are many other social and economic issues that require negotiation and agreement between employers and workers at company, national, regional and international levels. Each State's industrial relations system is grounded within a unique national historical, economic and political context and therefore there is wide variation among countries generally within the labour context, and more specifically with respect to the scope and limits of the right to strike. Even countries that have very liberal national regulations on the right to strike do not offer all the protections that the CEACR have stipulated in their comments and observations. If the Court decided that C87 protected the right to strike, the majority - if not all - State parties to C87, would be found in violation of the Convention under the CEACR's guidance of the right to strike.

302. Second, International Labour Standards are defined as "*principles and norms concerning labour and related issues which take the form of Conventions and Recommendations adopted by the annual ILC of the ILO*".[447] Member States are bound by these standards when they ratify and adopt a Convention. It would be contrary to the rule of law and also the principle of legal certainty if the creation of substantial new legal obligations with respect to a contentious area of labour law that have never been passed through the established ILO specific tripartite consensus-based process, such as those on the right to strike, were to be permitted. Such an outcome would not only affect the interpretation of the provisions in C87, but also of other existing and future ILO instruments. This could also have an impact on member States' confidence in ratifying any future ILO instruments.

[447] ILO, 'Glossary', p 4.

303. Third, the Court must consider that there are other existing forums available within the ILO to resolve questions of interpretation and to clarify the scope and limits of ILO instruments. These other existing forums, designed as they are within the *sui generis* ILO structure, are based on tripartite consensus. They include, a tripartite meeting of experts, a general discussion in the ILC, a declaration issued by the ILC or standard-setting by the ILC. In particular standard-setting, due to its sophisticated design, which has been tried and tested for many decades, leads to results that ensure tripartite ownership, reliably reflect the will and needs of the ILO constituents and are thus highly accepted. Standard-setting on the right to strike is very likely to provide a sustainable solution to the present interpretation dispute. In any case, the absence to date of political will does not provide a justification not to resort to these available ILO specific avenues to address the right to strike dispute.

304. Fourth, the ILO, acting as a global governance institution in labour issues, must adopt due process principles and procedural protections. It must also promote fairness, transparency and full participation in its decision-making processes. The Court should not allow the ILO to promote international labour standards that have been developed other than through means that conform to the procedural and substantive rules that have been agreed**.** In order words, the Court should not allow the interpretations of the right to strike in C87 by standards supervisory bodies such as CEACR and CFA to trump the genuine intentions of the drafters of C87. The CEACR and CFA neither have the authority nor the competence to give interpretations to ILO instruments. Legitimizing conduct by these bodies which is outside of their mandates would undermine the overall ILO governance system, and particularly the ILC as the apex legislature organ of the organisation.

VII. CONCLUSION

305. The right to strike is an important right that is recognised at national and international levels. However, as set out above, C87 cannot be properly interpreted under the rules of the VCLT as protecting the right to strike for workers and their organisations. Further, the CEACR's detailed comments and guidance on the right to strike have not been accepted by State parties to C87. Any suggestion that the non-binding and self-developed guidance issued by the CEACR should be recognised as a codification of the right to strike emanating from C87 should be roundly dismissed by this Honourable Court as being well outside any duly conducted interpretative process. For the ILO to create legal obligations for member States to protect the right to strike, it must do so in accordance with the rule of law through the established ILO standard setting process in the ILC, which involves tripartite constituents of all 187 member States.

Respectfully,

Roberto Suarez Santos
IOE Secretary General

Geneva, 16 May 2024

VIII. LIST OF ANNEXES

A. CEACR Guidance on the Right to Strike in ILO Convention 87

B. Table of CEACR Observations, Direct Requests, CAS cases regarding ILO Convention 87 and Right to Strike

C. Table of Countries Disagreeing with the CEACR's view on the Right to Strike in ILO Convention 87

D. Table of Countries Supporting Addressing the Right to Strike through Standard Setting

E. IOE comments under Article 23.2 of the ILO Constitution on the Application in Law and Practice of ILO Convention 87

F. Table of Countries Supporting the View that Right to Strike is Not Covered by ILO Convention 87

G. Table of Countries Supporting Addressing the Right to Strike through Social Dialogue

H. Table of CEACR Comments on the Right to Strike for Ratifying member States of ILO Convention 87