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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENTS OF THE SWISS CONFEDERATION

2 September 2024

[Translation by the Registry]

I. INTRODUCTION

1. By its Order dated 16 November 2023, the International Court of Justice (hereinafter the "Court") fixed 16 September 2024 as the time-limit within which written comments may be presented to it.

2. Switzerland hereby submits its comments to the Court, within the said time-limit and in due form. These supplement the information already provided in its written statement of 6 May 2024 and focus on points raised in the written statements of other States and organizations.

3. It is clear from the various written statements that the matter at hand is particularly complex. All the participants in the proceedings recognize the existence of the right to strike. However, they all draw attention to the modalities and limits of this right, which differ from one State to another. In this context, it should be recalled that the question put to the Court and under discussion is broader than whether or not the Freedom of Association and Protection of the Right to Organise Convention (No. 87) ("Convention No. 87") protects the right to strike.

4. Switzerland maintains its arguments as to the meaning and scope of the question before the Court (II). In Switzerland's view and in accordance with the rules of interpretation laid down by international law, Convention No. 87 does not protect the right to strike (III). This right is not absolute and the modalities for its application are manifold. It would be inappropriate for the Court to pronounce on the question of competence for defining the modalities of the right to strike (IV).

II. MEANING AND SCOPE OF THE QUESTION PUT TO THE COURT

5. Switzerland reiterates its view that the question put to the Court does not reflect "the legal questions really in issue". Formulated in too narrow terms, it fails to reflect the actual intention of the constituents of the International Labour Organization (hereinafter the "ILO") and will not enable the ILO to resolve the issue before it in practice.

6. This view finds support in the written statements. Indeed, the only point on which almost all the participants in the proceedings agree is that the right to strike is not an absolute right[1]. Most of the participants describe the modalities and limits of this right[2]. Of the 24 governments participating, 17 describe and analyse the modalities of the right to strike. This shows that the

[1] See the written statements of the International Labour Office (hereinafter the "Office"), para. 412, and referring to the supervisory bodies: paras. 329, 348 and 360; the French Republic, para. 25; the United Kingdom of Great Britain and Northern Ireland, paras. 79 *et seq.*; the Federal Republic of Germany, paras. 35 *et seq.*; the Republic of Poland, para. 2.7; Business Africa, para. 55; the International Organisation of Employers (hereinafter the "IOE"), para. 7; Canada, para. 9; the Swiss Confederation, paras. 93 *et seq.* and 99 *et seq.*; the Kingdom of Norway, para. 23; the Republic of Tunisia, p. 3; Australia, para. 19; Japan, para. 2; the Republic of Costa Rica, p. 6; the Kingdom of the Netherlands, para. 5.20; Belize, pp. 2 *et seq*. See also in this respect, the written statements of the Organisation of Caribbean, African and Pacific States (hereinafter the "OACPS"), para. 11; the Italian Republic, para. 7; the International Trade Union Confederation (hereinafter the "ITUC"), para. 4.72; the Republic of Colombia, para. 3.45; the Republic of South Africa, paras. 40 *et seq.*; the United Mexican States, paras. 27 *et seq.*

[2] Written statements of the Office, paras. 329 *et seq.* and 349 *et seq.*; the Kingdom of Spain, pp. 41 *et seq.*; the Italian Republic, paras. 6 *et seq.*; the United Kingdom of Great Britain and Northern Ireland, paras. 90 *et seq.*; the Federal Republic of Germany, paras. 28 *et seq.*; the Republic of Poland, paras. 2.1 *et seq.*; Business Africa, paras. 39 *et seq.*; the Republic of South Africa, paras. 40 *et seq.*; Canada, paras. 8 *et seq.*; the Swiss Confederation, paras. 85 *et seq.*; the Kingdom of Norway, paras. 44 *et seq.*; the Republic of Tunisia, p. 3; the United States of America, paras. 1.5 *et seq.*; the Republic of Costa Rica, pp. 2 *et seq.*; the Republic of Indonesia, para. 3; the United Mexican States, paras. 20 *et seq.*; the Federal Republic of Somalia, pp. 1 *et seq.*; the Kingdom of the Netherlands, para. 3; Belize, pp. 2 *et seq*.

question is complex and that the answer cannot be confined to determining whether or not Convention No. 87 protects the right to strike.

7. Indeed, the issue of competence for defining the modalities of this right cannot be separated from the question submitted to the Court.

8. The various written statements confirm that answering the question before the Court in the affirmative or the negative would provide neither the ILO nor its constituents with the necessary legal certainty, since "the legal questions really in issue" concern competence for defining the modalities of the right to strike[3].

9. For this reason, Switzerland recalls its position that the question put to the Court should be interpreted as relating not only to whether the right to strike is protected under Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise, but also and above all to whether it is within the competence of:

(a) national legislators;

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

(c) ILO supervisory bodies; and/or

(d) judges of an internal tribunal (Article 37, paragraph 2, of the ILO Constitution)

to make a binding decision on the content and modalities for the exercise of, and possible limits to, the right to strike, given that these elements are not addressed in the existing body of international law.

III. INTERPRETATION OF CONVENTION NO. 87

A. Ordinary meaning, object and purpose of Convention No. 87

10. The written statements differ in their interpretation of the ordinary meaning of the terms of Convention No. 87. There is no broad consensus as to the ordinary meaning of its terms.

11. Switzerland shares the United Kingdom's view that where the ordinary meaning of a term is very general, specific rights and obligations cannot be derived from it[4]. Thus, the right to strike cannot be inferred from the ordinary meaning of the terms "organise", "programmes" or "activities".

12. Switzerland also shares the view of Japan that the absence of an explicit reference to the right to strike is in itself an indication that the Convention does not protect this right[5].

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[3] See in this respect the written statements of the United Kingdom of Great Britain and Northern Ireland, para. 11; the IOE, paras. 5 and 31.

[4] Written statement of the United Kingdom of Great Britain and Northern Ireland, para. 20.

[5] Written statement of Japan, paras. 8 *et seq.*

13. As regards the object and purpose of Convention No. 87, it must be noted that in matters of interpretation, considerations of object and purpose are limited to the ordinary meaning of the text of the treaty in question[6].

14. It is clear from the preamble to Convention No. 87 that the latter is the receptacle for "certain proposals concerning freedom of association and protection of the right to organise"[7] and that it aims to protect the freedom of association and the right to organize, which constitute a means of improving conditions of labour and establishing peace[8].

15. The *travaux préparatoires*, which are of particular importance in interpreting ILO Conventions (see paragraphs 51-58 below), help to clarify the object and purpose of the Convention at issue.

16. In the questionnaire that led to the drafting of Convention No. 87, the International Labour Office (hereinafter the "Office") noted that the Committee of the Conference "took the view that freedom of association should be guaranteed in general terms"[9]. During the negotiations on the text, the Chairman of the Committee 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"[10].

17. No mention is made of the right to strike in the preamble or title of Convention No. 87.

18. The object and purpose of Convention No. 87 is to ensure and protect the freedom of association and the right to organize as a general matter, without legislating on specific rights and obligations such as the right to strike.

19. According to these methods of interpretation, Convention No. 87 cannot be considered to protect the right to strike.

B. Subsequent practice

20. Within the meaning of Article 31, paragraph 3 *(b)*, of the Vienna Convention on the Law of Treaties (hereinafter the "VCLT"), subsequent practice must be that of the parties to the treaty being interpreted. The parties are the States which have consented to be bound by the treaty and for which the treaty is in force (Article [2], paragraph 1 *(g)*, of the VCLT).

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[6] O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A commentary*, Art. 31, para. 57.

[7] Convention No. 87, preamble, first recital.

[8] Convention No. 87, preamble, second recital; written statements of the OACPS, para. 44; Business Africa, para. 34.

[9] ILC, 31st Session, 1948, Questionnaire, Freedom of Association and Protection of the Right to Organise [Document No. 157], p. 7.

[10] ILC, [31st Session, 1948], Record of Proceedings, p. 477.

21. In accordance with the conclusions of the International Law Commission, treaty monitoring bodies may *give rise to*, or refer to, subsequent practice[11].

22. It is therefore necessary to distinguish between the fact of *giving rise to* or inspiring subsequent practice and the fact of *constituting* subsequent practice. A treaty monitoring body *gives rise* to subsequent practice when its conclusions are taken up by the States. The conduct of the States in the application of the treaty is thus inspired by the treaty monitoring bodies. In itself, the conduct of the treaty bodies does not *constitute* subsequent practice. Only conduct attributable to a State constitutes subsequent practice.

23. In this respect, the Court has confirmed that, although it gives considerable weight to treaty monitoring bodies, it is not required to follow the interpretation of the Human Rights Committee, for example[12].

24. In fact, the Human Rights Committee itself deleted the reference in which it qualified its general comments as subsequent practice. Indeed, in one of its general comments, the Human Rights Committee had stated that the jurisprudence it generated could constitute subsequent practice[13]. However, this paragraph was deleted from the final version of the comments, following objection by a government[14].

25. Thus, contrary to what certain statements seem to suggest, the pronouncements of the ILO supervisory bodies do not constitute subsequent practice within the meaning of Article 31 of the VCLT. Such practice must be understood strictly as the practice of the States parties to the treaty in question.

26. That said, treaty supervisory bodies may *give rise* to subsequent practice by States parties. It is therefore necessary to analyse the conduct of the States parties to the Convention concerned, in this case Convention No. 87.

27. In order to be relevant to the interpretation of a treaty, the subsequent practice must reflect the will of *all* the States parties. Even if not all the States participate in the practice, all the States parties to the convention being interpreted must at the very least have accepted that practice, even tacitly, or in any event must not have objected to it[15].

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[11] Report of the International Law Commission, 2018, Seventieth Session, Supplement No. 10, A/73/10 (hereinafter "A/73/10"), Conclusion 13, para. [3].

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

[13] Human Rights Committee, Draft general comment No. 33: The obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights (Second revised version as of 18 August 2008), 25 Aug. 2008, CCPR/C/GC/33/CRP.3, para. 18.

[14] Comments of the United States of America on the Human Rights Committee's "Draft General Comment 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights", p. 6.

[15] A/73/10, Conclusion 4, para. 16; M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, 2009, Art. 32, para. 22.

28. The Court considers that, for example, resolutions adopted without the support of a State party to the convention being interpreted do not constitute a subsequent agreement or subsequent practice[16].

29. For the comments of a treaty body to give rise to subsequent practice, all States parties would at least need to accept them by not objecting to them.

30. As regards subsequent practice for the purposes of interpreting ILO Conventions, an ILO legal adviser was even of the view that the agreement of all parties was required, including the Employers' and Workers' groups[17].

31. Without going that far, it should be noted that many States have disputed the interpretation of the Committee of Experts on the Application of Conventions and Recommendations (hereinafter the "CEACR")[18]. The CEACR's comments have been actively challenged and have not given rise to subsequent practice by States.

32. Nor can such subsequent practice be inferred, as some participants in the proceedings claim, from the fact that numerous States ratified Convention No. 87 following the CEACR's initial interpretation thereof.

33. Ratification is an international act whereby a State establishes on the international plane its consent to be bound by a treaty (Article 2, paragraph 1 *(b)*, of the VCLT).

34. States agree to be bound by a convention and not by the non-binding recommendations of the CEACR.

35. It should also be recalled here that on ratifying Convention No. 87, Switzerland expressly stated that the Convention did not cover the right to strike, despite the CEACR's recommendations in this respect[19]. This proves that ratification is independent of the CEACR's comments.

36. When Switzerland ratifies an ILO Convention, that Convention becomes part of the Swiss legal system. Its provisions are not, however, directly applicable. There are exceptions where the provisions concern the rights and obligations of the individual; are sufficiently specific and clear to be applied directly to a particular case by an authority or a court; or are addressed to the authorities responsible for applying the law and not to legislative authorities[20].

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[16] *Ibid.*, para. 83; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 81, para. 27; *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 248, para. 46.

[17] C. W. Jenks, "The Significance for International Law of the Tripartite Character of the International Labour Organisation", *Transactions of the Grotius Society*, Vol. 22, 1937, p. 64.

[18] Written statements of the IOE, Annex C: Table of countries disagreeing with the CEACR's view on the right to strike in ILO Convention 87; Japan, paras. 72 *et seq.*; the ITUC, para. 4.124.

[19] ILC, 58th Session, 1973, Record of Proceedings, p. 544, para. 27, and FF 1974 I 1577.

[20] Judgments of the Swiss Federal Court: ATF 136 I 297, recital 8.1, or ATF 133 I 286, recital 3.2.

37. The fact that Switzerland has ratified Convention No. 87 does not therefore imply tacit acceptance of the CEACR's recommendations which could constitute subsequent practice in the application of the Convention.

38. Ratification does not constitute "conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty"[21]. The argument that in ratifying a convention, a State accepts all non-binding comments of the supervisory body is thus not tenable.

39. In light of the foregoing and the diversity of views in the written statements submitted to the Court, the CEACR's comments have not given rise to subsequent practice by States.

C. Relevant rules of international law

40. According to the rules applicable to the interpretation of treaties, when interpreting a treaty, account should be taken of "any relevant rules of international law applicable in the relations between the parties" (Article 31, paragraph 3 *(c)*, of the VCLT).

41. Switzerland would first note that in its view, account should be taken of the relevant rules applicable in relations between a significant number of States parties. While Article 31, paragraph 3 *(b)*, of the Vienna Convention requires the agreement of all the States parties to the convention being interpreted, it in fact seems logical to take account of the relevant rules of international law applicable in relations between at least a significant number of States parties to the convention being interpreted (Article 31, paragraph 3 *(c)*, of the VCLT)[22].

42. In interpreting Convention No. 87, the International Covenant on Economic, Social and Cultural Rights (hereinafter "Covenant I") is relevant. Indeed, of the 158 States parties to Convention No. 87, only 9 have not ratified Covenant I[23].

43. The relevant rule of international law applicable in the relations between the parties is Article 8 of Covenant I.

44. Unlike the provisions of Convention No. 87, Article 8, paragraph 1 *(d)*, of Covenant I explicitly mentions the right to strike.

45. This right is set out in a separate subparagraph from the right to form and join trade unions (subparagraph *(a)*), the right of trade unions to establish federations (subparagraph *(b)*) and the right of trade unions to function freely (subparagraph *(c)*). In this framework, the right to strike is an independent right that does not derive from the other trade union rights.

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[21] A/73/10, Conclusion 4, para. 2.

[22] In this respect, see O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A commentary*, Art. 31, para. 103; M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, 2009, Art. 31 para. 25; U. Linderfalk, "Who are 'the parties'? Article 31, paragraph 3 *(c)* of the 1969 Vienna Convention and the 'principle of systemic integration' revisited", *Netherlands International Law Review*, p. 354.

[23] These States are Botswana, the Comoros, Cuba, Kiribati, Mozambique, Saint Kitts and Nevis, Saint Lucia, Samoa and Vanuatu.

46. Further, competence for defining the modalities of the right to strike is explicitly regulated by Covenant I. According to the provision in question, this right may be exercised "in conformity with the laws of the particular country". It is therefore for national lawmakers to determine the modalities for the exercise of the right to strike. Some States have, moreover, made reservations concerning this provision by clarifying their modalities for the application of the right to strike[24].

47. It therefore cannot be inferred from Article 8 of Covenant I, in which the right to strike and the modalities for its application are expressly regulated separately from other trade union rights, that the right to strike is protected under Convention No. 87.

48. Although a right to strike does exist in international law, arising from Covenant I and other international treaties, that right is not protected by Convention No. 87.

49. Consequently and in this context, the terms of ILO Convention No. 87 do not cover strike action.

D. Supplementary means

50. ILO Conventions have several distinctive characteristics. They are drafted by means of a tripartite process, they constitute a minimum basis for protection, they aspire to universality by allowing a degree of flexibility in their application, and they do not permit reservations. In addition, the Member States that adhere to them are subject to a number of specific monitoring procedures, the application of which is supervised.

51. With these specificities in mind, the negotiators of the VCLT introduced Article 5 into that Convention[25].

52. This provision stipulates that the VCLT applies to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization (Article 5 of the VCLT).

53. The members of the ILO clarify that, according to Article 5, the VCLT is "without prejudice to the relevant rules [and practices] of the organisation which constitute a *lex specialis*"[26].

54. One of the main specificities of ILO Conventions is that they are negotiated and adopted in tripartite committees with the direct participation of employers' and workers' representatives. This characteristic, consistent with Article 5 of the VCLT, renders the *travaux préparatoires* particularly

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[24] Written statement of the [IOE], para. 260.

[25] United Nations Conference on the Law of Treaties, Official Records, First Session, 1968, Meetings of the Committee of the Whole, Seventh Meeting, Statement by the Observer for the International Labour Organisation, pp. 36-37, A/CONF.39/11 [Document No. 57], para. 3.

[26] Governing Body (hereinafter "GB"), 235th Session, 1987, Forthcoming issues of concern to the ILO and its constituents arising within the United Nations system, GB.235/IO/2/4, para. 7; ILC, 88th Session, 2000, Provisional Record No. 5, p. 5/7.

important when interpreting ILO Conventions[27]. The Office even considers the negotiating history to constitute an authentic means of interpretation[28] and pays particular attention to the *travaux préparatoires* in its informal opinions on international labour standards[29].

55. As Switzerland and other participants in the proceedings have already shown in their written statements, it is clear from an analysis of the *travaux préparatoires* that Convention No. 87 does not protect the right to strike[30].

56. For example, it is worth noting that the amendments to Article 3 of Convention No. 87, which sought to introduce certain minimum conditions in respect of the constitution and operation of professional organizations, were withdrawn after the Chairman of the Committee clarified the general nature of the Convention[31].

57. An analysis of the *travaux préparatoires* as a supplementary means confirms the conclusion of the previous section that Convention No. 87 does not protect the right to strike.

IV. COMPETENCE FOR DEFINING THE MODALITIES FOR THE APPLICATION OF THE RIGHT TO STRIKE

58. It is evident from the various written statements that the modalities for the application of the right to strike are manifold.

59. For instance, the definition of the "essential services" or public interests for which the right to strike may be limited differs from one country to another[32]. Procedural requirements such as the approval threshold within a trade union or the obligation to arbitrate, the nature of strikes or the subjects on which striking is permitted are all matters on which each State legislates differently according to its specificities[33].

60. In its comments, the CEACR itself applies different modalities of the right to strike depending on the circumstances of each State, for example when it comes to the minimum level of support required by trade union members to call a strike[34].

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[27] GB, 256th Session, 1993, Article 37, paragraph 2, of the Constitution and the Interpretation of International Labour Conventions, GB/256/SC/2/2 [Document No. 96], paras. 12 and 18.

[28] Written statement of the Office, para. 274.

[29] Office, Office informal opinions on international labour standards, IGDS Number 565 (Version 1), 2020 [Document No. 113], para. 23.

[30] Written statements of the United Kingdom of Great Britain and Northern Ireland, paras. 71 *et seq.*; the Office, paras. 306 *et seq.*; Business Africa, para. 38; Japan, paras. 38 *et seq*.

[31] ILC, 31st Session, 1948, Record of Proceedings, San Francisco, Appendix X, p. 477.

[32] Written statements of Brazil, paras. 10 *et seq.*; the Italian Republic, para. 14; the OACPS, para. 84.

[33] Written statement of Business Africa, paras. 41 *et seq.*

[34] Written statement of the Office, para. 335:

> "The Committee has thus considered that requiring 'a majority of two-thirds at the general assembly of a trade union in order to call a strike' would be incompatible with the Convention (Document No. 199), while on other occasions it has drawn attention to the need to 'lift the excessive limitations on the exercise of the right to strike, requiring a majority of 60 per cent for calling a strike' (Document No. 200)."

61. The variety of the modalities for the application of the right to strike is clear from the written statements of the participants and attests to the complexity of the issue before the Court.

62. Switzerland recalls its position that Member States recognize the right to strike as a corollary of the fundamental principle and right of freedom of association and the right of collective organization. The tripartite constituents do not, however, recognize this right as being protected by Convention No. 87. This distinction is important because the right to strike as a corollary of the right and principle of freedom of association does not have the same scope or nature as the right to strike, as defined by the CEACR, as a right protected by Convention No. 87[35].

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

64. It is apparent from the various written statements that competence to define the modalities for the application of the right to strike is a State prerogative. Many States note that the modalities of the right to strike are determined by national laws, irrespective of whether or not the States recognize that right as being protected by Convention No. 87[36].

65. Various international treaties, such as Covenant I (Article 8, paragraph 3 *(d)*), the European Convention on Human Rights (Article 11), the Charter of the Organization of American States (Article 45, paragraph 1 *(d)*) or the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Article 8, paragraph 2) specify that States are competent to define the modalities of the right to strike.

66. The ILC is the "supreme body"[37] of the ILO. It has the competence to develop international standards on a tripartite basis. All Member States and all major national employers' and workers' organizations are represented by delegates at the ILC. It is the most representative organ of the ILO.

67. As Switzerland and other participants have recalled, the CEACR has clarified its mandate on numerous occasions. When the Commission was set up in 1926, its function was intended to be solely technical and not judicial in nature[38], and the supervision of the implementation of standards was to be separated from the interpretation of their content[39]. In 1977, the CEACR clarified that it did not have the authority to give interpretations of Conventions. In 2013, it stated that its opinions did not have the force of *res judicata* and that it did not regard itself as a court of law. Since 2014, the CEACR has included in each annual report an explanatory note concerning its mandate.

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[35] Written statement of Switzerland, paras. 103 *et seq.*

[36] For example, the written statements of the Federal Republic of Germany, para. 45; Australia, para. 54; the Republic of Costa Rica, pp. 5 *et seq.*

[37] ILO, *The ILO Governing Body at a glance*, p. 2.

[38] ILC, 8th Session, 1926, Record of Proceedings, Appendix V: Article 408 of the Treaty of Versailles, pp. 393-408 [Document No. 72], p. 400.

[39] Written statements of the Office, para. 218; the OACPS, para. 64.

68. This note reads as follows:

> "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."[40]

69. Thus, contrary to what some participants claim, the CEACR has no judicial function and its non-binding comments do not constitute a body of jurisprudence.

70. Although the CEACR may have occasion to offer opinions on the scope and significance of standards when examining their implementation, it is not within its competence to interpret the standards. In 2014, the Office pointed out that there remained some differences of opinion about the extent of such interpretation[41]. When the CEACR identifies differing interpretations, it is invited to draw the ILC's attention to such instances[42].

71. The CEACR's mandate is clear. This body must provide a technical and non-binding analysis of the measures taken by States to give effect to a Convention[43].

72. As regards the Committee on Freedom of Association (hereinafter the "CFA"), Switzerland would recall that its mandate is to evaluate specific allegations relating to compliance with the principle of freedom of association. The recommendations of the CFA are not binding and relate to specific instances that have given rise to complaints. The CFA does not have the competence to ensure the application of Convention No. 87 or any other convention, but rather to ensure compliance with the principle of freedom of association in specific cases[44].

73. Switzerland reiterates its view that the CFA's recommendations and the CEACR's conclusions should be understood as invitations or proposals to governments to take all necessary measures to give effect to the ILO Conventions. Under Article 37 of the ILO Constitution, only the Court (paragraph 1) or an internal tribunal (paragraph 2) is empowered to give interpretations of international labour standards. Neither the CFA nor the CEACR has the authority to interpret Convention No. 87.

74. An internal ILO tribunal would have the authority to expeditiously determine any question or dispute relating to the interpretation of a Convention (Article 37, paragraph 2, of the Constitution). Switzerland has always been in favour of establishing an internal ILO tribunal, the modalities of

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

[41] GB, 320th Session, 2014, The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, GB.320/LILS/4 [Document No. 83], para. 13.

[42] For example: ILC, 14th Session, 1930, Report of the Director, Second Part, p. 636. The ensuing discussions led to the submission to the PCIJ of a request for an advisory opinion.

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

[44] ILO, Compilation of decisions of the Committee on Freedom of Association of the Governing Body of the ILO, Sixth edition, 2018 [Document No. 282], pp. 143-182, paras. 7[51] *et seq.*; written statement of the Office, para. 233.

which would be determined by the tripartite constituents. Their involvement in the drafting of the statutes of such a tribunal would enable them to ensure their participation and thereby make an active contribution to the development of a body of interpretation on standards and its integration into the overall process of standards supervision.

75. The establishment of such a tribunal would make it possible to set up a tripartite mechanism responsible for ensuring legal certainty and answering questions on the interpretation of ILO standards.

V. CONCLUSION

76. A reading of the written statements confirms Switzerland's position as to the meaning and scope of the question put to the Court. The fact that the majority of the participants in the proceedings define the modalities of the right to strike shows that the legal questions really in issue concern competence for defining the modalities for the application of the right to strike.

77. In Switzerland's view, and under the rules of interpretation of international law, Convention No. 87 does not protect the right to strike.

78. This right, which is recognized at national and international level by numerous States and organizations, is not absolute, and it is for national legislators, the ILC and/or an internal tribunal (Article 37, paragraph 2, of the ILO Constitution) to define its modalities.

79. Switzerland therefore reiterates the request made to the Court in its written statement and invites it to determine which entities (national legislators, the ILO and/or an internal tribunal) may define the modalities for the application of the right to strike.

Berne, 2 September 2024.

(Signed) Franz Xaver PERREZ,

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