INTERNATIONAL COURT OF JUSTICE

Right to Strike under ILO Convention No. 87

(Request for Advisory Opinion)

Written Statement of the Government of Japan

16 May 2024

Introduction

1. In its Order dated 16 November 2023, the Court invited the International Labour Organization ('ILO') and the States parties to the Freedom of Association and Protection of the Right to Organise Convention No. 87 ('ILO Convention No. 87' or 'the Convention') to submit written statements on the question referred to the Court by the Governing Body of the ILO in its resolution adopted at its 349th *bis* (special) session on 10 November 2023.[1] The Government of Japan appreciates the opportunity to furnish its observations on the question.

2. The Government of Japan voted in favour of the Governing Body's referral resolution in the firm belief that the Court's opinion would settle the 'serious and persistent disagreement' within the tripartite constituency of the ILO and provide guidance for ILO Members implementing the Convention in accordance with their respective national legal systems. As the present Written Statement will elaborate, the Government of Japan maintains that the application of the established rules on treaty interpretation leads to the conclusion that the right to strike of workers falls outside the scope of ILO Convention No. 87. This position in no way affects Japan's continued commitment to protect the right to strike under its Constitution and relevant laws and regulations. It is to be noted that the right to strike is not an absolute right but is restricted for certain categories of workers and in certain situations under Japanese law as well as in many jurisdictions.

3. The question referred to the Court is: "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)?" This question asks the Court to decide upon the interpretation of ILO Convention No.87. The right to strike is already protected in many States, including Japan, under their constitutions and relevant laws and regulations, and the question posed here is not about whether the right to strike should be protected or not. The question posed here concerns the interpretation of this particular Convention, and, therefore, due consideration should be given to the balance struck between different provisions of this Convention. Various provisions of this Convention were negotiated as a package,[2] and their interpretation should not distort the intended overall balance. Hence, a cautious approach based on the established rules of treaty interpretation needs to be

[1] *Right to Strike under ILO Convention No. 87,* Order of 16 November 2023.

[2] See Section II below.

applied here so as not to cause unintended consequences. The present Written Statement is based on this fundamental approach.

4. This Written Statement begins, in Section I, by providing the interpretation of ILO Convention No. 87 in accordance with the established rules of treaty interpretation. It points out that the right to strike of workers falls outside the scope of ILO Convention No. 87. Section II has recourse to supplementary means of treaty interpretation, particularly the preparatory work of ILO Convention No. 87 and the circumstances of its conclusion. While such recourse is not strictly necessary, it confirms the interpretation that the right to strike of workers falls outside the scope of the Convention. Section III shows that the interpretation that the right to strike is not covered by ILO Convention No. 87 shall be maintained irrespective of the opinions held by ILO supervisory bodies to the contrary. Section IV concludes the Statement by respectfully submitting that the right to strike of workers falls outside the scope of ILO Convention No. 87.

I. The ordinary meaning of the terms of ILO Convention No. 87 indicates that the right to strike of workers falls outside the scope of the Convention

5. As the Court has reaffirmed on many occasions, Articles 31 to 33 of the Vienna Convention on the Law of Treaties ('Vienna Convention')[3] reflect the rules of customary international law.[4] In accordance with the rules of interpretation enshrined in Article 31, paragraph 1, of the Vienna Convention, a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to its terms. All of these elements of interpretation must be considered 'as a whole'.[5]

6. This Section shows that the text of ILO Convention No. 87 (A.), read in context (B.) indicates, 'as a whole', that the ordinary meaning attributed to the terms of the Convention does not convey the right to strike of workers.

A. The text of the provisions of ILO Convention No. 87 indicates that the right to strike is not covered

1. The absence of explicit reference to the right of strike is by itself indicative that the right to strike is not covered by the Convention

7. As the Court has recalled on many occasions, treaty interpretation 'must be based above all upon the text of the treaty'.[6] In its interpretative practice, the Court also deals

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[3] 1155 UNTS 331, adopted 23 May 1969, entered into force 27 January 1980.

[4] See, e.g., *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016,* p. 19, para. 35; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016,* p. 112, para. 23; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019,* p. 598, para. 106; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022,* p. 510, para. 87; *Arbitral Award of 3 December 1899 (Guyana* v. *Venezuela), Preliminary Objection, Judgment of 6 April 2023,* para. 87.

[5] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017,* p. 29, para. 64; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021,* p. 96, para. 78.

[6] See, e.g., *Territorial Dispute Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994,* p. 22, para. 41; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021,* p. 98, para. 81.

with the absence of a particular term or terms in its analysis of the treaty text.[7]

8. The lack of express language designating a particular notion in a treaty has been taken into account by the Court to contemplate that the notion is lacking in that treaty. In *Immunities and Criminal Proceedings (Equatorial Guinea v. France),* for instance, the lack of reference to rules on immunities was taken into account by the Court to conclude that the ordinary meaning of the terms of the United Nations Convention against Transnational Organized Crime of 15 November 2000, often referred to as the Palermo Convention, does not incorporate the customary international rules on immunity of States and State officials.[8] This was the case notwithstanding that Article 4 refers to the principle of sovereign equality and that the Court affirmed that the customary rules of State immunity derive from the principle of sovereign equality.[9] Even accepting such derivation, the lack of explicit reference to immunity was taken by the Court to conclude that the Palermo Convention does not incorporate the customary rules on immunities of State and State officials.

9. The same approach is apposite in the present circumstances where the Court is asked to determine the coverage of ILO Convention No. 87 over the right to strike of workers to which the Convention does not expressly refer. The absence of express reference to the right to strike either in Article 3 or in any other provisions is thus by itself indicative that the Convention does not cover the said right.

10. The above reading of the silence can be reinforced by the *a contrario* interpretation of the treaty text, 'by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded'.[10] In *Railway Traffic Between Lithuania and Poland*, for instance, the Permanent Court of International Justice interpreted that the last paragraph of Article 3 of

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[7] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018,* p. 321, para. 93; *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019,* p. 439, para. 73.

[8] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018,* p. 321, para. 93.

[9] *Ibid.*

[10] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016,* p. 19, para. 37; see, e.g., *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II),* p. 432, para. 29; *S.S. 'Wimbledon', Judgment, 1923, P.C.I.J., Series A, No. 1,* pp. 23-24.

Annex III of the Convention concerning the Territory of Memel of 8 May 1924[11] did not oblige Lithuania to take steps to open the railway traffic to or from or in the port of Memel, on the ground that Article 3 referred 'solely to waterways and not to railways', in light of the contemporaneous political relations between Lithuania and Poland, in which Lithuania did not wish to abandon its right to impose restrictions on freedom of traffic.[12] In other words, from the express inclusion of waterway traffic the Permanent Court inferred that railway traffic – a comparable category of traffic – was not covered by that provision.[13]

11. Such an *a contrario* interpretation is not only apposite but also warranted in regard to ILO Convention No. 87. As its preamble indicates, the Convention provides for the freedom of association and the right to organise as 'a means of improving the conditions of labour and of establishing peace'. In contrast to the express recognition of this right and freedom, the Convention contains no language referencing the right to strike, notwithstanding that the latter right has also been perceived as an essential means of improving the conditions of labour.[14] It may thus be inferred from the express reference to the freedom of association and the right to organise that the right to strike, a comparable category of the means of improving the conditions of labour and of establishing peace, is not covered by the Convention. Both the express language of the Convention and the lack thereof shall scrupulously be read so as to represent the guarantees as embodied and agreed in the provisions of the Convention.

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[11] 29 L.N.T.S 87. The last paragraph provides:

'Recognising the international character of the river Niemen and traffic thereon, and the general economic benefits to be derived from the exploitation of the forests in the Lithuanian and other districts in the basin of the Niemen, for which Memel is the natural outlet, the Lithuanian Government undertakes forthwith to permit and to grant all facilities for the *traffic on the river* to or from, or in the port of Memel and not to apply, in respect of such traffic on the ground of the present political relations between Lithuania and Poland, the stipulations of Articles 7 and 8 of the Barcelona Statute on the Freedom of Transit and Article 13 of the Barcelona Recommendations relative to Ports placed under an International Regime'. (emphasis added)

[12] *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J. Series A/B, No. 42,* p. 121.

[13] Abdulqawi A. Yusuf & Daniel Peat, '*A Contrario* Interpretation in the Jurisprudence of the International Court of Justice', *Canadian Journal of Comparative and Contemporary Law,* Vol. 3, No. 1 (2017), p. 8.

[14] See, e.g., International Labour Conference, 69th session, *Freedom of Association and Collective Bargaining: General Survey,* Report III (Part 4B) (1983), para. 200; International Labour Conference, 81st session, *Freedom of Association and Collective Bargaining: General Survey,* Report III (Part 4B) (1994), para. 147.

2. None of the terms in Articles 3 or 10 of ILO Convention No. 87 could encompass strike actions

12. Article 3, paragraph 1, of ILO Convention No. 87 refers to the rights 'to organise […] administration and activities and to formulate […] programmes'. As with any other international treaties, an ILO convention

> must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.[15]

13. As such, it is most advisable to read the aforementioned phrases of Article 3, paragraph 1, in conjunction with '[t]he rest of that paragraph',[16] which identifies that the holders of the rights guaranteed under Article 3 are *both* the workers' *and* employers' organisations. Article 3 begins by referring to the rights to draw up constitutions and rules as well as to elect representatives in full freedom, which are equally held by both the workers' and employers' organisations. Thus, while certain terms of Article 3 are broad in its coverage, the rights enshrined in that provision are only those that can be attributed to *both* the workers' *and* employers' organisations. Rights that could belong only to either of these organisations – such as the right to strike of workers – cannot therefore be accommodated in Article 3.

14. The same applies to Article 10, which defines the term 'organisation' as 'any organisation of workers or of employers for furthering and defending the interests of workers or of employers'. The phrase 'furthering and defending the interests', read in conjunction with the rest of the paragraph, can accommodate only elements that can be attributed to *both* workers' *and* employers' organisations.

15. It has been suggested by the workers' side that, on the basis of the broad terms of ILO Convention No. 87, notably those found in Article 3 mentioned above,

> [t]he literal meaning of the words thus confers an unqualified right on the part of unions and employers' associations to include whatever they wish in their

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[15] *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion, 1922, P.C.I.J. Series B, No. 2,* p. 23.

[16] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment of 31 January 2024,* para. 47.

> plans for the future. This must include the right, for example, to plan for collective bargaining and, for trade unions, the right to plan for industrial action. There is no basis within the words used for excluding from the right of a trade union to formulate within its programme, a plan which includes the organisation of or support for industrial action.[17]

16. The meaning of words given by the Oxford English Dictionary has been invoked to substantiate that the terms employed in Article 3, such as 'constitutions', 'rules', 'activities' or 'programmes', have no literal limitations.[18]

17. However, such an approach is not in conformity with the customary rules of treaty interpretation. This is because 'it [i]s inconceivable that the International Law Commission [] intended that interpreters of treaties should arbitrarily select dictionary meanings when construing treaty texts' when drafting Article 31 of the Vienna Convention.[19] In fact, the Court has been restrained in relying upon dictionary definitions especially when the term in question generates diverse meanings, as has been observed in *Avena*:

> The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term […]. It is therefore necessary to look elsewhere for an understanding of this term.[20]

18. Even when reference is made to dictionary definitions, the Court does not draw an absolute meaning from them but identifies the sense of the term by considering the position in which the term is found. In its advisory opinion in *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture,* the Permanent Court of International Justice, after referring to dictionary

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[17] International Trade Union Confederation, *The Right to Strike and the ILO: The Legal Foundations* (March 2014), p. 79; see also the book originated and developed from the study undertaken for the International Trade Union Confederation, Jeffrey Vogt *et al., The Right to Strike in International Law* (Bloomsbury Publishing, 2020), pp. 15, 48.

[18] International Trade Union Confederation, *The Right to Strike and the ILO: The Legal Foundations* (March 2014), pp. 76-79; see also, Jeffrey Vogt *et al., The Right to Strike in International Law* (Bloomsbury Publishing, 2020), pp. 45-48.

[19] Mr. Sinclair (United Kingdom), *United Nations Conference on the Law of Treaties, First session, Vienna, 26 March-24 May 1968,* Official Records, U.N. Doc. A/CONF.39/11, p. 177, para. 7.

[20] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004,* p. 48, para. 84.

definitions of words, observed:

> the context is the final test, and in the present instance the Court must consider the position in which these words are found and the sense in which they are employed in Part XIII of the Treaty of Versailles.[21]

19. As such, any treaty text needs to be interpreted in its context. This is called for especially when all the elements of treaty interpretation are to be considered 'as a whole'. On the basis of this account, the present Written Statement continues the interpretation of ILO Convention No. 87 by moving on to the elements of context in the next subsection.

B. Taken in context, no terms in ILO Convention No. 87 could encompass strike actions

20. As the Permanent Court of International Justice stated in connection to the interpretation of an ILO convention, the meaning of the terms of a treaty

> cannot be determined in isolation by recourse to its usual or common meaning and attaching that meaning to the word where used in the [a]rticle. The word obtains its meaning from the context in which it is used. If the context requires a meaning which connotes a wide choice, it must be construed accordingly, just as it must be given a restrictive meaning if the context in which it is used so requires.[22]

21. Among the elements of context to be considered, the immediate surroundings of a term within a provision have already been examined in conjunction with the text itself in Section I.A.2. above, concluding that rights enshrined in Article 3 of ILO Convention No. 87 are only those that can be attributed to *both* the workers' *and* employers' organisations.

22. This reading is corroborated by other elements of context, such as the provisions of the Convention other than Article 3 (1.), ILO Convention No. 98 on the Right to Organise and Collective Bargaining of 1949[23] (2.) and certain international treaties expressly

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[21] *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion, 1922, P.C.I.J. Series B, No. 2,* p. 35.

[22] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960,* p. 158.

[23] ILO Convention No. 98 on the Right to Organise and Collective Bargaining of 1949 provides that workers shall be protected against discriminatory treatment related to their involvement in unions and workers' and employers' organizations shall be protected against interference with each other. The

guaranteeing the right to strike of workers in connection with collective bargaining (3.).

1. The reading that the right to strike is not covered under Articles 3 or 10 is corroborated by the other provisions of ILO Convention No. 87

23. Articles 3 and 10 of ILO Convention No. 87 needs to be interpreted in its context. The interpretation that these provisions do not encompass the right to strike is 'also supported by reference to the various articles taken by themselves and in their relation one to another'.[24]

24. ILO Convention No. 87 begins with Article 1 providing that each ILO Member 'undertakes to give effect to the following provisions'. Articles 2 and 8 refer to the rights of both workers and employers and the conditions on which such rights are to be guaranteed. Like Article 3, Articles 4 to 8 refer to the rights of both the workers' and employers' organisations and the conditions on which such rights are to be guaranteed. As such, all the provisions of the Convention in its Part I entitled 'Freedom of association', including Articles 3 and 10, with the exclusion of a single provision, provide the rights attributable to *both* the workers' *and* employers' sides, and the conditions on which such rights are to be guaranteed. The only exception to this is Article 9, specifically dedicated to the application of the guarantee of ILO Convention No. 87 to the armed forces and the police, which is to be determined by national laws or regulations. Article 9 has thus no bearing upon the holders of rights under the Convention.

25. The same applies to Article 11 in Part II of the Convention entitled 'Protection of the right to organise', providing that each ILO Member undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise. Read in context, it is apposite to read the referred right to be of the nature that is attributable to, and freely exercised by, *both* workers *and* employers.

26. Taken in the above context, neither Article 3 nor 10 accommodates the right to strike insofar as it is only attributed to, and exercised by, workers or workers' organisations.

Convention also does not include the right to strike. Relevant articles are as follows:
- Article 1(1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
- Article 2(1) Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

[24] *Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J. Series B, No. 11,* pp. 39-40.

Any other interpretation that purports to attribute rights that may be held only by workers' organisations to the terms such as 'activities' or 'programmes'[25] fails to take into account this context.

2. *The reading that the right to strike is not covered by ILO Convention No. 87 is further corroborated by ILO Convention No. 98 on the Right to Organise and Collective Bargaining*

27. The context in which an ILO convention is to be interpreted also includes other ILO conventions dealing with relevant subject-matters. In its advisory opinion in *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night,* the Permanent Court of International Justice interpreted the provisions of ILO Convention No. 4 on Night Work of Women of 1919 in comparison to ILO Convention No. 1 on Hours of Work (Industry) of 1919. The Permanent Court paid attention to the 'similarity both in structure and in expression between' the two conventions to conclude that, unlike ILO Convention No. 1 expressly excluding persons holding positions of supervisions or management from its scope of application, ILO Convention No. 4 applied to women who held positions of supervision or management given the absence of a corresponding exception. The comparison of two ILO conventions thus led the Permanent Court 'to attach some importance' in the interpretation of ILO Convention No. 4.[26] Insofar as the comparison was made in addition to, and separately from, the other elements of treaty interpretation, such as the analysis of the treaty text and the preparatory work,[27] reference to an ILO convention qualified as an element of context in interpreting other ILO conventions.

28. In contrast to ILO Convention No. 87 which simultaneously provides the rights of both workers' and employers' sides, ILO Convention No. 98 on the Right to Organise and Collective Bargaining of 1949 contains a provision dedicated only to the protection of workers. Article 1, paragraph 1, of ILO Convention No. 98 provides: 'Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment'. This construction is seen to be deliberate, insofar as Article 2 provides

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[25] International Labour Conference, 81st session, *Freedom of Association and Collective Bargaining: General Survey,* Report III (Part 4B) (1994), paras. 148-149.

[26] *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night, Advisory Opinion, 1932, P.C.I.J. Series A/B No. 50,* pp. 380–381.

[27] *Ibid.,* pp. 373–380.

protection of both workers' and employers' organisations: 'Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration'. Within this context, therefore, a provision that denotes both workers' and employers' organisations as the holders of the right referred to in the same provision, particularly Article 3 of ILO Convention No. 87, cannot accommodate rights attributed only to workers' organisations, such as the right to strike.

29. It has been suggested by the workers' side[28] and ILO supervisory bodies[29] that two other subsequent ILO instruments contain provisions referencing a right to strike. Read in context, however, these instruments cannot endorse the proposition that ILO Convention No. 87 encompasses the right to strike.

30. Article 1 of ILO Convention No. 105 on the Abolition of Forced Labour Convention of 1957 obliges each ILO Member not to make use of any form of forced or compulsory labour '[a]s a punishment for having participated in strikes'. The plain meaning of the terms merely prohibits ILO Members to use forced labour as a punishment for strike actions, and this provision does not presuppose that the right to strike is guaranteed under ILO Convention No. 105, let alone under ILO Convention No. 87.

31. ILO Recommendation No. 92 on Voluntary Conciliation and Arbitration Recommendation of 1951 contains provisions encouraging all the parties concerned to abstain from strikes and lockouts when a dispute has been submitted to conciliation or arbitration. Paragraph 7 of the Recommendation then provides that '[n]o provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike'. As the plain text indicates, paragraph 7 is to make sure that having recourse to conciliation or arbitration has no effect of limiting the right to take industrial action to the extent that such right is guaranteed. Since the right to strike had already been guaranteed under many domestic legal systems when ILO Recommendation No. 92 was adopted in 1951, paragraph 7 is understood to refer to the right to strike as guaranteed under the law

[28] International Trade Union Confederation, *The Right to Strike and the ILO: The Legal Foundations* (March 2014), p. 27; see also, Jeffrey Vogt *et al., The Right to Strike in International Law* (Bloomsbury, 2020), p. 69.

[29] International Labour Conference, 101st Session, *Giving Globalization a Human Face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008,* Report III (Part 1B) (2012), para. 121.

of each ILO Member.

3. Treaties expressly guaranteeing the right to strike of workers corroborates the reading that the said right is not covered by ILO Convention No. 87

32. The reading that ILO Convention No. 87 does not encompass the right to strike is also reached 'if the phrase [in question] is considered in the wider context', such as other international treaties regulating the same or a similar subject-matter, by observing the 'contrast of wording' among these treaties.[30]

33. There are a few international treaties which expressly guarantee the right to strike of workers. However, the construction of these treaty provisions shows that the right to strike is guaranteed in conjunction with the right to collective bargaining.

34. Article 28 of the Charter of Fundamental Rights of the European Union provides:

> Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.[31]

35. A human rights treaty which expressly refers to the right to strike guarantees that right independently from other comparable categories of rights of workers. Article 8, paragraph 1, subparagraph (d), of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 expressly provides for '[t]he right to strike'. Yet this is guaranteed independently from other trade union rights, such as the right to form a trade union under subparagraph (a), the right of a trade union to establish national federations or confederations under subparagraph (b), and the right of trade unions to be free from limitations other than prescribed by law under subparagraph (c). The contention that the right to strike is the corollary to the effective exercise of other trade union rights cannot be sustained, as will be discussed below in Section III.B.

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[30] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992,* p. 583, para. 374.

[31] *Official Journal of the European Communities* (C 364/15, 18 December 2000).

36. These international treaties guarantee the right to strike either independently from other comparable trade union rights or, if any, in conjunction with the right to collective bargaining. Read in this context, it is most reasonable to read the terms of ILO Convention No. 87, especially those under Article 3, such as 'activities' and 'programmes', as those that do not encompass strike actions.

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37. In light of the foregoing, the ordinary meaning of the terms employed in Article 3 or any other provisions of ILO Convention No. 87 does not encompass the right to strike of workers. Even assuming that 'the absence of a concrete provision is not dispositive',[32] all of the elements of interpretation to be considered 'as a whole' lead to the conclusion that no terms of the Convention could afford strike actions.

[32] See, International Labour Conference, 101st Session, *Giving Globalization a Human Face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008,* Report III (Part 1B) (2012), para. 118.

II. The *travaux préparatoires* confirm the interpretation that the right to strike is not covered by ILO Convention No. 87

A. 31st session of the International Labour Conference in 1948

38. In order to confirm the ordinary meaning given to the terms of ILO Convention No. 87 above, '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' pursuant to the customary rules of treaty interpretation as embodied in Article 32 of the Vienna Convention.[33]

39. The International Labour Conference decided, at its 30th Session in 1947, to place on the agenda of its 31st Session (San Francisco, June-July 1948) the questions of freedom of association and of the protection of the right to organise. The International Labour Office circulated a questionnaire to which 19 governments replied by 25 January 1948. The following question was included in the questionnaire in relation to the establishment of organisations:

> Do you consider that it would be desirable to provide that the recognition of the right of association of public officials by international regulation should in no way prejudge the question of the right of such officials to strike?[34]

40. The Office, having analysed the replies of the governments, summarised as follows:

> 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

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[33] See, e.g., *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016,* p. 25, para. 47; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016,* p. 122, para. 45; *Arbitral Award of 3 December 1899 (Guyana* v. *Venezuela), Preliminary Objection, Judgment of 6 April 2023,* para. 97 *et seq.*

[34] International Labour Conference, 31st Session, 1948, Report VII, *Freedom of Association and Protection of the Right to Organise* (1948), p. 14 **[ILO's Document No. 158]**.

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 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.[35]

41. The Office then drew the following conclusion for the consideration of the Conference:

> Hence, in keeping with the spirit of the replies, the general provision included in the text of the proposed Convention should be interpreted in the widest sense as meaning that freedom of association should be recognised without distinction whatsoever as to occupation, sex, colour, race, creed, nationality, political opinion, etc., not only for workers and employers in private industry, but also for officials or employees of the public service.
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> 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.
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> 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.[36]

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[35] *Ibid.,* p. 67. The Portuguese delegation subsequently held the same observation:

> […] we should avoid any drafting which might imply the idea that we were granting public servants the right to strike.
>
> The Portuguese Government could not fail to associate itself with these reservations, even if it were not obliged to adopt the attitude to the problem which it desires to maintain.

International Labour Conference, 31st session, 1948, Record of Proceedings, p. 232.

[36] International Labour Conference, 31st Session, 1948, Report VII, *Freedom of Association and Protection*

42. Against this backdrop, the Office prepared a draft text of Article 3 of the proposed convention concerning freedom of association and protection of the right to organise:

> 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.
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.[37]

43. The Record of Proceedings of the 31st session of the International Labour Conference indicates that '[a] number of amendments were presented to […] establish certain minimum conditions to be fulfilled by [industrial organisations] in respect of their constitution and operation'.[38] However, all of these amendment proposals were withdrawn subsequent to the Chairman's statement that the proposed convention was not to be a 'code of regulations' for the right to organise:

> 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. The States would remain free to provide such formalities in their legislation as appeared appropriate to ensure the normal functioning of industrial organisations. It followed, therefore, that formalities provided for by national regulations concerning the constitution and operation of workers' and employers' organisations were in conformity with the provisions of the Convention, provided that these regulations did not impair the guarantees granted by the Convention.[39]

44. As a result, the draft text of Article 3 was adopted in the form proposed by the Office with no amendment.[40]

45. The *travaux* of ILO Convention No. 87 thus reveal that the right to strike was

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of the Right to Organise (1948), p. 87 **[ILO's Document No. 158]**.

[37] International Labour Conference, 31st session, 1948, Record of Proceedings, p. 477.

[38] *Ibid.,* p. 478.

[39] *Ibid.*

[40] *Ibid.*

deliberately not included in the Office's draft text. The Office prepared the draft text on the basis of the replies of a number of governments that the question of the right to strike was not relevant to the proposed Convention. The fact that 'there was no focused or substantive discussion on the right to strike during the negotiations that led to the adoption of Convention No. 87'[41] was therefore the result of the already emerged convergence of views of the governments that replied.

46. Notwithstanding this, it has been suggested by the workers' side that '[t]here was a presumption of the existence of the right to strike inherent in this question, which was intended to address only the right of public officials to strike and not to address the right of all workers to strike'.[42] However, had the right to strike of all workers other than public officials been believed to exist, the consensus among governments that the right to strike of public officials 'is not relevant to the present proposed Convention'[43] could hardly have emerged. Rather, it follows from the rejection of the special reference to the case of public officials that the right of association for the purposes of the proposed convention is without prejudice to the question of the right to strike in general, including but not limited to those of public officials. This reading is consistent with the summary given by the Office that the question of the right to strike of public officials 'is not relevant to the present proposed Convention,'[44] which has no provision on the right to strike. Accordingly, the suggested presumption cannot be sustained.

47. The *travaux* rather indicate that the workers' side held the view that the proposed convention was to guarantee only 'the freedom of association in its primary stage'. At the fifteenth sitting of the Conference, the workers' delegate observed that a number of rights acquired under domestic legal systems were 'far from being recognised in the present text,' and the proposed convention contained certain 'defects.'[45] Notwithstanding this,

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[41] ILO Governing Body, *Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution: Office background report,* GB.349bis/INS/1/1 (10 November 2023), para. 38.

[42] International Trade Union Confederation, *The Right to Strike and the ILO: The Legal Foundations* (March 2014), p. 21; see also, Jeffrey Vogt *et al., The Right to Strike in International Law* (Bloomsbury, 2020), p. 60.

[43] International Labour Conference, 31st Session, 1948, Report VII, *Freedom of Association and Protection of the Right to Organise* (1948), p. 67 **[ILO's Document No. 158]**.

[44] *Ibid.*

[45] International Labour Conference, 31st session, 1948, Record of Proceedings, pp. 229-230.

the workers' delegate stated that it was going to vote in favour of the proposed convention because

> we considered it essential that the Conference should take positive action on a first Convention, so that freedom of association in its primary stage should be respected in all countries.[46]

48. The *travaux* therefore suggest that the workers' side was well aware that a number of labour-related rights that had already been acquired under domestic legal systems, such as the right to strike, was not included in the proposed convention.

B. 32nd session of the International Labour Conference in 1949

49. For the sake of completeness, the *travaux* of ILO Convention No. 98 on the right to organise and collective bargaining are also examined. This may shed light on the *travaux* of ILO Convention No. 87, insofar as '[t]he question under consideration [in the drafting of ILO Convention No. 98] was one of the practical application of the general principle of freedom of association already adopted for the purpose of a Convention in 1948', as the Employers stated.[47]

50. During the 32nd Session of the International Labour Conference in 1949, in which the draft convention concerning the application of the right to organise and to bargain collectively was discussed, the Polish and Czechoslovak Workers' members proposed an amendment to the proposed convention to add the following provision:

> The right to strike is guaranteed to workers. Collective cessation of work is therefore not to be regarded as a breach of a contract of employment and shall not give rise to any repressive measure on the part of employers or of public authorities.[48]

51. Nevertheless, the Record of the Proceedings indicates:

> The Chairman ruled that this amendment was not receivable, on the ground that the question of the right to strike was not covered by the proposed

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[46] *Ibid.,* p. 229.

[47] International Labour Conference, 32nd session, 1949, Record of Proceedings, p. 465.

[48] *Ibid.,* p. 468.

text, and that its consideration should therefore be deferred until the Conference took up item V of its agenda relating, *inter alia,* to the question of conciliation and arbitration.[49]

52. In relation to draft Article 4 concerning measures appropriate to national conditions, which was subsequently amended and then adopted as Article 4 of ILO Convention No. 98, an amendment was submitted by the Czechoslovak Government member to propose that a new Article relating to the guarantee of the right to strike should be placed between Article 3 and Article 4. However, this amendment was identical to an amendment already submitted by the Polish and Czechoslovak Workers' members in respect of Article 1. The proposal was therefore declared not to be receivable for the reasons already mentioned in connection with the former amendment.[50]

53. The *travaux* of ILO Convention No. 98 therefore show that the question of the right to strike, without any qualification as to the holders of the right, was consistently held to fall outside the scope of the proposed convention.

* *

54. In light of the foregoing, the *travaux préparatoires* confirm the interpretation that ILO Convention No. 87 does not encompass the right to strike of workers.

[49] *Ibid.*

[50] *Ibid.,* p. 470.

III. The interpretation that the right to strike is not covered by ILO Convention No. 87 shall be maintained irrespective of the opinions held by ILO supervisory bodies to the contrary

55. The Government of Japan appreciates ILO supervisory bodies' functions and contributions to the sound implementation of ILO conventions and recommendations. It has always taken their views into account in good faith.

56. Insofar as the interpretation of ILO Convention No. 87 is concerned, however, the Government of Japan takes the view that the right to strike is not covered by the Convention. This is the conclusion that has been reached in Sections I and II above in accordance with the customary rules of treaty interpretation, which shall therefore be maintained irrespective of the opinions held by ILO supervisory bodies to the contrary. This is not only because the Court is not bound by the interpretation of ILO supervisory bodies but also because their interpretation has not been made in accordance with the customary rules on treaty interpretation reflected in the Vienna Convention.

A. The Court is not bound by the interpretation of ILO supervisory bodies

57. Article 37, paragraph 1, of the ILO Constitution, pursuant to which the present request for an advisory opinion is made, provides:

> [a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

58. That any question or dispute relating to the interpretation of any ILO conventions concluded by the Members in pursuance of the provisions of the ILO Constitution shall be referred for decision to the Court presupposes that the Court is not bound by the interpretation held by ILO supervisory bodies, in which a question is discussed before coming to the Court. A contrary reading would render Article 37 meaningless. As to this point, no disagreement has arisen within the tripartite constituency of the ILO.

59. Moreover, even though the Court may 'ascribe great weight' to an independent treaty body's interpretation,[51] it is not hesitant to depart from the interpretation given by a treaty

[51] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 664, para. 66. ILO supervisory bodies are different from 'treaty bodies' mentioned here as they are not bodies established by relevant ILO Conventions but organs of the ILO. However, their

body when the Court's own conclusion has firmly been reached '[b]y applying [...] the relevant customary rules on treaty interpretation'.[52] In *Qatar v. United Arab Emirates*, the Court was asked to determine whether the term 'national origin' in the definition of racial discrimination in Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD') encompasses current nationality. The Court concluded in the negative by carefully investigating the ordinary meaning to be given to the term in its context and in the light of the object and purpose of CERD in accordance with the general rule of treaty interpretation reflected in Article 31 of the Vienna Convention.[53] It then moved on to an exploration of the *travaux préparatoires* of CERD, which corroborated the conclusion that the term 'national origin' does not include current nationality.[54] Thereafter, the Court examined the practice of the CERD Committee, including General Recommendation XXX, which reached an exactly opposite conclusion.[55] The Court further referred to a decision of the CERD Committee finding that it was competent to examine Qatar's communication against the UAE and that the communication was admissible, on the basis of General Recommendation XXX.[56] Yet the Court, having had 'carefully consider[ed] the position taken by the CERD Committee', maintained its own conclusion arrived at pursuant to the rules of treaty interpretation.[57]

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role in the interpretation of ILO Conventions is comparable to the one played by treaty bodies mentioned here. *See* Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, *Yearbook of the International Law Commission*, 2018, vol. II (Part Two), p. 82, commentary to draft conclusion 13, para. (4).

[52] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 104, para. 101.

[53] *Ibid.*, paras. 81–88.

[54] *Ibid.*, paras. 92–97.

[55] Committee on the Elimination of Racial Discrimination, General recommendation XXX on discrimination against non-citizens, Report of the Committee on the Elimination of Racial Discrimination, 23 February-12 March 2004, UN Doc. A/59/18, p. 94, para. 4. It stated, in its relevant part: 'differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim'.

[56] Committee on the Elimination of Racial Discrimination, Decision on the admissibility of the inter-State communication submitted by Qatar against the UAE dated 27 August 2019, UN doc. CERD/C/99/4, paras. 53–63.

[57] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 104, para. 101.

60. The Court's approach is explained by the fact that General Recommendation XXX 'gives no reason for its interpretation that different treatment based on nationality constitutes racial discrimination under CERD'.[58] In other words, the CERD Committee failed to develop its interpretation in accordance with the customary rules on treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention.

61. '[T]he Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of' a treaty on that of the relevant treaty body.[59] This is particularly the case when the relevant treaty body does not undertake the interpretative exercise required by the customary rules of treaty interpretation, as will be shown in the next section.

B. ILO supervisory bodies' interpretation has no basis in the customary rules on treaty interpretation

62. It has been suggested by ILO supervisory bodies that the right to strike is an 'intrinsic corollary' of the right to organise protected by ILO Convention No. 87.[60] In 1994, for instance, the Committee of Experts on the Application of Conventions and Recommendations ('Committee of Experts') opined that the right to strike is derived from the 'right of worker's [...] organizations to organize their activities and to formulate their programmes for the purposes of furthering and defending the interests of their members' recognized under Articles 3, 8, and 10 of the Convention.[61] The Committee of Experts stated that 'the ordinary meaning of the word "programmes" [in Article 3, paragraph 1, of the Convention] includes strike action'.[62]

63. However, the Committee of Experts has fallen short of explaining how the term in its ordinary meaning could encompass strike action. For instance, the Committee

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[58] Joint Declaration of Judges Tomka, Gaja and Gevorgian, *I.C.J. Reports 2018*, p. 436, para. 5.

[59] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 664, para. 66.

[60] International Labour Conference, 81st Session, 1994, Freedom of Association and Collective Bargaining: General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949, Report III (Part 4B), para. 151; *Freedom of Association. Compilation of decisions of the Committee on Freedom of Association* (6th edition, 2018), p. 143, para. 754.

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

[62] *Ibid.*, para. 148.

explained, as a matter of 'economic logic', that 'one of the means of pressure available to workers is to suspend their services by temporarily withholding their labour [...] thus inflicting a cost on the employer in order to gain concessions'.[63] Still, it is one thing that strike action might be explained as the matter of 'economic logic', and it is quite another that strike actions should be covered by the term 'programmes' within the meaning of the Convention as a matter of treaty interpretation.

64. The practice of human rights treaty bodies cannot corroborate the 'intrinsic corollary' argument. This is because these bodies simply repeat what has been stated by ILO supervisory bodies and do not by themselves elaborate on the alleged controversial 'intrinsic' relationship between the two rights.

65. In *Enerji Yapı-Yol Sen*, the European Court of Human Rights ('ECtHR') noted that the right to strike had been recognized by ILO supervisory bodies as a *'corollaire indissociable'* of the right to organise under ILO Convention No. 87.[64] Nevertheless, as the ECtHR clarified later in *National Union of Rail, Maritime and Transport Workers*, the *Enerji Yapı-Yol Sen* judgment did not go any further than 'adverting to the position adopted by the supervisory bodies of the ILO'.[65] In sum, the ECtHR merely adverted to what had been stated by ILO supervisory bodies. It has not filled the gap within the 'intrinsic corollary' argument by way of its own treaty interpretation.

66. The Committee on Economic, Social and Cultural Rights and the Human Rights Committee, in their 2019 Joint Statement, 'recall that the right to strike is the corollary to the effective exercise of the freedom to form and join trade unions'.[66] However, such an 'interpretation' is irrelevant to the International Covenant on Economic, Social and Cultural Rights, since the right to strike is explicitly provided for in subparagraph (d) of paragraph 1 of Article 8, separately and independently from the right to form trade unions under subparagraph (a).

67. As regards the International Covenant on Civil and Political Rights, the Joint

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[63] *Ibid.*

[64] European Court of Human Rights, *Enerji Yapı-Yol Sen c. Turquie*, no 60959/01, le 21 avril 2009, para. 24 **[ILO's Document No. 318]**.

[65] European Court of Human Rights, *National Union of Rail, Maritime and Transport Workers* v. *United Kingdom*, no. 31045/10, 8 April 2014, para. 84 **[ILO's Document No. 319]**.

[66] Joint statement by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, UN. Doc. E/C.12/66/5-CCPR/C/127/4, 6 December 2019, para. 4 **[ILO's Documents No. 314]**.

Statement fell short of providing its interpretative basis to uphold the right to strike, notwithstanding the absence of express provision referencing thereto. Moreover, the Joint Statement deems factually incorrect in maintaining that the Human Rights Committee has 'sought to protect the right to strike in [its] review of the implementation by States parties'.[67] For one reason or another, it failed to mention *J.B. v. Canada,* in which the Human Rights Committee itself found that the right to strike 'is not included in the scope of' Article 22, paragraph 1, of the Covenant, providing for the right to form and join trade unions. In sharp contrast to *J.B. v. Canada* in which the Human Rights Committee strictly followed the customary rules of treaty interpretation by making explicit reference to Articles 31 and 32 of the Vienna Convention,[68] the Joint Statement did not mention any part of the rules of treaty interpretation.

68. It has also been suggested that the 'intrinsic corollary' argument advanced by ILO supervisory bodies could be explained as a 'dynamic' or 'evolutive' method of treaty interpretation.[69] However, such an interpretative approach is not without limitations. As the Court stated in *Dispute regarding Navigational and Related Rights:*

> there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, *so as to make allowance for […] developments in international law.* In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it […].[70] (emphasis added)

69. Such an evolutive approach is not apposite to the interpretation of ILO Convention No. 87, because the notion of the right to strike had already existed at the time of the adoption of the Convention in 1948. This is evidenced by the *travaux* of the Convention examined in Section II.A. above, in which the coverage of the right to strike under the

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[67] *Ibid.*

[68] Human Rights Committee, *J.B. et al.* v. *Canada*, UN. Doc. CCPR/C/28/D/118/1982, 18 July 1986, paras. 6.3–6.4.

[69] International Labour Office, *The dispute on the interpretation of Convention No. 87 in relation to the right to strike – Background report,* Appendix to GB.349bis/INS/1/1 (14 September 2023), paras. 66-68.

[70] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64; see also *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 32, para. 77.

proposed convention was mentioned, and any provision referencing the right to strike was deliberately omitted. It would be contradictory to presume that the parties to the Convention, which deliberately refrained from dealing with the right to strike, had intended to give certain generic terms a meaning capable of evolving to encompass the rights to strike. Such an evolutive approach is not warranted as it would not 'respect the parties' common intention at the time the treaty was concluded'.

C. Opinions of ILO supervisory bodies do not constitute 'subsequence practice' within the meaning of Article 31, paragraph 3, subparagraph (b), of the Vienna Convention

70. It has further been suggested that the opinions of ILO supervisory bodies could constitute 'subsequence practice' within the meaning of Article 31, paragraph 3, subparagraph *(b),* of the Vienna Convention.[71] In this respect, the Court stated in *Dispute regarding Navigational and Related Rights:*

> the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties.[72]

71. The Vienna Convention defines 'subsequence practice' as one 'establish[ing] the agreement of the parties' regarding the interpretation of the treaty. According to the International Law Commission's commentary, to which the Court made a reference in *Kasikili/Sedudu Island*,[73] the phrase 'the parties' in subparagraph *(b)* 'necessarily means "the parties as a whole"'.[74] The ILO supervisory bodies' interpretation cannot therefore be regarded as representing a 'subsequent agreement' unless all the parties of ILO Convention No. 87 agree to or, at least, no party objects to, the 'intrinsic corollary' argument.[75]

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[71] International Trade Union Confederation, *The Right to Strike and the ILO: The Legal Foundations* (March 2014), pp. 81-83; see also, Jeffrey Vogt *et al., The Right to Strike in International Law* (Bloomsbury, 2020), p. 56 *et seq*.

[72] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64.

[73] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, pp. 1075–1076, para. 49.

[74] Report of the International Law Commission on the work of the second part of its seventeenth session, *Yearbook of the International Law Commission 1966*, vol. II, p. 222, para. 15.

[75] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011*, pp. 675–676, paras. 99–101.

72. It is apparent that not all the parties to ILO Convention No. 87 have agreed with the interpretation of ILO supervisory bodies. For instance, Germany observed:

> [N]o mention was made of the right to strike in any of the provisions of the Convention. 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.[76]

73. Similar observations have been held by other State parties to the Convention, including Japan.[77]

74. Consequently, the 'intrinsic corollary' argument of ILO supervisory bodies does not represent an agreement of the parties 'as a whole' to ILO Convention No. 87. Thus, it is not capable of constituting the 'subsequent practice' of the parties within the meaning of Article 31, paragraph 3, subparagraph *(b)*, of the Vienna Convention.

75. In any event, the practice of several States shown above, which does not draw the right to strike from ILO Convention No. 87, constitutes one of the 'factors which weigh against finding' that the right to strike is an 'intrinsic corollary' of the right to organise under the Convention.[78]

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[76] International Labour Conference, 72nd Session, 1986, *Record of Proceedings*, pp. 31/33–31/34; see also International Labour Conference, 58th Session, 1973, *Record of Proceedings*, p. 544, para. 26 (The Government member of Switzerland declared that 'the right to strike was not covered' by ILO Convention No. 87).

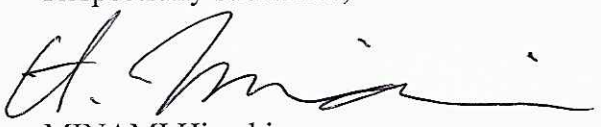
[77] Government of Japan, Comments by States parties on Concluding observations, UN Doc. E/C.12/2002/12, 29 November 2002, para. 5(1) (noting that 'ILO Convention No. 87 is not understood to deal with issues related to the right to strike, and that there are no ILO documents explicitly dealing with the right to strike').

[78] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Judgment, I.C.J. Reports 2020*, p. 322, para. 69.

IV. Conclusion

76. For the reasons set out in this Written Statement, the Government of Japan respectfully submits to the Court that ILO Convention No. 87 does not encompass the right to strike of workers.

Respectfully submitted,



MINAMI Hiroshi
Ambassador of Japan
to the Kingdom of the Netherlands

16 May 2024