INTERNATIONAL COURT OF JUSTICE

RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENTS OF THE INTERNATIONAL TRADE UNION CONFEDERATION

13 SEPTEMBER 2024

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Table of Defined Terms

CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFA	Committee on Freedom of Association
Convention No. 87; Convention	Freedom of Association and Protection of the Right to Organise Convention (No. 87)
Convention No. 98	Right to Organise and Collective Bargaining Convention (No. 98)
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IOE	International Organisation of Employers
ITUC	International Trade Union Confederation
Office	International Labour Office
VCLT	Vienna Convention on the Law of Treaties

Chapter 1.
Introduction

1.1. In its Order of 16 November 2023, the Court fixed 16 September 2024 as the time-limit within which States and organisations having presented written statements may submit written comments on the other written statements. The International Trade Union Confederation (the "ITUC") submits these Written Comments pursuant to the Court's Order.

1.2. Written statements have been submitted in these proceedings by a total of 23 States, the International Labour Organization (the "ILO"), another international organisation comprising 79 ILO Member States – 69 of which have ratified Convention No. 87 – as well as five organisations which have been granted general consultative status by the ILO. A large majority of these written statements support the idea that the right to strike is protected under the Freedom of Association and Protection of the Right to Organise Convention (No. 87) ("Convention No. 87" or the "Convention"). Out of the 30 participants in the advisory proceedings, only six (four States and two employers' organisations) take the opposite position.

1.3. The ITUC welcomes the written statements that have been submitted by all participants. The significant participation by States and international organisations in these proceedings evidences the importance of the issue before the Court. Far from being an academic debate, the question of the protection of the right to strike has profound implications, particularly for workers and their organisations worldwide, in a context where workers' rights are severely threatened.[1] Moreover, as explained in the ITUC's Written Statement and detailed below,[2] the Court's pronouncement will not only bind the 158 States Parties to Convention No. 87, but have ramifications for *all* 187 ILO Member States, which are bound by the *underlying* principle of freedom of association according to the ILO Constitution and the 1998 ILO Declaration on Fundamental Principles and Rights at Work.[3]

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[1] ITUC, Global Rights Index 2024, pp. 8, 43-44 ("The right to strike was violated in 87% of countries, unchanged from 2023") [Annex No. 1]. See *infra* para. 7.10.

[2] See Written Statement of the ITUC, paras. 3.10, 4.184; see also *infra* para. 7.4.

[3] See ILO Declaration on Fundamental Principles and Rights at Work (1998), as amended in 2022 [Document No. 128], para. 2(a) ("all Members, even if they have not ratified [Convention No. 87], have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of [the Convention], namely […] freedom of association"); see also *infra* paras. 5.2-5.11.

1.4. In its Written Statement, the ITUC has shown that a proper application of the principles of interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "VCLT") leads to the conclusion that the right to strike is protected under Convention No. 87.

1.5. First, the ordinary meaning of the terms of Convention No. 87 – amongst others the right of workers' organisations to "organise their […] activities" and "formulate their programmes"[4] – confirms that the right to strike is protected under that treaty. The fact that there is an inherent link between freedom of association and the right to strike, considered to be one of the main means of action of workers' organisations, has been repeatedly emphasised and confirmed over time. Any conclusion that the right to strike is *not* protected under Convention No. 87 would undermine one of the main objects of that treaty. It would also run against the principle of *effet utile*, since it would deprive workers' organisations of the leverage to achieve their defined objective, namely "furthering and defending the interests of workers".[5]

1.6. Second, the subsequent practice of States Parties to Convention No. 87 has evidenced a broad agreement that the right to strike is protected under that treaty. This agreement is reflected in the positions taken by States Parties collectively and individually, within the ILO tripartite structure or in other contexts (including in *all* known instances where domestic courts of States Parties were called upon to interpret Convention No. 87).[6]

1.7. Third, other "relevant rules of international law applicable in the relations between the parties" confirm that Convention No. 87 protects the right to strike. The inherent relationship between freedom of association and the right to strike has been emphasised by numerous universal and regional human rights instruments, as construed by supervisory bodies and courts. It has crystallised as a rule of customary international law.

1.8. Finally, nothing in the long process that resulted in the recognition of the principle of freedom of association in Part XIII of the Treaty of Versailles and in the adoption of Convention No. 87 leads to a different conclusion. A careful examination of the dossier shows that the protection of the right to strike was an important consideration in the mind of participants in those discussions at the time.

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[4] Convention No. 87, Article 3(1).

[5] Convention No. 87, Article 10.

[6] See *infra* para. 4.9; see also Written Statement of the ITUC, paras. 4.130-4.150.

1.9. As mentioned above, these conclusions are not shared by all participants in these proceedings. A small number argue that applying the interpretative process to the main provisions of Convention No. 87 yields the opposite result that the right to strike is not protected under that treaty.

1.10. In these Written Comments, the ITUC confirms the arguments set out in its first written submission and responds to the contrary arguments. Chapter 2 briefly addresses a few preliminary issues concerning the jurisdiction of the Court, the absence of reasons to decline the advisory opinion requested, and the scope of the question referred to the Court. It also addresses the ITUC's position regarding the applicable rules of interpretation, in particular in respect of the (in)applicability of any *lex specialis* in the context of the ILO. Turning to the substance of the interpretative process, these Written Comments follow the structure adopted by most participants' written statements, in confirming that the right to strike is protected under Convention No. 87. This is according to the ordinary meaning of the Convention's terms (Chapter 3), the subsequent practice of States Parties (Chapter 4), and the relevant rules of international law applicable in the relations between the Parties (Chapter 5). Finally, the ITUC shows that the use of supplementary means of interpretation does not lead to any different conclusion (Chapter 6). In concluding, the ITUC also briefly addresses the "wider implications" of these proceedings (Chapter 7).

Chapter 2.
Preliminary Issues

2.1. This chapter briefly addresses three preliminary issues. First, it shows that the argument of one participant to the effect that the Court should exercise its discretion not to give the advisory opinion has no factual or legal support (Section A). It then confirms that there is no reason for the Court to reformulate the question submitted by the ILO Governing Body (Section B). Finally, it shows the absence of any special rule of interpretation that would displace the application of the principles enshrined in Articles 31 and 32 of the VCLT (Section C).

A. The Court's jurisdiction in these proceedings is not challenged and there are no reasons for the Court to decline its exercise

2.2. There is a general consensus among the participants in these proceedings on the fact that the Court has jurisdiction to give the advisory opinion requested by the ILO Governing Body. All participants accept that the conditions set out in Article 96 of the United Nations Charter and Article 65 of the Statute are met. There is no doubt that the request for an advisory opinion has been formulated by a competent organ of a specialised agency within the UN system, duly authorised to that effect, and that it deals with a legal question that arose within the scope of the activities of the organisation concerned.

2.3. Moreover, an overwhelming majority of the participants in these proceedings – including the employers' organisations and the few States which support their views – are of the opinion that there is no reason for the Court to exercise its discretion not to give the advisory opinion requested.

2.4. Only one participant – Indonesia – argues that the Court should decline to exercise its jurisdiction.[7] According to Indonesia, the exercise by the Court of its competence in this case would threaten the integrity of the Court's judicial function. This would be because the Court, if it were to give an opinion on this matter, would circumvent the requirement of consent that applies to the judicial settlement of disputes.[8] Such circumvention would result from the fact that the issue before the Court has for a long time been – and still is – a matter in dispute

[7] See Written Statement of Indonesia, paras. 4 et seq.

[8] *Ibid.*, para. 25.

between the Employers' and Workers' groups within the ILO; thus, in the view of Indonesia, but no one else, to give the opinion would amount to deciding this dispute without the consent of the Employers' group.[9]

2.5. This argument lacks both factual and legal foundations, and is manifestly inconsistent with the Court's jurisprudence. Factually, there does not appear to be any ground for asserting that the Employers' group does not accept the submission of the issue of the right to strike in regard of Convention No. 87 to the Court.[10] On the contrary, as mentioned above, the International Organisation of Employers (the "IOE") has raised no objection in its Written Statement to the Court's exercise of its jurisdiction in the instant case. Legally – and more importantly – the requirement of consent for the submission of disputes to international judicial settlement applies to *States* exclusively. This is made crystal clear by the passage of the Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* quoted in Indonesia's Written Statement, where the Court "recalls that there would be a compelling reason for it to decline to give an advisory opinion when such a reply 'would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.'"[11] The Court is obviously not faced with such a situation here, and there is therefore no reason for it to refuse to give the advisory opinion requested.

2.6. In any event, to paraphrase the Court,[12] there is no basis to "regard the subject matter of the [Governing Body]'s request in the present case as being only a bilateral matter between [the Employers' and Workers' groups]" as Indonesia alleges. Rather, as alluded in Chapter 1 above, "this issue is a matter of particular interest and concern to the [ILO]".[13]

[9] *Ibid.*, paras. 22-24.

[10] *Ibid.*, para. 28.

[11] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 117, para. 85, quoting *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33.

[12] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion*, 19 July 2024, para. 35.

[13] *Ibid.*

B. There are no reasons for the Court to reformulate the question as submitted by the ILO Governing Body

2.7. Another preliminary issue calls for clarification at this stage: that of the scope of the question submitted to the Court. One participant to these proceedings – Switzerland – suggests that the Court should reformulate the question submitted by the ILO Governing Body. Switzerland argues that any limited understanding of the question would not allow the ILO to come to a lasting solution of the dispute surrounding the right to strike.[14] It therefore proposes that the question submitted to the Court should be interpreted as covering not only the existence of a right to strike under Convention No. 87, but also the issue of where the competence to regulate the right to strike would lie: with lawmakers at the State level, with ILO's tripartite constituents, with ILO supervisory bodies or with the judges of an internal tribunal.[15] According to this argument, this would be the only way to reflect the "real meaning" of the ILO Governing Body's request when it submitted the issue to the Court.[16]

2.8. Without going as far as proposing such an elaborate reformulation of the question submitted to the Court, other participants also argue that the question should be read extensively, so as to include not only the principle, but also the modalities of and limitations to the right to strike. This is, in particular, the case of the IOE, which asserts that the question is "somewhat vague"[17] and requests the Court to determine "whether the ILO standards supervisory bodies are competent to supervise implementation of the right to strike for State parties to C87."[18] In the same vein, the IOE claims that it would not make sense for the Court to pronounce on the existence of a right to strike under Convention No. 87 "in abstract", since this right cannot be absolute.[19] This would be confirmed by the fact that "all existing regional and international instruments referring to a right to strike simultaneously define limits on its exercise or at least stipulate an alternative source for the regulation of its limits."[20]

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[14] Written Statement of Switzerland, para. 20.

[15] *Ibid.*, para. 42.

[16] *Ibid.*, para. 43, quoting *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325, at p. 349, para. 47.

[17] Written Statement of the IOE, para. 5.

[18] *Ibid.*, para. 4.

[19] *Ibid.*, para. 7.

[20] *Ibid.*

2.9. The ITUC acknowledges the Court's "power to interpret and, where necessary, reformulate the questions put to it", and recognises that it is "for the Court to appreciate and assess the appropriateness of the formulation of the questions".[21] However, the ITUC maintains that no reformulation is necessary in the instant case.

2.10. First, it is not necessary to answer a question that the requesting organ has deemed not necessary to ask. As this Court has consistently emphasised, "[t]he Court cannot substitute its own assessment of the need for such an opinion with that of the organ requesting it",[22] such as by extending the scope of the question submitted to the Court far beyond what was intended by the ILO Governing Body. This is particularly visible in respect of the proposal formulated by Switzerland, which would entail the re-inclusion of an issue that was purposefully and knowingly left aside by the ILO Governing Body: the extent of the mandate of the ILO supervisory bodies, and in particular of the Committee of Experts on the Application of Conventions and Recommendations (the "CEACR").

2.11. The dossier indeed makes it clear that earlier drafts of the question intended to be submitted to the Court, as initially proposed by the Workers' group, covered two different issues:

i) Is the right to strike protected under Convention No. 87?

ii) Is the CEACR competent to determine that the right to strike derives from that convention and to specify elements "concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise"?[23]

2.12. In the course of the debates that took place in November 2023 within the Governing Body, a deliberate choice was however made to retain the first question only, which was seen

[21] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion*, 19 July 2024, para. 49.

[22] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 163, para. 62; see also *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion*, 19 July 2024, para. 37.

[23] See in particular GB.349bis/INS/1/1, Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution – Office background report, September 2023, Annex I, draft Governing Body Resolution, pp. 45-46 [Document No. 29], that draft was based on the proposed questions presented by the Workers' group on 12 July 2023 (see *ibid.*, p. 40, para. 94). See also Minutes of the 322nd Session of the Governing Body, October–November 2014, paras. 47–209 [Document No. 35].

– by the Workers' group itself – as "suffic[ing] to resolve the dispute."[24] According to the minutes of that meeting, "[n]o government expressed support for the second question included in the Workers' group's request."[25] Attempts to re-introduce the issue of the extent of the CEACR's competence in these proceedings would therefore *contradict* the "real meaning" of the Governing Body's request.[26] To paraphrase the Court, "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the [Governing Body] for the performance of its functions. The [Governing Body] has the right to decide for itself on the usefulness of an opinion in the light of its own needs."[27]

2.13. Second, as explained in the ITUC's Written Statement, the question before the Court is narrow and clear.[28] It can be answered by the Court as it stands. It would not be illogical to declare that a right exists without delineating its exact scope and limitations. To do so would not amount to a recognition of an "absolute" right, as claimed by the IOE. In the various international instruments recognising the right to strike at the universal or regional level, the only generic qualification of that right is that it must be exercised within the limits set in the applicable national laws.[29] Such qualification is already incorporated in Convention No. 87, which requires that the exercise of the right in Article 3(1) be "lawful"[30] and provides in Article 8(1) that "[i]n exercising the rights provided for in this Convention workers and employers and their respective organisations […] shall respect the law of the land" (subject to Article 8(2)).[31] The same limitation clearly applies to the right to strike, should the Court confirm that it is indeed protected under Convention No. 87. Moreover, as further detailed below, the ILO supervisory bodies have consistently determined that the right to strike was by no means absolute and could be subjected to various limitations.[32]

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[24] Draft minutes of the 349th *bis* (Special) Session of the Governing Body of the International Labour Office, 10 November 2023, p. 20 [Document No. 31].

[25] *Ibid.*

[26] See *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325, at p. 349, para. 47.

[27] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 16.

[28] Written Statement of the ITUC, para. 1.7.

[29] See the various treaties included in the ILO Dossier (Documents No. 284-294 e.g.)

[30] Article 3(2); see *infra* para. 3.44.

[31] Article 8(2) ("The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention").

[32] See, *e.g.*, ILO, *Compilation of decisions of the Committee on Freedom of Association*, sixth edition, 2018, pp. 143–182 (Chapter 10) [Document No. 282].

2.14. As will be seen in the following chapters, the IOE and the few participants supporting its position have repeatedly conflated and confused the distinction between the existence of the right to strike and its modalities or limitations throughout their arguments concerning ordinary meaning, subsequent practice, relevant rules of international law, and supplementary means under the VCLT.

2.15. In conclusion, there is no reason for the Court to reformulate the question submitted by the Governing Body or to interpret it more broadly so as to pronounce on the contours of and limitations on the right to strike. As the ITUC stated in its Written Statement, the precise regulation of that right has for long been – and will continue to be – a matter for the ILO tripartite constituents, in accordance with the decision-making mechanisms set up within the organisation.[33]

C. There are no relevant *"lex specialis"* rules of interpretation under Article 5 VCLT

2.16. All participants in these proceedings also broadly agree in their written statements that the question before the Court is essentially a matter of treaty interpretation, and one to which the customary rules of interpretation as reflected in Articles 31-32 VCLT apply. In particular, there is no dispute that the interpretation of the text in accordance with Article 31 of the VCLT is the starting point in interpreting Convention No. 87. This textual approach was already emphasised by the Permanent Court when it was last requested to interpret another international labour convention in the 1932 Advisory Opinion on the *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*. Following a textual analysis, the Court decided to examine the preparatory work of the 1919 convention but specifically emphasised that:

> "In doing so, the Court does not intend to derogate in any way from the rule which it has laid down on previous occasions that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself."[34]

On the facts, the Permanent Court held that the preparatory work "confirms the conclusion reached on a study of the text of the Convention that there is no good reason for interpreting

[33] Written Statement of the ITUC, para. 1.7.

[34] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, *Advisory Opinion of 15 November 1932, P.C.I.J., Series A/B, No. 50*, p. 378.

Article 3 otherwise than in accordance with the natural meaning of the words".[35] That same approach remains applicable in interpreting Convention No. 87 as well.

2.17. However, while frequently claiming fidelity to the "text" of Convention No. 87 as opposed to any sort of "teleological approach",[36] the IOE and a small number of participants attempt to import Article 32 extra-textual materials into the Article 31 interpretation process. Among other "backdoors", the IOE argues that there are "*lex specialis*" interpretation rules applicable to the ILO under Article 5 of the VCLT.[37] In particular, the IOE refers to the "special importance" of preparatory work in the ILO's interpretive practice.[38] In support, it relies on a remark by the former ILO Director-General Wilfred Jenks at the Vienna Conference on the Law of Treaties that "ILO practice on interpretation had involved greater recourse to preparatory work" than envisaged in what became Article 32 of the VCLT.[39]

2.18. The ITUC submits that Jenks' remark is taken out of context. Seen in its proper context, this ILO practice refers only to the use of preparatory work as a guide to the internal workings of ILO organs, particularly the International Labour Office (the "Office"); it does not seek to displace or override the general rules of treaty interpretation that this Court has ordinarily applied. The ITUC argues that there are no "*lex specialis*" rules of interpretation, whether in relation to the use of preparatory work (Subsection 1), or on account of the tripartite nature of the ILO (Subsection 2).

1. The ILO's practice on the use of preparatory work is not a *lex specialis* rule of interpretation

2.19. First of all, there is no dispute that the application of the general law of treaties is "without prejudice to any relevant rules of the organizations" under Article 5 of the VCLT.[40]

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[35] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, *Advisory Opinion of 15 November 1932, P.C.I.J., Series A/B, No. 50*, pp. 378, 380.

[36] See, *e.g.*, Written Statement of the IOE, paras. 135-136.

[37] See *ibid.*, paras. 10, 124(iii); see also Written Statement of the ILO, paras. 171, 248.

[38] See Written Statement of the IOE, paras. 10, 129; see also Written Statement of Switzerland, para. 48; Written Statement of BusinessAfrica, para. 31; Written Statement of the ILO, para. 249.

[39] United Nations Conference on the Law of Treaties, Vienna, First session, UN Doc. A/CONF.39/C.1/SR.7 (seventh meeting of the Committee of the Whole, 1 April 1968), p. 37, para. 12; see Written Statement of the IOE, para. 129; see also Written Statement of the ILO, para. 248.

[40] See Written Statement of the ITUC, para. 4.6; see also Written Statement of the ILO, paras. 171, 248; Written Statement of the IOE, paras. 10 and 124; Written Statement of BusinessAfrica, para. 31; see also Written Statement of Germany, para. 9; Written Statement of Switzerland, paras. 44, 76.

As the IOE points out,[41] these rules may also be found in the "established practice of the organisation".[42] For example, as Switzerland mentions,[43] it is an "established practice" at the ILO that States shall not make any reservation when ratifying international labour conventions such as Convention No. 87 notwithstanding the general rules on reservations under Article 19-23 of the VCLT.[44]

2.20. An ILO organ may also develop interpretive practices – such as those followed by the supervisory bodies in applying the conventions, and by the Office in its "unofficial" role to render informal opinions. However, such internal ILO interpretive practices are not binding on this Court as "*lex specialis*". This is a necessary corollary of the primacy given to the Court's interpretive role in the ILO constitutional framework, a fact that is not disputed by any participant in these proceedings. As Francis Maupain – former legal adviser to the ILO – pointed out, the statement by Jenks "does not give the full picture of the situation",[45] specifically because:

> "First, the practice to which reference is made [by Jenks] is the practice whereby the Office and established bodies can give non-official interpretations of Conventions. The only body competent to give official interpretations is the International Court of Justice (ICJ). It would be very interesting to see whether and how these non official methods of interpretation would be applied if a question of interpretation was officially put to the ICJ."[46]

2.21. In the ITUC's submission, Article 5 of the VCLT merely *permits* (as seen from the phrase "without prejudice") ILO organs to apply rules of interpretation with respect to preparatory work that differ from Articles 31-32 of the VCLT. The Court may *take into account* – but is not *bound* by – such practices in giving an authoritative interpretation of a convention.

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[41] Written Statement of the IOE, paras. 10, 124(iv), quoting Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, Art. 2(1)(j).

[42] See also D.H. ANDERSON, "Art. 5, 1969 Vienna Convention", in O. CORTEN and P. KLEIN (eds.), *The Vienna Conventions on the Law of Treaties*, Oxford, OUP, 2011, pp. 88-98, para. 21; see also ITUC, *The Right to Strike and the ILO: The Legal Foundations*, March 2014, p. 69, n. 231.

[43] Written Statement of Switzerland, para. 46.

[44] See *Reservations to the convention on the prevention and punishment of the crime of genocide, Advisory Opinion of May 28th 1951*, Written proceedings, Memorandum by the International Labour Office, para. 5 ("International labour conventions are adopted and enter into force by a procedure which differs […] The special features of this procedure have always been regarded as making international labour conventions intrinsically incapable of being ratified subject to any reservation. […] the established practice does not appear to have been challenged from any quarter.").

[45] F. MAUPAIN, "The ILO's Standard-Setting Action: International Legislation or Treaty Law?", in V. GOWLLAND-DEBBAS (ed.), *Multilateral Treaty-making*, Dordrecht, Springer, 2000, p. 131.

[46] *Ibid.*, pp. 131-132 (citation omitted).

2.22. Although the ITUC acknowledges the Office's practice of taking into account the preparatory work even where the ordinary meaning of the text is clear, this practice serves a specific function in the institutional context of the Office. As Anne Trebilcock – another former legal adviser to the ILO – wrote:

> "While heavy reliance is placed on the meaning of the terms used in the particular context, the preparatory works are cited even when it is stated that the meaning is clear. This practice can be seen as *a way to enhance 'ownership' by the ILO constituents of the views expressed by the Secretariat*."[47]

2.23. However, the Office's role as the secretariat and unofficial adviser is not the same as the Court's duty to render official interpretation as the principal and supreme judicial organ. Whereas the Office might have found it beneficial to increase "stakeholder buy-in" with the use of preparatory work *because* of its unofficial status, there is no indication why this practice should bind the Court. Indeed, as noted, in the 1932 *Employment of Women during the Night* Advisory Opinion, the Permanent Court either did not find any specific rules of interpretation at the time, or it did not find them binding on itself. Either way, the onus falls upon the IOE and others to justify why the rules of interpretation should be different in this case.

2.24. Second, more importantly, this "greater recourse" to preparatory work does not affect the primacy of Article 31 or the "supplementary" (*complémentaires*) nature of preparatory work. As seen above, this was the Permanent Court's approach in using preparatory work to confirm the textual interpretation of another international labour convention.[48] This also aligns with this Court's established "practice of confirming, when it deems it appropriate, its interpretation of the relevant texts by reference to the *travaux préparatoires*".[49] Thus, the

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[47] A. TREBILCOCK, "The International Labour Organization", in MJ. BOWMAN, D. KRITSIOTIS (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, Cambridge, CUP, 2018, p. 871.

[48] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, *Advisory Opinion of 15 November 1932, P.C.I.J., Series A/B, No. 50*, p. 380 ("The preparatory work thus confirms the conclusion reached on a study of the text of the Convention that there is no good reason for interpreting Article 3 otherwise than in accordance with the natural meaning of the words.").

[49] *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. 100, para. 89; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 142, and pp. 129–130, para. 147; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 21, para. 40; see also M. FORTEAU, A. MIRON and A. PELLET, *Droit international public*, 9th edn., Paris, LGDJ, 2022, pp. 343–344; J. CRAWFORD, *Brownlie's Principles of Public International Law*, 9th edn., Oxford, OUP, 2019, p. 369; H. THIRLWAY, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* Volume II, Oxford, OUP, 2013, pp. 1252–1253; see also *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, pp. 503–504, para. 104; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention*

difference between the "general" and "special" rules of treaty interpretation of the ILO, in this context, is a distinction without practical consequence.

2.25. Third, in any event, even when the ILO's practice of examining preparatory work is taken into account, it does not alter the fact that Convention No. 87 protects the right to strike. In fact, the ILO supervisory bodies have acted in accordance with that practice in interpreting Convention No. 87. For example, the CEACR stated in 2011 that:

> "it constantly and consistently bears in mind all the different methods of interpreting treaties recognized under international public law, and in particular under the Vienna Convention on the Law of Treaties, 1969. In particular, the Committee of Experts has always paid due regard to the textual meaning of the words in light of the Convention's purpose and object as provided for by Article 31 of the Vienna Convention. *In addition* and in accordance with Articles 5 and 32 of the Vienna Convention, the Committee *takes into account the Organization's practice of examining the preparatory work* leading to the adoption of the Convention. This is especially important for ILO Conventions in view of the tripartite nature of the Organization and the role that the tripartite constituents play in standard setting."[50]

2.26. Specifically, the CEACR confirmed the supplementary role of preparatory work in relation to the right to strike under Convention No. 87:

> "While the Committee considers that the preparatory work is an important supplementary interpretative source when reviewing the application of a particular Convention in a given country, it may yield to the other interpretative factors, in particular, in this specific case, to the subsequent practice over a period of 52 years."[51]

2.27. Indeed, as further detailed in Chapter 6, the preparatory work confirms the conclusion that Convention No. 87 protects the right to strike.

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on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgment of 31 January 2024, para. 51.

[50] ILC, 100th Session, 2011, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 12 [Document No. 101] (emphasis added).

[51] ILC, 101st Session, 2012, Report III (Part 1B), *Giving globalization a human face*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, p. 48, para. 118 (citing Articles 31-32 of the VCLT) [Document No. 236].

2. The ILO's tripartism is not a *lex specialis* rule of interpretation

2.28. A handful of participants have also referred to the tripartite nature of the ILO as providing relevant rules of interpretation under Article 5 of the VCLT.[52] The IOE argues that "[i]t is only the ILC [International Labour Conference] that has the competence and authority under the ILO's Constitution […] to clarify the meaning (*and therefore the legitimate interpretation*) of any existing International Labour Standard *through standard setting* as and if required".[53] It further claims that, "as a result of which, principles are not to be dynamically evolved beyond the bounds of tripartite cooperation."[54] Further, the IOE suggests that it is a *lex specialis* rule to ensure "fidelity to the organisation's relevant rules (i.e. tripartite interaction and cooperation)."[55]

2.29. While tripartism under the ILO system is not disputed, it is not a "*lex specialis*" rule of interpretation in and of itself. The IOE's attempt to recycle and repackage the familiar "judges should not make law" argument in the language of the ILO's tripartite structure has no place before this Court. The fact that alternative means may be available to the ILO, such as amending Convention No. 87 or adopting a new convention or protocol, is not in doubt. However, as explained in the foregoing Section B, the Court is asked to undertake a very specific task of treaty interpretation, rather than to identify or advise the ILO on the most efficient alternative ways of realising the ILO's objectives.

2.30. For clarity, the ITUC reiterates that, contrary to the IOE's assertion (repeated throughout its Written Statement), standard setting is not the process to resolve disputes of interpretation. As Article 37 of the ILO Constitution plainly states:

> "Any question or dispute relating to the interpretation […] of any subsequent Convention […] *shall* be referred for decision to the International Court of Justice."

Thus, when presented with two options as to how to proceed, the ILO Governing Body decided to refer the dispute to the Court pursuant to Article 37 of the ILO Constitution.[56]

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[52] See Written Statement of Switzerland, paras. 45-48; Written Statement of BusinessAfrica, para. 31; Written Statement of the IOE, paras. 10, 126-128.

[53] Written Statement of the IOE, para. 127 (emphasis added).

[54] *Ibid.*, para. 128.

[55] *Ibid.*, para. 130.

[56] See Written Statement of the ILO, paras. 54-57.

2.31. Finally, the IOE cannot both call for "fidelity to […] tripartite interaction and cooperation"[57] whilst seeking to undermine the interpretation by the tripartite ILO Committee on Freedom of Association (the "CFA") of Convention No. 87. Quite the contrary, as explained in the ITUC's Written Statement and set out in Section 4.B below, it is precisely in light of tripartism that Convention No. 87 should be recognised to protect the right to strike.

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2.32. In sum, the Court's first and primary task in answering the questions put to it is to interpret the *text* of Convention No. 87 according to the general rule of interpretation in Article 31 VCLT, as set out in the following chapter.

[57] Written Statement of the IOE, para. 130.

Chapter 3.
The right to strike is protected under Convention No. 87 according to the ordinary meaning of its terms

3.1. With respect to the application of Article 31, a clear consensus has emerged from the written statements on the following points, even among the IOE and those of the view that Convention No. 87 does not protect the right to strike.

i) The right to strike, although not an absolute right, is protected as part of the principle of freedom of association and the right to organise;[58]

ii) in the absence of an express provision on the right to strike under Convention No. 87, the existence of the right falls to be determined by interpreting Articles 3(1) and 10;[59]

iii) the "freedom of association" protected by Convention No. 87 includes not only the freedom to establish and join an organisation *per se*, but also the freedom for the organisation to "meaningfully exist[]" and organise "meaningful organisational activit[ies]";[60]

iv) in its literal sense, the word "activities" under Article 3(1) has a broad meaning;[61] and

v) Convention No. 87, particularly Article 3, was intended to state broad principles on freedom of association and the right to organise, not as a detailed regulation of freedom of association.[62]

3.2. However, two competing interpretations of Convention No. 87, specifically Articles 3(1) and 10, have emerged:

[58] See, *e.g.*, Written Statement of Switzerland, paras. 73, 84; Written Statement of the IOE, paras. 3, 117. See also GB.323/INS/5/Appendix I, The Standards Initiative, Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, March 2015, Annex II, Government Group Statement (23 February 2015), paras. 4-5 [Document No. 106].

[59] See, *e.g.*, Written Statement of the IOE, paras. 122-123 ("Key Articles from C87").

[60] *Ibid.*, paras. 147, 149 ("so that it may meaningfully exists" [sic]).

[61] *Ibid.*, para. 140.

[62] *Ibid.*, paras. 16, 291(3).

i) On the one hand, in the submission of the ITUC as well as the great majority of participants, the rights protected under Articles 3(1) and 10 encompass "activities" and "programmes" of organisations "for furthering and defending the interests of workers or of employers", which in the workers' case includes strikes (the "Majority Interpretation").

ii) On the other hand, according to the IOE and a small number of others, that right only covers the organisation's "internal" activities "amongst members" "such as the organisation of meetings",[63] but not "the right of workers (or employers) to use collective action to defend their interests"[64] (the "Minority Interpretation").

3.3. In its Written Statement, the ITUC argued for the Majority Interpretation based on: (i) the plain meaning of the words in Article 3(1), read together with the defined objective of workers' organisations in Article 10;[65] (ii) taken in their context;[66] (iii) in light of the object and purpose of Convention No. 87;[67] and (iv) under the principles of good faith[68] and effectiveness.[69]

3.4. While most participants concur with this interpretation in their Written Statements, a small number of others – particularly Bangladesh, Japan, the United Kingdom, Switzerland, BusinessAfrica, and the IOE – disagree on the basis of the following reasons:

i) Convention No. 87 applies equally to workers and employers, which would be inconsistent with the recognition of the right to strike, insofar as it is a right that can only be exercised by workers and their organisations;[70]

ii) the text of Convention No. 87 does not specifically mention a right to strike, which is therefore not included within the ordinary meaning of Article 3(1);[71]

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

[64] *Ibid.*, para. 154(ii).

[65] Written Statement of the ITUC, para. 4.13-4.26.

[66] *Ibid.*, paras. 4.27-4.50.

[67] *Ibid.*, paras. 4.51 – 4.58.

[68] *Ibid.*, paras. 4.59 – 4.66.

[69] *Ibid.*, paras. 4.62 – 4.66.

[70] See, *e.g.*, Written Statement of the IOE, para. 27; Written Statement of Japan, paras. 24-25.

[71] See, *e.g.*, Written Statement of the IOE, paras. 141 *et passim*; Written Statement of BusinessAfrica, para. 26; Written Statement of Japan, paras. 8-9; Written Statement of the United Kingdom, para. 20.

iii) Article 10 is irrelevant when considering whether Convention No. 87 provides for a right to strike; its purpose is purely definitional and only serves to identify the type of organisations entitled to protection under the treaty;[72]

iv) the term "activities" in Article 3(1) is overly broad and ambiguous because it requires but lacks any limitation on its scope; instead, in its context, "activities" means internal activities of the organisation that provide it with the ability to exist as a coherent whole;[73] and

v) the intention for Convention No. 87 to be a concise statement of certain fundamental principles and not a code of regulations shows that it would not contain a specific right to strike.[74]

3.5. None of these arguments have any merit or withstand scrutiny. As demonstrated below, the arguments are premised on a misunderstanding of the question put to the Court (Section A), and would result in an interpretation of Convention No. 87 that is illogical and inconsistent with the plain text of the terms (Section B), their context (Section C), the Convention's object and purpose (Section D), and above all the principle of good faith (Section E). To the contrary, a proper interpretation leads only to the conclusion that the right to strike is protected under Convention No. 87.

A. Convention No. 87 protects the rights of both workers and employers

3.6. The ITUC will first dispose of the arguments advanced by the IOE and a few participants that "C87 equally protects the freedom of association of workers and employers without favouring one side or another"[75] and therefore cannot protect a right to strike, which does not apply to employers.[76] This reasoning also formed a central element of Japan's arguments in its Written Statement.[77]

[72] See, *e.g.*, Written Statement of the IOE, para. 152.

[73] See, *e.g.*, Written Statement of the United Kingdom, para. 20; Written Statement of the IOE, para. 147.

[74] See, *e.g.*, Written Statement of Japan, para.43; Written Statement of BusinessAfrica, para. 38; Written Statement, para. 164.

[75] Written Statement of the IOE, para. 27 (emphasis in the original).

[76] See, *e.g.*, *ibid.*, para. 144.

[77] Written Statement of Japan, paras. 13-14.

3.7. The argument is premised on a misunderstanding of the interpretive question before the Court. The question put to the Court focuses only on the right to strike because that is the activity in dispute.

3.8. First of all, it is not disputed that Convention No. 87 *also* protects the rights of employers and their organisations. Indeed, the IOE and other employers' organisations have extensively relied on Convention No. 87 to secure their rights in the same supervisory procedures that the IOE purports to discredit, such as in their multiple complaints before Commissions of Inquiry under Article 26 of the ILO Constitution[78] and the tripartite CFA.[79] In particular, although the IOE now argues against "the right of workers (*or employers*) to use collective action to defend their interests" under Convention No. 87,[80] the ITUC notes that the employers themselves have repeatedly claimed such rights under the Convention.[81]

3.9. In any case, it would be perfectly arguable that Convention No. 87 protects the right to strike of workers and their organisations *only*. As stated in the preambles of both Convention No. 87 and the ILO Constitution, freedom of association serves to improve the "conditions of *labour*",[82] which the Permanent Court recognised already in 1932 as "the main preoccupation of the authors of Part XIII of the Treaty of Versailles of 1919".[83] As submitted in the ITUC Written Statement and further seen below, the Convention is intended to provide greater protection for workers in the context of a relationship of power that is inherently

[78] See, *e.g.*, Report of the Commission of Inquiry appointed under article 26 of the Constitution to examine the observance by Nicaragua of Conventions Nos 87, 98 and 144, *Official Bulletin*, vol. LXXIV, 1991, paras. 500–509 [Document No. 278]; see also Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of the Bolivarian Republic of Venezuela of Conventions Nos. 26, 87 and 144, GB. 337/INS/8, October 2019, in particular para. 1 containing the text of their complaint with all relevant allegations especially concerning the violation of ILO Convention No. 87 [Annex No. 2].

[79] See, *inter alia*, CFA complaints in respect of murder (Case No. 1007), arbitrary arrests (Cases Nos. 1007, 1084, 1344, 1351), confiscation of property (Case No. 1344), travel restrictions (Cases Nos. 1114, 1317, 1351), violation of freedom of expression (Case No. 1084) [Annexes Nos. 3 to 8].

[80] Written Statement of the IOE, para. 154(ii) (emphasis added).

[81] See, *e.g.*, CFA, Case No. 2530 (Uruguay), Complaint date: 28-NOV-06, Definitive Report, Report No. 348, November 2007 [Annex No.9]; see also ILO, *Compilation of decisions of the Committee on Freedom of Association*, sixth edition, 2018, paras. 764, 843 and 860 [Document No. 282].

[82] Constitution of the ILO [Document No. 1]; Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) [Document No. 120].

[83] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, *Advisory Opinion of 15 November 1932, P.C.I.J., Series A/B, No. 50*, p. 374.

asymmetrical.[84] It should therefore come as no surprise that workers enjoy specific rights such as strikes even where employers have no parallel rights.

3.10. This is confirmed by reference to the International Covenant on Civil and Political Rights (the "ICCPR") and the International Covenant on Economic, Social and Cultural Rights (the "ICESCR"). While Article 22(1) ICCPR provides generally for freedom of association, it mentions as the sole example "the right to form and join *trade unions* for the protection of his interests". Indeed, Article 8(1) of the ICESCR provides only for workers' and trade unions' (collective) rights without mentioning employers' rights at all.[85]

3.11. In short, the core question at issue is not whether Convention No. 87 protects *only* strikes, but whether it protects strikes as an inherent part of the collective action already recognised as falling under Convention No. 87. As set out below, this must be answered in the affirmative.

B. Strikes are plainly amongst the "activities" and "programmes" of workers' organisations "for furthering and defending the interests of workers" under Articles 3(1) and 10

3.12. Starting with the text of Convention No. 87 itself, the small number of participants espousing the Minority Interpretation argue that the word "strike" is not expressly mentioned in the treaty's text.[86] Japan, in particular, referred to the Court's decision in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* in support of the proposition that "[t]he absence of express reference to the right to strike […] is thus by itself indicative that the Convention does not cover the said right".[87] Switzerland merely asserts that the words "*activité*" and "*programme d'action*" do not include strikes, without offering any textual analysis other than that "*grève*" is not mentioned.[88] This line of "textual" argument has no basis.

[84] See *infra* para. 3.65.

[85] See International Covenant on Economic, Social and Cultural Rights, 1966, Article 8(1)(a) to (d) [Document No. 284] (emphasis added).

[86] See Written Statement of Bangladesh, para. 3.1; Written Statement of Costa Rica, sec. II (unpaginated and unnumbered); Written Statement of the United Kingdom, para. 20; Written Statement of Switzerland, para. 51; Written Statement of BusinessAfrica, para. 26; Written Statement of the IOE, paras. 141 *et passim*.

[87] Written Statement of Japan, paras. 8-9, citing *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018,* p. 321, para. 93.

[88] Written Statement of Switzerland, paras. 50, 51.

3.13. First of all, as detailed in Chapter 5 below,[89] the omission of the phrase "right to strike" in Convention No. 87 was in line with contemporary human rights instruments, such as the Universal Declaration of Human Rights and the European Convention on Human Rights. The absence of the concrete language has not prevented the supervisory bodies of those treaties from concluding that those earlier instruments protect the right to strike.[90] It was only two decades later that the ICESCR and other human rights instruments included language expressly protecting the "right to strike".

3.14. More fundamentally, however, contrary to Japan's argument, "[t]he lack of express language designating a particular notion in a treaty" does *not* indicate that "the notion is lacking in that treaty".[91]

3.15. As stated in the ITUC's Written Statement, in one of its first opinions interpreting Part XIII of the Treaty of Versailles, this Court's predecessor rejected precisely this reasoning. In its Advisory Opinion on the *Competence of the ILO in regard to International Regulation of the Conditions of Persons Employed in Agriculture*, the PCIJ found, even though the word "agriculture" was not explicitly mentioned in Part XIII, "no doubt that agricultural labour is included" within the competence of the ILO.[92] "[I]n considering the question before the Court upon the language of the Treaty", the Court found it "obvious that these clauses are in their terms applicable to agriculture" and "obvious that the Treaty 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."[93]

3.16. Similarly, in the *LaGrand* case for instance, this Court interpreted Article 36 of the Vienna Convention on Consular Relations to imply individual rights of foreign nationals themselves (rather than just States), as well as an obligation of States (and corresponding right

[89] See *infra* paras. 5.14-5.18.

[90] See also Written Statement of the ITUC, paras. 4.161-4.164.

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

[92] *Competence of the ILO in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion of 12 August 1922, P.C.I.J., Series B*, pp. 39, 43 (the Organisation's competence must extend "to international regulation of the conditions of labour of persons employed in agriculture").

[93] *Ibid.*, p. 31 (adding "there is nothing in [the relevant article] that enjoins the application of all the principles in their entirety by any particular nation [to agriculture], or at any particular time, or to any particular kind of labour").

of foreign nationals) to provide access to justice and judicial review, even though these rights and obligations are not expressly mentioned in that convention.[94]

3.17. This is also the case with numerous human rights instruments. For example, the Human Rights Committee has interpreted the right to life and the prohibition of torture under Articles 6 and 7 of the ICCPR to include an implicit right of non-refoulement on the basis that returning someone to a place where their life or freedom would be at risk violates these provisions. This is despite the fact that the text does not mention non-refoulement.[95]

3.18. In the present case concerning Convention No. 87, the notion of a "strike" is clearly within the natural meaning of the terms of Article 3(1) (Subsection 1), read together with Article 10 (Subsection 2), namely "activities" and "programmes" of organisations "for furthering and defending the interests of workers and employers". Contrary to the arguments of the IOE and others, there is no ambiguity in those terms, or any reason to exclude the notion of a "strike" from the scope of their ordinary meaning (Subsection 3).

1. Under Article 3(1), strikes plainly come within the broad scope of "activities" and "programmes"

3.19. All participants, including the IOE,[96] agree that freedom of association under Convention No. 87 protects not only the freedom to form or join organisations (Article 2), but also the freedom to organise certain activities (Article 3(1)). In addition, almost all agree that the natural meaning of the terms in Article 3(1), particularly "activities", is broad in scope and includes strikes.[97] The small number of participants arguing otherwise are mistaken.

3.20. The United Kingdom is alone in claiming that the "ordinary meaning of the terms 'organise', 'activities', 'guarantees' and 'interests' is very general and *does not, in usual parlance, include the right to strike*".[98] No authority is provided to substantiate the claim, and

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[94] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* p. 466, at pp. 497-498, paras. 77, 89-91; see, similarly, *Advisory Opinion on the Jurisdiction of the Courts of Danzig, PCIJ Series B, No. 15, 1928*, pp. 18-21.

[95] See, *e.g.*, Human Rights Committee, *Chitat Ng v. Canada*, Communication No. 469/1991, CCPR/C/49/D/469/1991 [Annex No. 10].

[96] See, *e.g.*, Written Statement of the IOE, paras. 147, 149.

[97] See, *e.g.*, Written Statement of France, para. 65; Written Statement of Australia, para. 30; Written Statement of Germany, para. 56; Written Statement of the United States of America, para. 2.2.

[98] Written Statement of the United Kingdom, para. 20 (emphasis added).

there is none. Indeed, as both Bangladesh and BusinessAfrica concede – using the same verbatim phrase – the term "activities […] of workers' organizations" in Article 3(1) "could potentially also include strike action".[99]

3.21. Japan argues that strikes must be excluded under an "*a contrario*" interpretation on the basis of *Railway Traffic Between Lithuania and Poland*, where the Permanent Court had to interpret a treaty provision referring "solely to waterways but not to railways".[100] That case is evidently inapposite here. While "railways" and "waterways" are two different categories, "strikes" and "activities" (or "programmes") are not: the former is a subset of the latter.

3.22. For completeness, the ITUC briefly addresses the IOE's argument that the use of the word "organise" "concerns the ability of a relevant organisation to govern and order itself."[101] This argument, once again, is not consistent with ordinary usage of the English language. While also quoting from the same entry in the Oxford English Dictionary as the ITUC, the IOE has somehow only quoted the first sense (*a.*) of "organise" ("[t]o arrange into a structured whole; to systematize; to put into a state of order"),[102] but omitted the second, more relevant sense (*b.*) of "[t]o coordinate or manage the *activities* of (a group of people)".[103] Moreover, as the ITUC submitted, this sense (as in "organise their activities") is closely linked to the third sense (*c.*) (as in the titular "right to organise"), which the IOE also conveniently omitted, namely:

> "[t]o become coordinated, attain an orderly structure; spec. (of a political body, esp. a trade union) to form; to put in place an administrative structure; *to plan organised action*."[104]

Put simply, the right to "organise" includes the right not only to govern and order oneself, but "to plan organised action" such as strikes.

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[99] Written Statement of BusinessAfrica, para. 33; Written Statement of Bangladesh, para. 3.1.

[100] *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J. Series A/B, No. 42*, p. 121; Written Statement of Japan, paras. 10-11 ("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.").

[101] Written Statement of the IOE, para. 139.

[102] Oxford English Dictionary, "organize (v.)", sense 2.a, March 2024, available on www.oed.com, cited in Written Statement of the IOE, para. 139.

[103] Oxford English Dictionary, "organize (v.)", sense 2.b, March 2024, available on www.oed.com (emphasis added), cited in Written Statement of the ITUC, para. 4.19.

[104] Oxford English Dictionary, "organize (v.)", sense 2.c, March 2024, available on www.oed.com (emphasis added), para. 4.19.

2. Read with Article 10, the "activities" and "programmes" of workers' organisations include their collective action "for furthering and defending the interests of workers"

3.23. Moreover, all participants, including the IOE, agree that Article 3(1) must be read together with the definition of the word "organisation" in Article 10, which is the other "key article".[105] Indeed, the IOE in its Written Statement correctly points out that:

> "reading Article 3 in light of the definition of organisation in Article 10 simply produces: '[w]orkers' and employers' organisations [for furthering and defending the interests of workers and employers] shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.'"[106]

3.24. Significantly, instead of denying that a strike is a form of collective action for furthering and defending workers' interests, the IOE argues that Article 3(1) only protects "the right of 'workers' to organise *as different from the right of workers (or employers) to use collective action to defend their interests*."[107] According to the IOE, the definition in Article 10 serves only to distinguish which organisations qualify for protection under Convention No. 87. In its view, Article 10 has no other significance.[108]

3.25. The IOE's approach is self-contradictory and wrong. As the Court held, it is "generally the case in international law" that one "places the principal emphasis on the intentions of the parties".[109] The IOE does not dispute that, pursuant to Article 31(4) of the VCLT, "[a] special meaning shall be given to a term if it is established that the parties so intended."[110] Nothing can more clearly establish the parties' intention to do so than when they specifically and expressly define a term as having a certain meaning. Further, pursuant to the overarching principles of good faith and *effet utile*, a treaty must be interpreted to give effect to all of its terms – *a fortiori* where the parties specifically intended a special meaning.

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[105] Written Statement of the IOE, paras. 122-123 ("The Key Articles from C87").

[106] *Ibid.*, para. 152 (alteration in the original).

[107] *Ibid.*, para. 154(ii) (emphasis supplied).

[108] *Ibid.*, para. 152.

[109] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment of 26 May 1961, I.C.J. Reports 1961*, p. 17, at p. 31.

[110] See Written Statement of the IOE, para. 275, referring to VCLT, Article 31(4).

3.26. While the IOE has repeatedly proclaimed its desire to adhere to the Parties' intention, it argues that there "is no evidence that the parties to C87 have given the term 'activities' in Article 3 of C87 a special meaning that would correspond to a 'right to strike'".[111] The IOE conveniently omits Article 10. While Article 10 is definitional in nature and does not expressly bestow on trade unions a right to strike, the Parties clearly intended to give a special meaning to a workers' "organisation", whose defined mandate is "for furthering and defending the interests of workers". Under the principle of *effet utile* and good faith, Convention No. 87 must be interpreted to give effect to the Parties' specific intention behind Article 10.

3.27. Contrary to the IOE's mischaracterisation of Article 10, the fact that Convention No. 87 is confined to organisations which possess these objectives is an irrefutable indication by the drafters that those same objectives are to be rendered effective under the Convention. In other words, the freedom of association protected under Convention No. 87 necessarily includes a corollary freedom to lawfully put into effect the objects of a protected organisation, namely "to take collective action to defend their interests, including strike action".[112]

3.28. The ITUC accepts that, as noted by the IOE, not every union *exercises* the right to strike.[113] Indeed, in practical terms not all unions are in the position or are willing to engage in strike action. But that does not mean that they do not – or should not – have the right to do so if they wished.

3.29. Therefore, contrary to the IOE's argument, Convention No. 87 patently protects not only freedom of *mere* association, but also "the right of workers (or employers) to use collective action to defend their interests"[114] through their organisations, which must include strikes.

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[111] Written Statement of the IOE, para. 275.

[112] See Charter of Fundamental Rights of the European Union, 2000, Article 28 [Document No. 288] ("Workers and employers, or their respective organizations, in accordance with Community law and national laws and practices, have […] 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.*") (emphasis added).

[113] Written Statement of the IOE, para. 148.

[114] *Ibid.*, para. 154(ii).

3. There is no ambiguity in the terms or other reason to *exclude* the right to strike from their scope

3.30. In the face of the plain meaning of the terms, some participants have resorted to an argument that is illogical: they argue that the plain meaning of "activities" does not include all activities *because* it does not restrict the kind of "activities".

3.31. Thus, while the IOE accepts that the word "activities" "covers a broad range of matters, with no clear or definite scope",[115] it argues that Article 3(1) "does not provide a clear answer to whether those words cover a right to strike".[116] The IOE argues that, "[b]eginning with a focus on only those words, whilst it is clear that Article 3 is concerned with the ability of an organisation to govern and order itself and conduct associated activities, the plain words (in isolation) leave an ambiguity as to the bounds of its right to do so".[117] Similarly, the United Kingdom argues that:

> "It cannot be correct that when the 'ordinary meaning' of a term is very broad, that any specific right or obligation can be read into it. Workers have various means of organising their activities and furthering their interests. Nothing in the language of the provision entails that *this must include* a right to strike."[118]

3.32. Despite the IOE's attempt to manufacture an ambiguity in order to import extra-textual limitations, a limitation cannot be read into the terms of a treaty where there is none.[119] The situation in this case is exactly as the Permanent Court held in its *Employment of Women during the Night* Advisory Opinion:

> "The wording of Article 3, considered by itself, gives rise to no difficulty; *it is general in its terms and free from ambiguity or obscurity*. It prohibits the employment during the night in industrial establishments of women without distinction of age. Taken by itself, it necessarily applies to the categories of women contemplated by the question submitted to the Court. If, therefore, Article 3 of the Washington Convention is to be interpreted in such a way as not to apply to women holding posts of supervision and management and not

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[115] *Ibid.*, para. 140.

[116] *Ibid.*, para. 141.

[117] *Ibid.*, para. 138.

[118] Written Statement of the United Kingdom, para. 20 (emphasis added).

[119] *Competence of the General Assembly Regarding Admission of a State to the United Nations*, *Advisory Opinion, I.C.J. Reports 1950*, p. 8 ("the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter"); see also *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; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *I.C.J. Reports 1994*, pp. 21-22, para. 41.

> ordinarily engaged in manual work, *it is necessary to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of the words*."[120]

3.33. In short, a textual reading of Article 3(1) together with Article 10 in good faith – even without relying upon the other elements under Article 31 of the VCLT, all of which confirm the ITUC's textual reading – clearly supports the Majority Interpretation. In these circumstances, as the Permanent Court pointed out, the IOE has asked the wrong question to begin with. The true question of treaty interpretation at issue is not why the right to strike should be somehow *included* into Convention No. 87, as the United Kingdom has suggested. Rather, it falls upon them to justify why it should be treated as having been *excluded* from the otherwise broad and all-encompassing terms of the terms in Articles 3(1) and 10. The IOE and concurring participants have failed to do so; none of their other arguments are of merit, as set out in the following sections.

C. The contextual meaning of the terms includes the right to strike

3.34. In its Written Statement, the ITUC raised three contextual elements in support of the Majority Interpretation, namely: the breadth of the rights under Article 3(1) as a whole;[121] the high degree of autonomy and lack of restrictions under Articles 2-9 more broadly;[122] and the use of the qualifier "*syndical·e*" in the French text.[123]

3.35. In the face of the unambiguous text, some participants attempt to resort to "context". They are wrong on both the law and the facts.

3.36. As a threshold matter, the IOE's arguments reveal an erroneous understanding of what constitutes "context" under Article 31(2) of the VCLT to begin with.[124] The IOE is the only participant to argue that "supplementary material […] might also be regarded as extrinsic content for the purposes of Article 31(2) […] because such materials show why the parties

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[120] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, *Advisory Opinion of 15 November 1932, P.C.I.J., Series A/B, No. 50*, p. 373.

[121] Written Statement of the ITUC, para. 4.38.

[122] *Ibid.*, paras. 4.39–4.46.

[123] *Ibid.*, paras. 4.47–4.50.

[124] Article 31(2) provides that "context" comprises, *inter alia*, (a) "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;" and (b) "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

ultimately agreed what they did and may therefore be said to demonstrate a latent agreement, such that they ought to be considered under Article 31(2) as well as pursuant Article 32.2 [*sic*]."[125] This argument needs no detailed rebuttal. It is difficult to imagine any preparatory work that does *not* "show why the parties ultimately agreed what they did and may therefore be said to demonstrate a latent agreement". For the purposes of contextual meaning under Article 31, the starting point for the Parties' agreement remains the actual text of the Convention, only to be supplemented by preparatory work if and only if the conditions are fulfilled under Article 32, as further discussed in Chapter 6 below.[126]

3.37. Their contextual arguments also have no basis in the actual text of the Convention. As shown below, the most important context of the terms – freedom of association – clearly confirms that the natural meaning of the words includes strikes (Subsection 1). The claim that the contextual meaning of "activities" excludes strikes (Subsection 2) and rather means "internal" activities (Subsection 3) cannot be sustained.

1. The meaning of "freedom of association" confirms that the right to strike comes within the scope of the terms

3.38. Referring to the title of Convention No. 87, namely "Freedom of Association and Protection of the Right to Organise Convention", the IOE argues that "[t]he focus of C87, per its title, is on the ability to associate, and protection of the right to organise; whilst, at the same time, there is no reference to a right to strike, or even to collective bargaining (cf. C98)."[127] For one, this is a mere recycling and recital of its "textual" argument that the word "strike" is not mentioned in the Convention, already addressed above. But more importantly, this is once again an illogical and self-contradictory argument.

3.39. The IOE has itself acknowledged "the existence and recognition of a right to strike *per se*", which it admitted is "linked to freedom of association".[128] Indeed, as Switzerland correctly

[125] Written Statement of the IOE, para. 169(iv).
[126] See *supra* paras. 6.1 et seq.
[127] *Ibid*., para. 157.
[128] *Ibid*., paras. 3, 117.

points out, in the 2015 Tripartite Meeting, "les gouvernements ont […] reconnu que le droit de grève était un corollaire du droit et principe fondamental de la liberté syndicale".[129]

3.40. As a matter of logic, if:

i) the terms in Articles 3(1) and 10 are to be given their ordinary meaning in their context; and

ii) the context of Articles 3(1) and 10 is the principle of "freedom of association" and the "right to organise" ("la liberté syndicale" and "le droit syndical"); and

iii) the right to strike is an inherent corollary to the principle of freedom of association and the right to organise;

then it follows that the right to strike must come within the ordinary meaning of the terms in Articles 3(1) and 10.

3.41. Both the IOE and Switzerland suggest that the States Parties at the 2015 Tripartite Meeting were only referring to freedom of association *generally*, but "not in C87"[130] and "sans se prononcer sur la convention n° 87".[131] This is inaccurate: not only is Convention No. 87 mentioned in the very title of the Tripartite Meeting, but the Government group also specified in its statement that it "had the opportunity to thoroughly ponder on the question that is posed to us all, *namely the relation between Convention 87 on Freedom of Association and the right to strike*."[132] In any event, the fact that the States Parties recognise that "le droit de grève était un corollaire du droit et principe fondamental de la liberté syndicale" suffices to confirm the presumption that the contextual meaning of Articles 3(1) and 10 also includes the right to strike. It is for the IOE to explain why that presumption does not apply in the context of Convention No. 87, and it has failed to do so. If freedom of association implies a right to strike under the ILO Constitution, then it surely does also in Convention No. 87.

[129] Written Statement of Switzerland, para. 73 (citing GB.323/INS/5/Appendice I, para. 4), see also para. 84 ("Le droit de grève étant reconnu comme un corollaire du droit et principe fondamental à la liberté syndicale").

[130] Written Statement of the IOE, para. 117.

[131] Written Statement of Switzerland, para. 73, citing GB.323/INS/5/Appendice I, para. 4.

[132] GB.323/INS/5/Appendix I, The Standards Initiative, Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, March 2015 Annex II, Government Group Statement (23 February 2015), para. 3 [Document No. 106] (emphasis added).

2. Context does not *exclude* the right to strike from the terms

3.42. Moreover, in the ITUC's submission, the context of Articles 3(1) and 10 based on the actual text of the Convention conclusively confirms that Convention No. 87 does *not* exclude the right to strike. In contrast with Article 9, which expressly allows States to exclude police and the armed forces, the Convention contains no indication that the right to strike is excluded from its scope.

3.43. The IOE does not deny this, but rather claims that, without the specification of limitations, the right to strike has no limits, "a result that is manifestly absurd and/or unreasonable".[133] The IOE argues that "[i]t would not be meaningful to state a 'right to strike' in an international instrument without at least indicating in a general manner what its scope and limits are, or who would be competent to determine its scope and limits."[134] The IOE further argues that, without knowing the limitations, ratifying States would not know what they were ratifying.[135]

3.44. To begin with, none of these arguments concern "context" in the sense of Article 31(1) of the VCLT. Moreover, the very premise of the IOE's claim – that the right under Article 3(1) has no limits – is wrong. As mentioned in Chapter 2 above, all participants have long agreed that the right to strike is not "an absolute and unlimited right"[136] as the IOE alleged. Within Convention No. 87, as stated in the ITUC's Written Statement, Article 3(2) requires the exercise of the right in Article 3(1) be "lawful", whereas Article 8(1) more broadly provides that "workers and their […] organisations […] shall respect the law of the land" in exercising their rights, subject to Article 8(2).[137]

3.45. Moreover, as mentioned in Chapter 2, the ILO organs have set the appropriate limits on the right to strike, including its scope and the modalities of its exercise, such as public emergency exceptions. In that respect, Convention No. 87 is no different from any other ILO Convention which protects a specific right without specifying for that matter who would be competent to determine its scope or limits.

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[133] Written Statement of the IOE, para. 153(i)-(iii).

[134] *Ibid.*, para. 153.

[135] *Ibid.*, para. 158.

[136] *Ibid*., para. 153.

[137] Art. 8(2) provides that "[t]he law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention"; see also Written Statement of the ITUC, para. 4.44.

3.46. Further, the IOE's proposition is inconsistent with core principles of general international law, and international labour law in particular. Many international treaty obligations, such as the right not to be subjected to inhuman or degrading treatment or the right to a fair trial, do not specify the precise boundaries of what is and is not permissible, but leave it to the relevant supervisory organs to establish the parameters. This is also the case for the right to strike. As the ITUC describes, all the international instruments which expressly specify a "right to strike"[138] only include the most minimal pre-requisites or conditions. However, the jurisprudence since their publication has subsequently accumulated very detailed restrictions and conditions, similar to the ones set by ILO bodies.[139]

3.47. Finally, the suggestion that the States Parties of Convention No. 87 did not know what they were ratifying is wrong and unsupported by evidence. As stated in the ITUC's Written Statement,[140] the overwhelming majority of States Parties – 143 out of 158 – ratified Convention No. 87 after 1952,[141] when the CFA expressly confirmed that the scope of the Convention included the right to strike.[142] The States Parties recognised that they were ratifying a Convention which provided for the right to strike subject to the limitations identified by the organs of the ILO by the time of ratification.

3. Context does not limit the terms to "internal" activities

3.48. In support of the Minority Interpretation, the IOE argues that the only activities protected by Convention No. 87 are those internal to the organisations of workers (or employers), to the exclusion of all activities external to the governance or regulation of the organisations or affecting non-members.[143] This "contextual" meaning has no basis.

3.49. According to the IOE's "contextual" interpretation, the "activities" permitted by Article 3(1) are restricted to "those concerning the ability of the organisation to come together as a coherent body, govern itself, and conduct activities amongst members".[144] For example, the

[138] Written Statement of the ITUC, paras. 4.158-4.179.

[139] *Ibid.*, paras. 4.161, 4.164-4.165, 4.167, 4.170-4.171.

[140] *Ibid.*, paras. 4.219-4.220.

[141] *Ratifications de C087 - Convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948*, Normlex.

[142] CFA, Case No. 28 (United Kingdom of Great Britain and Northern Ireland), Complaint date: 01-JUL-51, Definitive Report - Report No 2, 1952, para. 68 [Annex No. 15 to the Written Statement of the ITUC].

[143] Written Statement of the IOE, paras. 146-149.

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

protected activities are restricted to the "organisation of meetings and conferences, the delivery of members' services, such as legal advice and training, [and] advocacy for a legal framework that is conducive to workers' or employers' needs", and campaigns for new members.[145] The IOE repeats these arguments under different legal labels throughout its submissions.[146]

3.50. First, as previewed in the previous section, the IOE's reasoning is based on the alleged "ambiguity" in the broad scope of Article 3(1) because of its lack of restrictions. For the reasons already explained in the previous section, the attempt to read in "internal" to the scope of Article 3(1) has no merits.

3.51. Second, the IOE has omitted the obvious fact that Convention No. 87 does not specifically and expressly confine the scope of "activities" to "the right of organisation to order themselves and conduct activities amongst members" either. Using the same logic of the IOE, if it were the intention, the limitation would have been specified, as is the case in Article 9.

3.52. Third, the IOE's interpretation also contradicts the express wording of Article 10, which refers to "furthering and defending" interests. The organisation of activities to further and defend interests clearly applies to activities outside the organisation as well as inside it.

3.53. Fourth, the IOE's interpretation is internally contradictory. For example, the IOE accepts a range of "activities" that it claims are "internal to organisations",[147] but cannot explain why "advocacy for a new legal framework" or "the implementation of campaigns" are "internal" but strikes are not.

3.54. Finally, the IOE's interpretation also contradicts the meaning of the phrase "freedom of association", as already explained above.

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3.55. In sum, the context of Articles 3(1) and 10 supports the Majority Interpretation that Convention No. 87 protects the right to strike.

[145] *Ibid*.
[146] See, *e.g.*, *ibid.*, paras. 155, 157.
[147] *Ibid*., para. 147.

D. The object and purpose of Convention No. 87 confirm that the right to strike comes within the ordinary meaning of its terms

3.56. Finally, contrary to the arguments of the IOE and others, strikes come within the ordinary meaning of "activities" and "programmes" of organisations "for furthering and protecting the interests of workers". This is in light of the object and purpose of Convention No. 87 to be a statement of principles (Subsection 1), as well as to protect freedom of association (Subsection 2) and to improve the conditions of labour (Subsection 3).

1. The right to strike is included in light of the Convention's nature as a statement of principles

3.57. The IOE argues that strikes are excluded from Convention No. 87 in light of the treaty's object and purpose to create "specific, minimum rights" and not regulate "the various manifestations of the right to organise or its practical implementation".[148] As the ITUC anticipated, the IOE relies heavily on the preparatory work of Convention No. 87, specifically the statement of the Chairman (of the Committee of Freedom of Association and Industrial Relations[149]) "that the Convention was not intended to be a 'code of regulations' for the right to organise, but rather a concise statement of certain fundamental principles" (emphasis added by the IOE).[150]

3.58. First, it is undisputed that the starting point for determining the object and purpose of Convention No. 87 is not the preparatory work, but the text.[151] However, the IOE alone argued that "in determining the object and purpose for Article 31(1), *'recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties'*",[152] quoting the International Law Commission's 2011 Guide to Practice on Reservation of Treaties in support.

3.59. The IOE has misconstrued the law as well as the Commission's Guide. The Commission's commentary to the Guide explains, in the context of assessing whether a

[148] Written Statement of the IOE, para. 164.

[149] To be distinguished from the current CFA, despite the similar names.

[150] Written Statement of the IOE, para. 164, quoting ILC, Record of Proceedings, 1948, Appendix X, p. 477 [Document No. 164] (emphasis in the IOE's original).

[151] Written Statement of the ITUC, para. 4.54.

[152] Written Statement of the IOE, para. 159(iii), quoting International Law Commission, "Guide to Practice on Reservations of Treaties", 2011, Guideline 3.1.5.1. (emphasis added by the IOE).

reservation may be made, that it simply "transpose[s] the principles in articles 31 and 32 of the Vienna Conventions applicable to the interpretation of treaties […] and […] adapt[s] them to the determination of the object and purpose of the treaty".[153] The Commission did not, and certainly was not intending to, blur the clear distinction between Articles 31 and 32 of the VCLT.[154]

3.60. Second, the premise of the IOE's argument is wrong. As noted in Chapter 2, the question is whether the right to strike *in general* is protected by Convention No. 87, not whether its precise scope and modalities are provided for by Convention No. 87.

3.61. Third, in any event, it is not apparent why an intention to adopt "a concise statement of certain fundamental principles" of Convention No. 87 would exclude a right to strike. In the view of the ITUC, it is precisely because of that intention that there was no need to specifically enumerate each and every activity, such as strikes.

2. The right to strike is included in light of the Convention's object to protect freedom of association

3.62. All participants agree that the object and purpose of Convention No. 87 was the freedom of association and the right to organise.[155] Some argue that the right to strike was not the object of Convention No. 87.[156] This argument is wrong.

3.63. For one, the right to strike *need not be* an explicitly stated object and purpose of Convention No. 87 in order to be protected. What Article 31(1) of the VCLT requires, rather, is for the Court to give an ordinary meaning to the terms "activities" and "programmes" of organisations "for furthering and defending the interests of workers" *in light of* the Convention's object and purpose.

3.64. In the contextual analysis in Section C.1 above, the ITUC has demonstrated how the *context* of freedom of association confirms that strikes come within the ordinary meaning of Articles 3(1) and 10. Here, in considering freedom of association as the Convention's *object*, it

[153] International Law Commission, "Guide to Practice on Reservations of Treaties", *Yearbook of the International Law Commission, 2011, vol. II,* Guideline 3.1.5.1, para. 4 [footnote omitted].

[154] *Ibid.*, Guideline 3.1.5.1, para. 7.

[155] See, in particular, Written Statement of the United Kingdom, para. 28.

[156] See Written Statement of Costa Rica (unpaginated and unnumbered).

is important to understand *why* the right to strike is inherent in the freedom of association and the right to organise.[157]

3.65. For one, without a right to strike – a right which is necessary to overcome the asymmetry in power between workers and employers at the bargaining table – one party, the employer, would have little incentive to negotiate in good faith.[158] This is why it has been frequently observed that collective bargaining in the absence of a right to strike would be nothing more than collective begging.[159] As eloquently put by the Canadian courts, "the removal of the freedom to strike renders the freedom to organize a hollow thing":

> "freedom of association contains a sanction that can convince an employer to recognize the workers' representatives and bargain effectively with them. That sanction is the freedom to strike. […] If that sanction is removed the freedom is valueless because there is no effective means to force an employer to recognize the workers' representatives and bargain with them. When that happens the *raison d'être* for workers to organize themselves into a union is gone."[160]

3. The right to strike is included in light of the Convention's purpose of improving labour conditions

3.66. Moreover, as explained in the ITUC's Written Statement, freedom of association and the right to organise are, in turn, a means to improve conditions of labour and achieve "universal

[157] See Written Statement of the ITUC, paras. 4.51-4.58, 4.194-4.202.

[158] See, Supreme Court of Canada, *Saskatchewan Federation of Labour v. Saskatchewan*, Case No. 2015 CSC 4 (2015) para. 75 ("[a] meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. […] the suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining.") [Document No. 342].

[159] See, German Federal Labour Court (Bundesarbeitsgericht), Case 1 AZR 822/79, Judgment 10 June 1980, "Against the background of this conflict of interests collective bargaining without the right to strike in general would be nothing more than collective begging (Blanpain)" (Original German: "Bei diesem Interessengegensatz wären Tarifverhandlungen ohne das Recht zum Streik im allgemeinen nicht mehr als kollektives Betteln (Blanpain)") [Annex No. 11]; See also E. TUCKER, "Can Worker Voice Strike Back?", in A. BOGG and T. NOVITZ, *Voices at Work: Continuity and Change in the Common Law World*, Oxford, OUP, 2014, p. 456 (tracing the history of the 'collective begging' concept).

[160] Supreme Court of Canada, *Saskatchewan Federation of Labour v. Saskatchewan*, Case No. 2015 CSC 4 (2015), para. 52, approving *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231 (Ont. H.C.J.) at 249 [Document No. 342].

and lasting peace", which "can be established only if it is based upon social justice."[161] This is explicitly recognised in the preambles of both Convention No. 87 and the ILO Constitution.

3.67. Adopting the interpretation put forward by the IOE would be contrary to this clear purpose of Convention No. 87. Artificially narrowing the meaning of "activities" in Article 3(1) to the internal governance of organisations and excluding the right to strike would ignore the reality (of which the drafters were no doubt aware)[162] of the conditions of labour. The drafters recognised that freedom of association is a means of improving the conditions of labour by enabling workers to organise and form a collectivity. This is a clear indication that they envisaged that workers could resort to collective action in negotiating for improvements of the labour conditions. Indeed, the withdrawal of their labour is the only means workers have, as a last resort, to defend their interests. The IOE's submission that Convention No. 87 excludes "activities" of collective bargaining and strike action is untenable in light of the treaty's purpose.

3.68. The Declaration of Philadelphia – adopted 80 years ago and referred expressly in the Convention's preamble – has reaffirmed the ILO's "fundamental principles", not only that "freedom of expression and of association are essential to sustained progress", but also that "labour is not a commodity" and "poverty anywhere constitutes a danger to prosperity everywhere".[163] As strike action provides one of the most indispensable and immediate means to guarantee the realisation of these principles, the right to strike must be protected by Convention No. 87. As the CFA recognised:

> "The occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers."[164]

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[161] Written Statement of the ITUC, paras. 3.3-3.5, 4.55-4.58; see also Written Statement of Costa Rica p. 5 (unpaginated and unnumbered) ("the object and purpose of the adoption of Convention 87 was to codify freedom of association in the broader context of promoting better conditions of work and peace").

[162] See Written Statement of the ITUC, paras. 4.194 – 4.221.

[163] Constitution of the ILO, Preamble and Annex, Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia) [Document No. 118].

[164] ILO, Compilation of decisions of the Committee on Freedom of Association, sixth edition, 2018, pp. 143–182, para. 64 [Document No. 282].

3.69. For the foregoing reasons, the object and purpose of Convention also confirm the Majority Interpretation that the right to strike comes within the ordinary meaning of Articles 3(1) and 10.

E. The principle of good faith requires that Convention No. 87 protect the right to strike

3.70. Finally, in assessing the competing interpretations before it, the Court must be guided by the principle of good faith, which confirms the Majority Interpretation and precludes the Minority Interpretation.

3.71. As the Court held, "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."[165] Just as "the very rule of *pacta sunt servanda* in the law of treaties is based on good faith",[166] it is also expressly provided in Article 31(1) of the VCLT, which requires that a treaty shall be, first and foremost, interpreted in good faith. One important corollary, as the ITUC submitted in its Written Statement, is the principle of effectiveness, which was already discussed in Section B.2 above in relation to giving *effet utile* to Article 10 of Convention No. 87 and the previous section in relation to achieving the Convention's object and purpose.

3.72. But good faith entails another important corollary, namely "the concepts of acquiescence and estoppel".[167] As the Court recognised in the *Gulf of Maine* case, "both follow from the fundamental principles of good faith and equity"; thus, even though the two concepts are "based on different legal reasoning since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion", the Court took "the two concepts into consideration as different aspects of one and the same institution."[168]

3.73. In other words, where the parties to a treaty have previously agreed on an interpretation, there may be circumstances where, according to the principle of good faith, a party has acquiesced to that interpretation, or is estopped from later contesting it. In the instant case, since

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[165] *Nuclear Tests (Australia* **v.** *France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 268, para. 46.
[166] *Ibid.*
[167] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 305, para. 130.
[168] *Ibid*.

1952 at the very latest, a consensus has formed not only among (then existing) States Parties but also the social partners – Workers and Employers – namely that Convention No. 87 protects the right to strike as an inherent corollary to freedom of association. As detailed in the Written Statements of the ITUC[169] and the ILO[170] – and as the IOE itself admits[171] – the Employers had always accepted this interpretation – that is, until after the end of the Cold War, and even then, their objections were not about the existence of the right *per se*, but only its specific contours.

3.74. The States Parties have relied on this interpretation, *inter alia*, in amending national laws and in ratifying Convention No. 87 (for Parties joining after 1952). The States Parties to Convention No. 87 and Workers thus have a legal interest in "the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled."[172]

3.75. For these reasons, the Employers and the few States Parties now challenging the Majority Interpretation have either acquiesced to (that is, tacitly recognised) that interpretation, or should be estopped (that is, precluded) from challenging it. Indeed, this same principle also underpins and applies to subsequent practice under Article 31(3)(b) of the VCLT,[173] as seen in the next chapter.

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[169] Written Statement of the ITUC, para. 4.1.

[170] Written Statement of the ILO, para. 221, quoting ILC, 76th Session, 1989, Record of Proceedings, p. 26/43 (Annex No. 23 of the ILO Written Statement) ("The Employers' members emphasised that this case raised two issues: the restrictions on the right to strike of public servants and the freedom of association of fire-fighters. During the general discussion, they had made clear that they could not accept certain conclusions of the Committee of Experts they considered excessive, in particular as regards the restrictions of the right to strike where it threatened life and health of the population. *Far from challenging the right to strike […], they merely wanted the exercise of that right submitted to reasonable restrictions.* Since under the general rules of international public law, the concepts and practice of each member State should be taken into account to interpret correctly the obligations of the States which have ratified a Convention. This general rule of law was explicitly enshrined in the Vienna Convention on Treaties. However, if no State recognised this limitation of the right to strike, no interpretation could be correct. Therefore, they expressed the hope that the Committee of Experts would reconsider its position on that issue, and they stated that they were ready to continue the discussions. *Their intention was not to support restrictions of the right to organise or the freedom of association* enjoyed by employees in essential services, but rather to propose reasonable limitations of the right to strike.") (emphasis added).

[171] Written Statement of the IOE, paras. 95-97.

[172] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 664, para. 66.

[173] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, conclusion 10, commentary, para. 24 (any disagreement arising "between the parties regarding the interpretation of a treaty after they had reached a subsequent agreement regarding such interpretation […] normally will not replace the prior subsequent agreement").

Chapter 4.
Subsequent practice establishes the Parties' agreed interpretation that the right to strike is protected under Convention No. 87 as an inherent corollary to freedom of association

4.1. In its Written Statement, the ITUC demonstrated that subsequent practice by States Parties confirms the inherent link between the right to strike and freedom of association as protected under Convention No. 87, in accordance with Article 31(3)(b) VCLT.[174] This is overwhelmingly supported by other participants' written statements: 19 States and one international organisation comprising 79 ILO Member States – including 69 States Parties to Convention No. 87 – have clearly reiterated the Majority Interpretation that Convention No. 87 protects the right to strike,[175] or at least agreed that the right to strike is inherently linked to freedom of association.[176]

4.2. This is a reaffirmation of the consistent practice in the application of the Convention in and of itself. What is more, many expressly recognise the consistent subsequent practice by States Parties in the application of Convention No. 87 confirming the Majority Interpretation.[177] Other States Parties to Convention No. 87 forfeited the unique opportunity of the present proceedings to suggest otherwise.

4.3. Out of these participants, only four – Bangladesh, Japan, the United Kingdom and Switzerland – expressly argue against the agreed interpretation. The isolated position of these four States in these proceedings cannot lead to the modification of a constant and uniform interpretation of the Convention to the detriment of legal certainty for the other 154 States Parties to Convention No. 87.

4.4. Article 31(3)(b) of the VCLT requires to take into account, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;". Subsequent practice under article 31(3)(b) of the VCLT is defined as "conduct

[174] Written Statement of the ITUC, paras. 4.68-4.153.

[175] Australia, Belize, Brazil, Canada, Colombia, France, Germany, Indonesia, Italy, Mexico, Netherlands, Norway, Organisation of African, Caribbean and Pacific States (OACPs), Poland, Somalia, South Africa, Spain, Tunisia, USA, Vanuatu. Brazil and the United States of America are not States Parties to Convention No. 87, but are ILO Member States.

[176] Costa Rica (unpaginated).

[177] See, *e.g.*, Written Statement of France, paras. 87 et seq.; Written Statement of Vanuatu, paras. 32 et seq.

in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty."[178] Thus, subsequent practice refers to any act or omission in the application of the treaty, that "contribute to establishing agreement".[179] Such conduct includes official acts by which a State applies the treaty but also official statements, including "judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation".[180] As demonstrated in the ITUC's Written Statement and further developed in the present chapter, numerous elements of subsequent practice clearly show the agreement of States Parties to Convention No. 87 regarding its interpretation.

4.5. Accordingly, contrary to the arguments put forward by the IOE and the four States mentioned above, the ITUC submits, first, that the individual positions of States Parties to Convention No. 87 show a uniform and consistent understanding of its scope (Section A); and second, that the conclusions of the ILO supervisory bodies constitute relevant practice, both by giving rise to and reflecting States Parties practice, as well as in and of themselves (Section B).

A. Individual States Parties' positions show a uniform and consistent understanding of the scope of Convention No. 87

4.6. The IOE alleges that divergent views expressed by individual States or groups of States Parties to Convention No. 87 suggest that there is no tacit agreement on its interpretation. However, this conclusion cannot be inferred from the practice referred to by the employers (Subsection 1), while participation to these proceedings confirms the uniformity of the subsequent practice of States Parties (Subsection 2).

1. The alleged lack of tacit agreement cannot be inferred from the practice referred to by the employers

4.7. The IOE provides a list of public statements from States allegedly negating the protection of the right to strike under Convention No. 87.[181] However, the quoted statements

[178] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, conclusion 4(2).

[179] *Ibid.*, conclusion 4(2), comment, para. 17.

[180] *Ibid.*, conclusion 4(2), comment, para. 18.

[181] Written Statement of the IOE, para. 216 and Annex F.

only question the scope and modalities of the exercise of the right without denying its protection under Convention No. 87,[182] some even confirming the inherent link between the right to strike and freedom of association.[183]

4.8. Remaining examples given by the IOE are either outdated or do not reflect a consistent position. As acknowledged by the employers themselves, "some governments may have changed their minds on whether or not the right to strike is included in C87 over time".[184] In its Written Statement, the IOE even relies on a declaration of Lebanon, a non-State Party to Convention No. 87.[185]

4.9. In addition to the misleading scope that the IOE gives to those statements, numerous other declarations directly and expressly linking the right to strike to freedom of association under the Convention are not addressed.[186] Those include decisions of national jurisdictions, ruling on violations of the right to strike.[187] Contrary to Switzerland's argument,[188] the fact that only a limited number of such judgments are referred to is irrelevant. Indeed, this is merely a reflection of the fact that courts in a limited number of States Parties only have been called upon to rule on this issue. What matters is that those who did, clearly confirmed the interpretation of the convention as protecting the right to strike.

2. Participation in these proceedings confirms the uniformity of subsequent practice

4.10. Thus, to this date, the subsequent practice of States has progressively become uniform. As mentioned above, only 4 States out of the 158 States Parties to the Convention have expressed the view that the right to strike is not protected under Convention No. 87 in the context of the present proceedings.

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[182] See, *e.g.*, Written Statement of the IOE, Annex F, quoting ILO, Minutes of the 253rd Session, GB. 253/PV(Rev.), 28 May 1992, p. I/12-I/13; Written Statement of the IOE, para. 216 (5), quoting: ILO, Minutes of the 349th bis (special) session, GB.349bis/PV, 10 November 2023, p. 13, para. 43.

[183] Written Statement of the IOE, Annex F, quoting ILO, Minutes of the 253rd Session, GB. 253/PV(Rev.), 28 May 1992, p. I/16.

[184] Written Statement of the IOE, para. 217. For Belarus, see Written Statement of the ITUC, paras. 4.114–4.117; for German Democratic Republic and Uruguay, see Written Statement of the ITUC, para. 4.125; Algeria was a regular member of the 2015 GB Government group which clearly confirmed the inherent link between the right to strike and freedom of association in 2015.

[185] Written Statement of the IOE, para. 191.

[186] Written Statement of the ITUC, paras. 4.90 et seq.

[187] Written Statement of the ITUC, paras. 4.131–4.150.

[188] Written Statement of Switzerland, para. 67.

4.11. Out of these four States, the United Kingdom and Bangladesh do not have a consistent approach, since they were of a different opinion before. Indeed, the UK has recognised the implicit protection of the right to strike by Convention No. 87 as early as 1978.[189] For its part, Bangladesh has not denied the existence of the right to strike when facing the criticism of the CFA regarding that State's reaction to a strike.[190] As the International Law Commission explained, any disagreement arising "between the parties regarding the interpretation of a treaty after they had reached a subsequent agreement regarding such interpretation […] normally will not replace the prior subsequent agreement".[191]

4.12. As for Japan and Switzerland, both earlier declared that Convention No. 87 does not protect the right to strike in 2002 and 1973 respectively.[192] However, these two States ratified the Convention respectively in 1965 and 1975 – 17 and 27 years after its adoption.[193] Upon their ratification of Convention No. 87, the interpretation of that instrument as protecting the right to strike had already clearly been established.[194] Therefore, the scope of the declarations formulated by these two States must be put into perspective and cannot be of such a nature as to modify the content of an existing convention as interpreted by all the other States Parties.

4.13. The UK argues that practice under Article 31(3)(b) must be consistent and reflect the agreement of all parties to the interpreted treaty.[195] However – and in any event – according to the International Law Commission, there is no requirement under Article 31(3)(b) of the VCLT for the practice to be completely unanimous.[196] Although exceptionally deviating opinions can impact on the breadth of subsequent practice, such practice cannot alter the interpretation as

[189] ILC, 64th Session, 1978, Report of the Committee on the Application of Standards, pp. 29/28-29/29 (Ethiopia) [Document No. 241]; Written Statement of the ITUC, para. 4.121.

[190] CFA, Case No 3263 (Bangladesh), Complaint date: 26-FEB-17, Interim Report - Report No 388, March 2019. [Annex No. 12]

[191] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, conclusion 10, commentary, para. 24 (emphasis added).

[192] Written Statement of Japan, para. 73; Written Statement of Switzerland, para. 6.

[193] *Ratifications de C087 - Convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948*, Normlex (last accessed on 18 June 2024).

[194] ILC, 43rd Session, 1959, Report III (Part IV), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 101–129 [Document No. 232].

[195] Written Statement of the United Kingdom, para. 43.

[196] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, conclusion 9, commentary, para. 12.

agreed upon by all other States Parties. In other words, "the view of one state does not make international law".[197]

B. Pronouncements of supervisory organs constitute relevant practice confirming the interpretation of Convention No. 87

4.14. The conclusions of the ILO supervisory organs, which have consistently confirmed the protection of the right to strike under Convention No. 87, are relevant elements of practice in its application to be considered in the interpretation of the Convention. First, due to its unique composition, the CFA's decisions constitute State practice expressed collectively (Subsection 1). Second, decisions adopted by the CEACR, an independent expert body, reflects and gives rise to practice by States Parties (Subsection 2). Third, the pronouncements of both organs are relevant for the interpretation of the Convention in and of themselves (Subsection 3).

1. The CFA's decisions are an expression of subsequent collective practice by States Parties confirming that the right to strike is protected under Convention No. 87

4.15. Two participants question that the CFA's determinations can give rise to or reflect subsequent practice. The IOE repeats that the CFA is not even competent to interpret Convention No. 87,[198] while the United Kingdom argues that the CFA's decisions do not constitute subsequent practice for the purposes of Article 31(3)(b) of the VCLT.[199] Neither line of argument has merits.

4.16. The first line of argument relates to the extent of the CFA's mandate. The IOE asserts that States Parties' implementation of the CFA's pronouncements does not amount to subsequent practice because that organ is not competent to supervise Convention No. 87; it

[197] *Ibid.*, conclusion 4, commentary, para. 33, citing: S*empra Energy International v. Argentine Republic*, Award, 28 September 2007, ICSID Case No. ARB/02/16, para. 385; see also *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republi*c, Award, 22 May 2007, ICSID Case No. ARB/01/3, para. 337; WTO Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, WT/DS353/R, adopted 23 March 2012, fn. 2420 in para. 7.953; *Philip Morris Brands S rl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 28 June 2016, para. 476.

[198] Written Statement of the IOE, paras. 84-93.

[199] See, *e.g.*, Written Statement of the United Kingdom, para. 52.

would have a mandate to assess conformity with the principle of freedom of association as protected in the ILO Constitution only.[200] This argument must be dismissed for two reasons.

4.17. First, without prejudice to the fact that the supervisory bodies' mandate per se is beyond the scope of the question before the Court, there is no point of contention regarding the fact that the CFA does not control the application of Convention No. 87 by States Parties exclusively. Rather, its mandate – which has never been contested by Member States[201] – consists more broadly in "determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining as laid down in the relevant Conventions",[202] including Convention No. 87. Indeed, as the International Labour Office stated in its Written Statement:

> "The Committee on Freedom of Association may also be directly involved in the supervision of the application of Convention No. 87, since it may examine representations submitted under article 24 of the Constitution alleging non-observance of Conventions dealing with trade union rights."[203]

4.18. Accordingly, the CFA comments on compliance both with the ILO constitutional guarantee of freedom of association and with ILO Conventions relevant to freedom of association (such as Convention No. 87[204]). As a matter of fact, the compilation of decisions includes numerous applications of Convention No. 87 relating to various topics, including the right to strike and States concerned by the CFA's decisions very often justify their national legislation on the right to strike with reference to Convention No. 87.[205]

4.19. Second, and in any event, to consider that the CFA would only be competent to supervise freedom of association in general, but not to the extent that it is protected by a convention the title of which refers to that very principle, would lead to an absurd result. The existence of the right to strike,[206] and its inherent link to freedom of association are not contentious here, since the IOE concedes that the right to strike is a facet of freedom of

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[200] Written Statement of the IOE, para. 91.

[201] Written Statement of Colombia, para. 2.19.

[202] Compendium of rules applicable to the Governing Body of the International Labour Office, Annex II, Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, para. 14 [Document No. 90]; Written Statement of the ILO, para. 206.

[203] Written Statement of the ILO, para. 208.

[204] Also the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); see *infra* para. 5.8.

[205] Written Statement of the ITUC, paras. 4.92, 4.102.

[206] Written Statement of the IOE, paras. 115–116.

association.[207] The inherent link between the right to strike and freedom of association is likewise recognised by Switzerland[208] and Costa Rica[209] in their written statements. It is therefore peculiar to allege that Convention No. 87 is somehow carved out of this general acceptance of the intrinsic connection between freedom of association and the right to strike.

4.20. As to the second line of argument, the United Kingdom claims that the "pronouncements of non-parties or of private individuals that are not attributable to the States Parties cannot be taken into account" and the CFA's determinations cannot give rise to or reflect subsequent practice because its members served only in their "personal capacity".[210] Moreover, it alleges that, since the "decisions of the CFA are adopted by only nine members, with only a small proportion of these members representing States, they cannot establish the 'agreement of the parties' for the purposes of Article 31(3)(b) VCLT".[211]

4.21. Contrary to what the United Kingdom alleges, CFA members are not "experts serving in their personal capacity". Rather, the CFA is a tripartite body whose rotating members represent a wide variety of regions and States.[212] Nor are they mere "private individuals" as the United Kingdom suggests. As the ITUC submitted, the first CFA members who determined – in respect of a complaint against the United Kingdom – that Convention No. 87 protected the right to strike in 1952 included the very delegates attending the Paris Peace Conference in 1919 and International Labour Conference in 1947-48.[213]

4.22. It should in any event be noted that the CFA reaches its conclusions by tripartite consensus.[214] These conclusions are then approved by the Governing Body, on a case-by-case basis. This means that its consistent interpretations for the more than 70 years that Convention No. 87 protects the right to strike reflect the practice of States Parties – which all have consented to the adoption of those decisions – expressed collectively.

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[207] Written Statement of the IOE, para. 93.

[208] Written Statement of Switzerland, paras. 136-137.

[209] Written Statement of Costa Rica.

[210] Written Statement of the United Kingdom, paras. 47-48.

[211] *Ibid.*, para. 52.

[212] K. CURTIS and O. WOLFSON (eds.), *70 Years of the ILO Committee on Freedom of Association: A Reliable Compass in Any Weather*, Geneva, ILO, 2022, Annex, The Composition of the Committee on Freedom of Association, pp. 189-195 [Annex No. 13].

[213] Written Statement of the ITUC, para. 4.219.

[214] Compendium of rules applicable to the Governing Body of the International Labour Office, Annex II, Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, para. 11 [Document No. 90].

4.23. The United Kingdom also claims that the CFA's "determinations cannot have been intended to constitute subsequent practice" because "the mandate of CFA is limited to determining whether specific legislation or practice complies with freedom of association".[215] But this argument is illogical. As explained above and as the United Kingdom itself admits,[216] the CFA's mandate pertained specifically to determining compliance with Convention No. 87. Such determinations were therefore fully intended to – and did in fact – constitute "practice in the application of the treaty" establishing an interpretation accepted by the States. Moreover, the CFA has repeatedly affirmed in general terms that "the right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87".[217] The tacit acceptance by States Parties of such statements therefore constitutes their practice in the application of Convention No. 87.

4.24. In that respect, the United Kingdom further argues that the practice of the CFA does not establish the agreement of the parties to Convention No. 87, on the basis of the Court's reasoning in the *Whaling in the Antarctic* case.[218] However, contrary to the International Whaling Commission's resolutions, it was showed in the previous paragraphs that the CFA's decisions are adopted by consensus and have not raised opposition concerning the protection of the right to strike.

4.25. Thus, those decisions clearly reflect *collective* State practice.[219] As mentioned in Section 2.C.2 above, it would be contradictory not to give the necessary weight to the tripartite nature of the CFA, while insisting on the importance of tripartism elsewhere.[220]

4.26. In addition, the decisions of the CFA also reflect the practice of *individual* States Parties in the application of Convention No. 87. This is evidenced by the numerous statements of States Parties that expressly link the right to strike to the Convention, in the context of the procedure

[215] Written Statement of the United Kingdom, para. 51.

[216] Written Statement of the United Kingdom, para. 11 "Similarly, the purpose of the tripartite Committee on Freedom of Association (CFA) is to examine specific complaints that Convention No. 87 has been violated."

[217] ILO, *Compilation of decisions of the Committee on Freedom of Association*, sixth edition, 2018, pp. 143–182, para. 754 [Document No. 282]; Written Statement of the ITUC, para. 4.79.

[218] Written Statement of the United Kingdom, paras. 44-46; *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

[219] Written Statement of the ITUC, paras. 4.76–4.81.

[220] Written Statement of the IOE, paras. 126-128; Written Statement of Switzerland, paras. 44-48.

before the CFA.[221] Those statements are entirely ignored by those who argue that there is no subsequent practice in the application of Convention No. 87.

2. The CEACR's interpretations give rise to subsequent practice by States Parties confirming that Convention No. 87 protects the right to strike

4.27. As both the IOE and the United Kingdom admit, the determination of supervisory organs can constitute subsequent practice under Article 31(3)(b) of the VCLT.[222] The International Law Commission established that pronouncements of expert treaty bodies "may give rise to, or refer to, […] subsequent practice by parties […] without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates."[223] Notably, as the International Labour Office points out, the Commission specifically envisioned that "the substance of the present draft conclusion may apply, *mutatis mutandis*, to pronouncements of independent expert bodies that are organs of international organizations", of which the CEACR is, according to the Commission, "an important example".[224]

4.28. In its Written Statement, the IOE provides a list of States Parties to Convention No. 87 that were repeatedly criticised by the CEACR for the inadequacy of their domestic legislation in respect of the right to strike. The IOE deduces from these repeated critics a lack of implementation by States of the CEACR's recommendations. Subsequently, the IOE argues that the lack of implementation by States of the CEACR's recommendations indicates that there is no consistent practice in the application of Convention No. 87.[225]

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[221] Written Statement of the ITUC, paras. 4.92, 4.102.

[222] Written Statement of the IOE, para. 220; Written Statement of the United Kingdom, para. 49 ("pronouncements by expert bodies may 'give rise to', or 'refer to' subsequent practice under Article 31(3)(b)"), para. 51 n. 73, referring to ILC, Draft conclusions on subsequent agreements and subsequent practice, commentary to Conclusion 4, para. 35 ("Such "conduct by one or more parties in the application of the treaty" may, in particular, consist of a direct application of the treaty in question, conduct that is attributable to a State party as an application of the treaty, a statement or a judicial pronouncement regarding its interpretation or application.") and Conclusion 11(2) on "Decisions adopted within the framework of a Conference of States Parties" ("Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32.").

[223] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, conclusion 13.

[224] See Written Statement of the ILO, referring to Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, Conclusion 13, commentary, para. 4 and footnote 602.

[225] Written Statement of the IOE, paras. 225–245.

4.29. This argument fails to properly consider the numerous instances where States have indeed followed the observations or requests of the CEACR and adapted their legislation on the right to strike accordingly, without contesting its protection under Convention No. 87. Notably, the CEACR often expresses its "satisfaction" regarding the progress made in the cases it comments on. Satisfaction is expressed by the CEACR

> "in cases in which, following comments it has made on a specific issue, governments have taken measures through either the adoption of new legislation, an amendment to the existing legislation or a significant change in the national policy or practice, thus achieving fuller compliance with their obligations under the respective Conventions."[226]

Accordingly, the Committee has expressed satisfaction regarding improvements made by States Parties to Convention No. 87 in their regulation of the right to strike on various occasions.[227] For instance, the Committee recently welcomed the legislative changes in Armenian law lowering the number of votes required for participation in strikes and the procedure for defining minimum services requirement, thus finding that the State had brought its legislation on that matter in conformity with Convention No. 87.[228]

4.30. The acceptance of the CEACR's views by States Parties to Convention No. 87 constitutes relevant practice.[229]

4.31. In any event, any alleged lack of compliance with observations and direct requests of the CEACR is irrelevant in the assessment of the subsequent practice of States Parties in light of Article 31(3)(b) of the VCLT. Indeed, there is no logical link between the lack of

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[226] Application of International Labour Standards 2024, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 112th Session, 2024, para. 116 [Annex No. 14].

[227] See also, *e.g.*, Albania (Application of International Labour Standards 2020, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 109th Session, 2020, p. 43) [Annex No. 15]; Panama (Application of International Labour Standards 2012, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 101st Session, 2012), p. 217 [Annex No. 16] ; Togo (Application of International Labour Standards 2023, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 111th Session, 2023), pp. 284-285 [Annex No. 17].

[228] Application of International Labour Standards 2024, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 112th Session, 2024, p. 119 [Annex No. 14].

[229] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, conclusion 4, commentary, para. 17.

implementation of the CEACR's decisions and the conclusions that the IOE reaches on that basis, for the following three reasons.

4.32. First and foremost, none of the examples provided by the IOE (except for that of Switzerland)[230] suggests that States did justify their lack of compliance with the CEACR's views on the basis that Convention No. 87 would not protect the right to strike. To the contrary, their reactions show that rather than contesting the mere existence of the right under Convention No. 87, they question its modalities, such as the definition of essential services,[231] the majority required to call a strike,[232] the requirement of a minimum service during a strike in some sectors,[233] compulsory arbitration,[234] and so on. This eventually reinforces the ITUC's argument as it further evidences that States Parties to Convention No. 87 interpret the right to strike as protected under the Convention, although they provide for different contours and modalities of exercise of that right depending on their national legal context.

4.33. Second, many States referred to by the IOE have in fact *expressly* confirmed that they understand the right to strike to be an inherent component of freedom of association, as protected under Convention No. 87.[235]

4.34. Third, non-compliance with the decisions of a supervisory organ cannot, in any event, be interpreted as a dispute concerning the existence of the right protected by the instrument that that organ monitors. To take an analogous example, non-compliance with the decisions of supervisory organs of human right treaties, such as the European Court of Human Rights (the "ECtHR") is commonplace.[236] However, it is never suggested that such lack of compliance would reflect any dispute on the existence of the substantive right breached by the State which failed to comply. This is *a fortiori* the case for the lack of compliance with a supervisory organ such as the CEACR whose decisions are – according to the IOE itself – not legally binding, unlike the judgments of the ECtHR.

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[230] Written Statement of the IOE, para. 243(16).

[231] Written Statement of the IOE, paras. 238(1) (Algeria), 238(3) (Benin), 238(5) (Burundi), 240(1) (Antigua and Barbuda).

[232] *Ibid.*, paras. 238(5) (Burundi), 238(17) (Sao Tome and Principe), 243(3) (Bulgaria).

[233] *Ibid.*, paras. 238(6) (Cabo Verde), 243(7) (Hungary).

[234] *Ibid.*, paras. 238(1) (Algeria), 243(11) (Norway).

[235] Written Statement of the ITUC, paras. 4.90–4.150.

[236] See, *e.g.*, Belgique, Principales questions devant le comité des ministres – surveillance en cours, *Department for the execution of judgments of the European Court of Human Rights*, available at: https://rm.coe.int/mi-belgium-fra/1680a23c43 (last accessed on 9 September 2024).

4.35. Therefore, the alleged non-compliance of States with the CEACR's views, which constitutes the central – if not the only – argument of the IOE to discredit the consistent subsequent practice of States in the interpretation of Convention No. 87 for decades, is irrelevant and must be dismissed. If the examples of "non-compliance" provided prove anything, it is that the right to strike is at the core of freedom of association in the ILO system since, as stressed by the IOE itself, more than 80% of the CEACR's pronouncements on Convention No. 87 have focused on that right.[237]

3. The ILO supervisory bodies' pronouncements constitute relevant practice as such

4.36. Irrespective of the – collective or individual – States Parties practice they give rise to or reflect, pronouncements of the ILO supervisory bodies specifically designated to monitor the protection of freedom of association by States Parties carry great weight in the interpretation process of Convention No. 87 in and of themselves.[238]

4.37. The importance of the pronouncements of independent bodies in the interpretation of a convention was also established by the Court in the *Ahmadou Sadio Diallo* case[239] and later reaffirmed in the *Qatar v. United Arab Emirates* case, in which the Court was called to decide on the interpretation of the terms "national origin" in the definition of racial discrimination.[240] It is true that in the latter case, the Court did not follow the interpretation of the Committee on the Elimination of Racial Discrimination which it deemed contrary to the ordinary meaning of the terms and the *travaux préparatoires* of the convention. In its Written Statement, Japan argues that, in that case, the Court did not follow the Committee's interpretation because it "gives no reason for its interpretation", thus deviating from the interpretative process required by Articles 31 and 32 of the VCLT.[241]

4.38. In the present case – even if Japan's reading of the *Qatar v. United Arab Emirates* Judgment were valid – the findings of CEACR are fully based upon and consistent with the

[237] Written Statement of the IOE, paras. 83, 226.

[238] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, conclusion 13.

[239] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 664, para. 66.

[240] *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. 71, at p. 96, para. 77 and p.104, para. 101.

[241] Written Statement of Japan, paras. 59-60.

interpretative process prescribed by the VCLT. As seen in Section 2.C.1 above,[242] its conclusions are consistent with the ordinary meaning to be given to Convention No. 87 as well as with the *travaux préparatoires*,[243] and the CEACR has expressly applied Articles 31 and 32 of the VCLT.[244] Therefore, adequate weight should be given to this organ's findings in the interpretation of Convention No. 87.

4.39. Similarly, this applies equally to the interpretation adopted by the CFA. While it is not an expert treaty body as such, it represents all three constituents and is mandated to "determin[e] whether any given legislation or practice complies with the principle[] of freedom of association […] as laid down in [Convention No. 87]".[245] Therefore, it is a nonpartisan and "independent body that was established specifically to supervise the application of that treaty".[246] In any case, as the Court said, "[t]he point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled."[247]

4.40. Since those bodies have regularly reaffirmed that the right to strike is protected under Convention No. 87, as an intrinsic corollary to the freedom of association, the same conclusion must be reached regarding the question submitted to this Court.

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4.41. To conclude on Article 31(3)(b), the subsequent practice of States Parties to Convention No. 87 uniformly indicates that the right to strike is an inherent component of freedom of association as protected under Convention No. 87. This inescapably results from an analysis of

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[242] See *supra* para. 2.25.

[243] See also *infra* paras. 6.6-6.11.

[244] ILC, 102nd Session, 2013, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 27 [Document No. 104]; ILC, 101st Session, 2012, Report III (Part 1B), *Giving globalization a human face*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, para. 118 [Document No. 236]; ILC, 100th Session, 2011, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 12 [Document No. 101].

[245] Compendium of rules applicable to the Governing Body of the International Labour Office, Annex II, Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, para. 14 [Document No. 90].

[246] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 664, para. 66.

[247] *Ibid.*

relevant practice, whether it is expressed individually or collectively by States or contained in the pronouncements of the ILO supervisory bodies as such.

4.42. If any doubt remained regarding the uniformity of the interpretation, the numerous elements of subsequent practice identified in the ITUC's Written Statement should still be considered as supplementary means of interpretation under Article 32 of the VCLT. In any case, the isolated positions of a couple of States should not be of a nature to put into question the consistent and clear interpretation of Convention No. 87 developed over time by the vast majority of its 158 States Parties, potentially causing detrimental effect to the protection of a fundamental right.

Chapter 5.
Applicable rules of international law uniformly confirm that the right to strike is an inherent corollary of freedom of association protected under Convention No. 87

5.1. Article 31(3) of the VCLT requires treaty interpreters to "tak[e] into account, together with the context […] (c) any relevant rules of international law applicable in the relations between the parties". The ITUC's Written Statement, and the many others sharing its position, explained why, read in context, the relevant rules of international law confirm the Majority Interpretation that ILO Convention No. 87 protects the right to strike as an integral part of the freedom of association.[248] The few participants arguing otherwise have failed to take into account all relevant ILO instruments (Section A), human rights treaties (Section B), and customary international law (Section C).

A. Other relevant ILO instruments confirm the interpretation that Convention No. 87 protects the right to strike

5.2. Just as the Court's pronouncement on Convention No. 87 will affect the interpretation of the ILO Constitution and other instruments,[249] an international labour convention should be interpreted in the context of – and taking into account – the entire "international labour code", which is part of the "relevant rules of international law *applicable*" to all ILO Member States under Article 31(3)(c) VCLT, whether or not they have ratified the particular Convention being interpreted.

5.3. For one, as BusinessAfrica correctly recognises,[250] this includes Part XIII of the Treaty of Versailles (the ILO Constitution). This is not only because the preamble to Convention No. 87 expressly refers to it; rather, as the Permanent Court observed in considering Part XIII in its 1932 *Employment of Women during the Night* Advisory Opinion,[251] this "results from the fact that the Convention is a Labour convention, i.e. one prepared within the framework of Part XIII

[248] See generally, Written Statement of Colombia; Written Statement of South Africa; Written Statement of Mexico; Written Statement of Australia.

[249] See *supra* para. 1.3.

[250] Written Statement of BusinessAfrica, para. 31 ("The principle [*sic*] 'relevant rules' of the ILO are […] the ILO's well-established practice of ensuring fidelity to the ILO's Constitution.").

[251] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, *Advisory Opinion of 15 November 1932, P.C.I.J., Series A/B, No. 50*, p. 374.

of the Treaty of Versailles of 1919, and in accordance with the procedure provided for therein".[252]

5.4. However, this extends to all other international labour conventions adopted by the Conference, which are "applicable" within the meaning of Article 31(3)(c), whether or not the Parties to Convention No. 87 have ratified them. This is another reason why Francis Maupain remarked that Jenks' statement referred to in Section 2.C above[253] "does not give the full picture of the situation":[254]

> "the scope of the practice is much broader than the Office's presentation of the issue in Vienna suggests. In concrete terms it is a fact that each Convention draws inevitably (even though not always explicitly) on concepts or even provisions developed in other Conventions. It is therefore difficult to interpret any Convention in isolation without referring more generally to the whole body of international labour standards which to that extent does constitute a fairly integrated single 'legislative corpus'."[255]

5.5. This position is further confirmed in the 1932 *Employment of Women during the Night* Advisory Opinion, where the Permanent Court also looked at "[t]he similarity both in structure and in expression between the various draft conventions adopted by the Labour Conference at Washington in 1919" (in that case specifically the Eight Hour Day Convention).[256]

5.6. As Japan acknowledges, Convention No. 87 must be interpreted in light of other ILO instruments, including the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) ("Convention No. 98").[257] However, contrary to Japan's conclusion, when interpreted in light of Convention No. 98 and other ILO instruments, Convention No. 87 clearly protects the right to strike.

5.7. First, as noted in the ITUC's Written Statement, the most important of these is Part XIII of the 1919 Treaty of Versailles, which expressly included the "principle of freedom of association". As seen in Section 3.C.1 above, all parties – Governments, Employers and

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[252] *Ibid.*

[253] See *supra* para.2.20.

[254] F. MAUPAIN, "The ILO's Standard-Setting Action: International Legislation or Treaty Law?", in V. GOWLLAND-DEBBAS (ed.), *Multilateral Treaty-making*, Dordrecht, Springer, 2000, p. 131.

[255] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, *Advisory Opinion of 15 November 1932, P.C.I.J., Series A/B, No. 50*, pp. 131-132 (citation omitted).

[256] *Ibid.*, pp. 380-381.

[257] Written Statement of Japan, para. 22.

Workers – now agree that the right to strike is an inherent corollary to this "principle of freedom of association".[258] Interpreting Convention No. 87 taking into account the ILO Constitution therefore confirms the Majority Interpretation.

5.8. Second, in 1949, one year after Convention No. 87 was adopted, the ILO adopted Convention No. 98 on the Right to Organise and Collective Bargaining.[259] As core ILO conventions,[260] Conventions Nos. 87 and 98 shared a common object and purpose: ensuring the protection of the freedom of association, the right to organise, as well as the right to collective bargaining as enabling rights to redress the imbalance of power in the workplace, by providing the right to collective action – including strikes – as a counter-balancing right that workers could invoke to protect their related rights and interests. These "twin conventions" complement one another, refuting the arguments now made by some participants that Convention No. 87 can only extend to rights that *both* workers and employers may exercise.

5.9. Third, as the IOE acknowledges,[261] in 1951 the ILO adopted the Voluntary Conciliation and Arbitration Recommendation (No. 92), which explicitly mentioned at paragraph 7 that "[n]o provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike."[262] The IOE claims that "the purpose of this provision is not concerned with the question of whether such a right is protected by C87, which is not mentioned at all", but "simply to make clear that it is not intended to represent agreement about the extent of *any* right to strike".[263] This makes little sense. The mention of "the right to strike" in an ILO recommendation in 1951 strongly implies a recognition of the existence of such a right under Convention No. 87 of 1948, which was the ILO Convention most directly relevant to the said right at the time. Indeed, the IOE's claim that paragraph 7 "does no more than to *preserve the status quo*"[264] inadvertently supports the interpretation that the right to strike was widely recognised and protected under the recently adopted Convention No. 87.

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[258] See *supra* para. 3.39.

[259] Right to Organise and Collective Bargaining Convention, 1949 (No. 98) [Document No. 121].

[260] See ILO Declaration on Fundamental Principles and Rights at Work (1998), as amended in 2022 [Document No. 128], para. 2(a).

[261] Written Statement of the IOE, para. 183.

[262] ILO, Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92) [Document No. 126].

[263] Written Statement of the IOE, para. 184 (emphasis added).

[264] Written Statement of the IOE, para. 184 (emphasis added).

5.10. Finally, Article 1 of the Abolition of Forced Labour Convention, 1957 (No. 105), adopted in 1957, further built upon the protected right to strike by imposing upon all ratifying States the obligation "to suppress and not to make use of any form of forced or compulsory labour […] (d) as a punishment for *having participated in strikes*".[265] By so saying, Convention No. 105 not only clarified that participation in strikes is a right protected under international law, but also that that right is inherent to the understanding of the core freedom of association protected by Convention No. 87.[266]

5.11. By the time Convention No. 105 was adopted, the International Labour Conference regarded the right to strike as so fundamental that its exercise through collective action merited particular protection by treaty. When representatives from Japan and India sought to delete the provision protecting strikers from the punishment of forced labour,[267] the Workers' members and many governments successfully opposed the deletion, reasoning that:

> "If the reference [to forced labour as a punishment for participation in strikes] were now deleted this could only be interpreted *as meaning that the right to strike was not recognised* and that the Conference approved of the use of forced labour as a penalty for participating in strikes. *Surely no members of the Committee really held these views.*"[268]

[265] Abolition of Forced Labour Convention, 1957 (No. 105, Art. 1(d)) [Document No. 122] (emphasis added).

[266] Indeed, numerous delegates at the ILC in 1957 expressly linked the freedom of association with the right to strike, with one Employers' Delegate declaring: "But we appreciate in particular the efforts to abolish forced labour and discrimination, to reinforce the principles of freedom of association and of bargaining, to give precedence to objective information and calm reason in dealing with the disputes and the threats of strikes and lockouts, for this is *the main mission of the [International Labour] Organisation'*." Remarks of Mr. Campanella (Employers' delegate from Italy), Fifth Sitting, p. 54; see also Mr. Potrč (Government delegate, Yugoslavia), Fifth Sitting, p. 41 ("we must morally condemn… any oppression of the right to strike…"); Mr. Sanchez Madariaga (Workers' delegate, Mexico), Fifth Sitting, p. 47; Mr. Sabroso (Workers' delegate, Peru), Twentieth Sitting, p. 320; Mr Liang (Workers' delegate, China), Twenty-Second Sitting, p. 346. ILC, 40th Session, 1957, Record of Proceedings [Annex No. 18].

[267] *Ibid*., per Mr. Desai (Employers' adviser, India), Twenty-Second Sitting, p. 345; see also Appendix VII: Forced Labour, p. 709.

[268] *Ibid*., Appendix VII: Forced Labour, pp. 709-10 (emphasis added). Accordingly, the Committee on Free Association (CFA) has since gone on to hold that sanctions imposed on strikers for taking strike action (beyond loss of pay for the duration of the strike) violate the principles of freedom of association. See ILO, *Compilation of decisions of the Committee on Freedom of Association*, sixth edition, 2018, pp. 176-180, paras. 942-964 [Document No. 282].

B. Human rights treaties applicable in the Parties' relations confirm the interpretation that Convention No. 87 protects the right to strike

5.12. The content of freedom of association in Convention No. 87, adopted in 1948, should not be viewed in isolation but against the backdrop of the recognition of the importance of human rights values following the Second World War. It is worth recalling that Convention No. 87 was adopted in the same year as the Universal Declaration of Human Rights. Article 20 of the Universal Declaration sought to ensure that "[e]veryone has the right to freedom of peaceful assembly and association"[269] and under Article 23, "[e]veryone has the right to form and to join trade unions for the protection of his interests."[270]

5.13. The opposing written statements ignore this historical context by claiming – falsely, as seen in Section 3.B above – that Convention No. 87 should have used the words "right to strike" *in haec verba*.

5.14. Convention No. 87 was part of a broader movement to recognise and protect freedom of association. While the Convention did so in the specific context of labour law, other instruments did the same for human rights more broadly speaking, as seen in the Universal Declaration, the European Convention on Human Rights, and the American Convention on Human Rights. In none of these human rights instruments providing for freedom of association was there a specific reference to the right to strike. But the absence of that language certainly did not prevent the supervisory organs of those treaties from holding consistently that freedom of association protects the right to strike.

5.15. In its Written Statement, the United Kingdom claims that the case law of the ECtHR on the rights to strike shows that the right to strike is not a corollary of freedom of association.[271] This statement is plainly wrong. The ECtHR has consistently held that the right to strike is protected as part of freedom of association guaranteed by Article 11 of the European Convention on Human Rights.[272]

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[269] Universal Declaration of Human Rights, 1948, Article 20 [Document 283].

[270] *Ibid.*, Article 23(4).

[271] Written Statement of the United Kingdom, para. 126.

[272] See, *e.g.*, ECtHR, *Enerji YAPI-YOL SEN v. Turkey*, no. 68959/01, 21 April 2009, para. 24; *Ognevenko v. Russia*, no. 44873/09, 20 November 2018, paras. 57 and 61; *UNISON v. United Kingdom*, no.53574/99, 2002, (third substantive para. under "The Court's Assessment"); *Affaire Dilek et Autres v. Turquie*, nos. 74611/01, 26876/02

5.16. It was only at a later stage that human rights instruments expressly mentioned the right to strike as such. Starting in 1966, Article 8(1) of the ICESCR expressly confirmed, in unambiguous language, that "[t]he States Parties to the present Covenant undertake to ensure: […] (d) *[t]he right to strike*, provided that it is exercised in conformity with the laws of the particular country."[273] By so saying, the drafters of the ICESCR both confirmed protection of the right to strike as a core element of the freedom of association, while pointedly declining to codify or delineate any *limitations* upon that right, which they recognised might vary from country to country.

5.17. Similarly, it was not before 1988 that the Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights made explicit that "[t]he States Parties shall ensure: […] [t]he right to strike."[274] The language was further specified in 2000, when the Charter of Fundamental Rights of the European Union expressly referred to the right of "workers and employers, or their respective organisations" to "*take collective action to defend their interests, including strike action*".[275]

5.18. For that reason, the absence of the words "right to strike" in Convention No. 87 or contemporaneous human rights instruments is not an obstacle to the recognition of its existence.

5.19. This is affirmed by numerous other participants. As the ILO's Written Statement correctly notes, the ICESCR provides explicitly for the right to strike and the Committee on Economic Social and Cultural Rights has regularly challenged the legality of legislation that limits the right to strike inconsistently with Article 8 of the Covenant.[276] The ILO also confirms,

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and 27628/02, 17 July 2007, para.57; *National Union of Rail and Transport Workers v. the United Kingdom*, no. 31045, 8 April 2014, paras. 77-78; *Association of Academics v. Iceland*, no. 2451/16, para. 24; *Hrvatski Liječnički Sindikat v. Croatia*, no. 36071, para. 59; *Humpert v. Germany* nos. 59433/18, 59477/18, 59494/18, 14 December 2023, para. 105. See also Written Statement of Germany, paras. 23-27 [Annexes Nos. 19 to 26].

[273] International Covenant on Economic, Social and Cultural Rights, 1966, Article 8(1)(d) [Document No. 284] (emphasis added).

[274] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, 1988, Article 8(1)(b) [Document No. 290].

[275] See Charter of Fundamental Rights of the European Union, 2000, Article 28 [Document No. 288] ("Workers and employers, or their respective organizations, in accordance with Community law and national laws and practices, have […] 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.*") (emphasis added).

[276] Written Statement of the ILO, paras. 376-377; International Covenant on Civil and Political Rights, 1966, Article 22(3) [Document No. 285]; International Covenant on Economic, Social and Cultural Rights, 1966, Article 8(3) [Document No. 284] expressly refers, in Article 8(3), to Convention No. 87, pronouncing in identical terms ("Nothing in this article shall authorize States Parties to the International Labour Organisation Convention [No. 87] of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative

as the ITUC did in its own Written Statement,[277] that the Human Rights Committee construing the ICCPR has recognised the right to strike as an inherent corollary of freedom of association.[278]

5.20. In 2019, both Committees published a joint statement on freedom of association which expressly recognised that the right to strike is protected under both Covenants.[279] Japan tries to dismiss this Joint Statement, which asserted the right to strike as a corollary to the effective exercise of freedom to form and join trade unions, because it failed to mention a decision by the Human Rights Committee.[280] However, that decision was not only the subject of a strong dissent,[281] but the Committee has clearly departed from that interpretation. Apart from that single case, since 1999, several Concluding Observations by the Human Rights Committee examining States' compliance with the ICCPR have consistently affirmed the existence of a right to strike under that instrument.[282] For example, in the recent Concluding Observations on the Republic of Korea (2023), the Committee has reiterated that laws and practices:

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measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."); see Written Statement of Colombia, para. 3.83 ("[I]n the universal system, the [ICCPR and ICSECR] protect the right of workers to strike in a similar manner. In this sense, the universal system has demonstrated its relevance for the protection of the right to work by recognizing the need to allow workers to associate in order to assert their interests and guarantee the rights derived from the possibility of having a decent job within the framework of human rights.").

[277] ITUC Written Statement, para. 4.161.

[278] Written Statement of the ILO, paras. 379-385.

[279] Joint statement by the Committee on Economic, Social, and Cultural Rights and the Human Rights Committee, E/C.12/66/5-CCPR/C/127/4 (2019), para. 4 [Document No. 314]. See also T.NOVITZ, "World War II and beyond: The ILO role in human rights protection and economic governance as a UN agency" in J. BELLACE & J. BRUDNEY (eds.), *Elgar Companion to the Law and Practice of the International Labour Organisation*, Cheltenham, Edward Elgar, 2024, forthcoming [Annex No. 27].

[280] Human Rights Committee, *J.B. et al. v. Canada*, CCPR/C/28/D/118/1982, 18 July 1986; Written Statement of Japan, para. 67 [Annex No. 28].

[281] The majority decision in *J.B. v. Canada* was accompanied by an individual opinion by five members, who dissented from the majority: See Human Rights Committee, *J.B. et al. v. Canada*, CCPR/C/28/D/118/1982, 18 July 1986, Appendix, Individual Opinion submitted by Mrs. Higgins and Messrs. Lallah, Mavrommatis, Opsahl, and Wako concerning the admissibility of Communication No. 118/1982 *J.B. et al. v. Canada*, paras. 3 (finding concerted activities an inherent aspect of the right granted by Article 22, paragraph 1 ICCPR), 5 (criticising the majority for not sufficiently engaging with the "object and purpose" of the ICCPR which is protection of human rights, where limitation of the exercise or rights should be interpreted strictly), 4-5 (finding travaux preparatoires not determinative of the issue of exclusion of the right to strike), 6-7 (finding no reason to interpret Article 22 ICCPR in a manner different from Article 8 ICESCR or Article 10 ILO Convention No. 87, when addressing a comparable consideration).

[282] See Written Statement of the ITUC, para. 4.161, n. 238, for the respective Concluding Observations until 2019; For its further and most recent Concluding Observations confirming this approach, see: Concluding observations on the second periodic report of Macao, China, CCPR/C/CHN-MAC/CO/2, para. 41 ("Macao, China, should take the measures necessary to guarantee, in law and in practice, the meaningful exercise of the right to freedom of association, including the *right to strike*, in full compliance with article 22 of the Covenant") (emphasis added) [Annex No. 29]; Concluding observations on the seventh periodic report of Germany, CCPR/C/DEU/CO/7, para.

> "should […] ensure that *all workers* – including public officials, teachers, and workers in non-standard forms of employment – can fully exercise the right to form and join a trade union, the right to collective bargaining and the *right to strike* and that limitations on that right are in strict compliance with Article 22 of the Covenant".[283]

5.21. The Written Statement of the IOE similarly concedes, as it must, that the ICESCR expressly protects a right to strike, but then argues that it is the *only* international instrument the Court may consider under Article 31(3)(c) of the VCLT.[284] This would be because the only instruments that may be taken into consideration for the purposes of that provision of the VCLT are treaties binding upon all parties to the convention to be interpreted, and the ICESCR is the only relevant treaty to which all parties to Convention No. 87 are also parties.

5.22. This argument is unduly formalistic. It ignores the fact that, beyond the ICESCR, there is a whole array of international and regional instruments protecting the right to strike. It is true that those instruments, taken individually, are binding for some of the States Parties to Convention No. 87 only. But taken as a whole they cover all world regions, and thus globally bind all States Parties. What matters is the consistency of the protection those instruments offer. As developed in the ITUC's Written Statement,[285] each of these instruments implicitly or explicitly protects the right to strike as an inherent component of freedom of association. In addition, as reiterated in the next section, the right to strike has achieved the status of customary international law and is therefore, by definition, part of "the relevant rules of international law applicable in the relations between the parties" to Convention No. 87.

5.23. The United Kingdom's Written Statement similarly concedes that "the right to strike is codified in international and regional human rights conventions."[286] But it goes on to argue that this legal framework "cannot introduce a right into C.87 that is not contained in that instrument".[287] However, as Article 31(3) of the VCLT makes clear, the issue is not whether a

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51 ("The Committee reiterates the recommendation of the Committee on Economic, Social and Cultural Rights[13] that the State party should take measures to revise the scope of the category of essential services with a view to ensuring that all those civil servants whose services cannot reasonably be deemed as essential are entitled to their *right to strike*, also in accordance with article 22 of the International Covenant on Civil and Political Rights.") (emphasis added) [Annex No. 30].

[283] Concluding observations on the fifth periodic report of the Republic of Korea, CCPR/C/KOR/CO/5, para. 58(a) (emphasis added) [Annex No. 31].

[284] Written Statement of the IOE, para. 255.

[285] ITUC Written Statement, paras. 4.158-4.179.

[286] Written Statement of the United Kingdom, para. 61.

[287] *Ibid.*

right is being "introduced" into an otherwise silent treaty. It is whether that treaty, *when broadly read in context with other binding relevant rules of international law*, is best interpreted as protecting the particular right as part of the treaty's broader object and purpose.

5.24. The opposing written statements further focus on two irrelevant questions: whether various *restrictions* on the right to strike exist, and if so, what the precise scope of these restrictions might be.[288] It should first be repeated that the Court has only been asked to address the question whether the right to strike exists, not the permissible scope of its regulation. Whatever restrictions various States may impose on the right to strike under domestic law neither negates nor disproves the existence of a core right to strike as a matter of international law.

5.25. The right to free assembly, for example, may be restricted under circumstances where its exercise would trigger a threat of imminent violence. But the fact that a recognised right may be lawfully limited under certain conditions in no sense negates the existence of the protected right. Similarly, acknowledging that certain exceptions to the right to strike might prove necessary for acute national emergencies and in relation to essential services in no way negates the existence under international law of a core right to strike, which has been accepted globally and by regional and international fora.[289]

5.26. In sum, before the Employers' abrupt change of position in 2012, the inextricable link between Convention No. 87's right to strike and the universal human right of free association had won universal acceptance on the international stage.

C. The customary status of the right to strike as an inherent component of freedom of association confirms the interpretation that it is protected under Convention No. 87

5.27. The ITUC's Written Statement explained why the right to strike has achieved the status of customary international law, as an inherent component of the universal human right of freedom of association.[290] The two key elements are the existence of widespread State practice

[288] The Written Statement of the IOE similarly offers a series of irrelevant observations regarding the scope of various lawful restrictions on the exercise of the right to strike. See Written Statement of the IOE, paras. 258-260.

[289] J. J. BRUDNEY, "The Right to Strike as Customary International Law", *Yale Journal of International Law,* vol. 46, no. 1, 2021 p. 30.

[290] See Written Statement of the ITUC, paras. 4.154 - 4.188.

of recognising that right, which the ITUC has fully chronicled, and *opinio juris:* that the general practice stems from State acceptance of protecting that right as an international legal obligation.

5.28. The opposing written statements mistakenly claim that the diversity of national laws and practices regarding the regulation of industrial action somehow disproves that the right to strike has emerged as a norm of customary international law. But the regulations delineating the permissible scope of the right to strike under domestic laws do not contradict the widespread acceptance of its existence as a norm of customary international law.

5.29. Switzerland, for example, argues that "[p]lus de 150 pays encadrent les modalités de l'action de grève en vertu de leur législation générale et quelque 50 pays ont adopté à cet égard une législation spécifique".[291] But the ITUC never claimed that the right to strike should be absolute. Far from disproving the existence of the right to strike under international law, the fact that some 150 countries may *regulate* the terms of strike actions only proves that all of those countries protect the essential and core right to strike at some level.

5.30. As one international labour expert has summarised the evidence:

> "There are variations in national practice and also disagreements at the margins about what the right to strike protects, but these aspects are not different in kind from diversity and contests regarding [other] international rights […] As for *opinio juris*, a broad range of sources combine to establish that the general practice stems from a sense of *acceptance and obligation* […]."[292]

5.31. In its Written Statement, South Africa confirms that:

> "The right to strike is also explicitly or implicitly guaranteed in 101 national constitutions and at different levels of intensity recognized in national legislation.
>
> It is submitted that the extent of widespread State practice in which ratification of international conventions that have been interpreted to include a right to strike and conformity of domestic legislation reflects *opinio juris*, a genuine sense of obligation under international law."[293]

5.32. Like Switzerland, the IOE attempts to challenge the universal existence of a right to strike by pointing to the diversity among national laws and practices in the area of industrial

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[291] Written Statement of Switzerland, para. 91 (citation omitted).

[292] J. J. Brudney, "The Right to Strike as Customary International Law", *Yale Journal of International Law,* vol. 46, no. 1, 2021, p. 31 (emphasis added).

[293] Written Statement of South Africa, paras. 61-62.

action in member States.[294] The IOE claims that the existence of various kinds of strikes and the diverse motivations that underlie them negates their common core. But that common core remains consistent across all States implementing the right. At base, a workers' strike is a collective decision and action, taken as part of the workers' freedom of association, to further and defend their interests. The mere fact that national variations may exist as to the contours of how the right to strike may be exercised provides no basis for refusing to recognise that right as customary international law.

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5.33. Finally, the Court should dismiss the IOE's cursory argument that Convention No. 87 does not protect the right to strike because of the subsidiary interpretive principle of *in dubio mitius*, which requires restrictive interpretation of a treaty when it infringes upon State sovereignty.[295] This is irrelevant to Article 31(3)(c). The IOE cites no instance where any State Party has objected to the CEACR's guidance on the ground that its interpretations of Convention No. 87 would somehow infringe upon its sovereignty. And as Australia's Written Statement chronicles, numerous States Parties, including Argentina, Chile, France, Germany, Italy, Norway, Panama, and Venezuela (on behalf of the GRULAC countries) have all "[i]ndividually or collectively made public statements supporting the existence of the right to strike under C.87."[296] The simple fact that so many States now recognise the right to strike even while regulating it, and endorse that right without claiming that it compromises sovereignty, confirms that current treaties establishing a right to strike do not infringe upon State sovereignty. To the contrary, for this Court to confirm that the right to strike is enshrined in Convention No. 87 would reaffirm the exercise of sovereignty that led to each State's decision to ratify that treaty.

[294] Written Statement of the IOE, paras. 28 and 267.

[295] The IOE is the only party making this argument. See Written Statement of the IOE, paras. 271-274.

[296] Written Statement of Australia, para. 56.

Chapter 6.
Supplementary means of interpretation confirm that the right to strike is protected under Convention No. 87

6.1. At the outset, the ITUC reiterates that:

i) almost all participants agree that the primary rules of interpretation in Article 31 of the VCLT take precedence, and that the supplementary rules of interpretation in Article 32 are auxiliary, which may be resorted to either (1) to resolve ambiguities or avoid outcomes that are manifestly absurd or unreasonable, or (2) to confirm the meaning derived from Article 31;[297]

ii) in the last advisory opinion interpreting another international labour convention, the Permanent Court definitively confirmed "the rule […] that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself";[298] and

iii) there are no "*lex specialis*" rules of the ILO under Article 5 of the VCLT to displace this rule.[299]

6.2. The ITUC submitted and the great majority of the participants agree that supplementary means, including the preparatory work of Convention No. 87 and the circumstances of its conclusion, unequivocally confirm the Majority Interpretation that the right to strike is an essential component of freedom of association and is protected under Convention No. 87.[300] Upon careful analysis, the Minority Interpretation is not supported by the preparatory work or the historical circumstances leading to the adoption of the Convention.

6.3. The historical circumstances surrounding the conclusion of the Treaty of Versailles and the establishment of the ILO confirm that freedom of association was inherently linked to the freedom to take collective action, including strikes. The IOE and others have failed to pay regard to the legal and historical contexts that influenced the drafters of both the Treaty of

[297] See *supra* paras. 2.16 et seq.

[298] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, *Advisory Opinion of 15 November 1932, P.C.I.J., Series A/B, No. 50*, p. 378.

[299] See *supra* paras. 2.16-2.31.

[300] Written Statement of the ITUC, paras. 4.189-4.221.

Versailles and Convention No. 87. This is particularly so for the United Kingdom, which has ignored the fact that its own legislative history on trade unions and strikes – specifically the shift from prohibiting combinations and strikes to recognising them as lawful activities – underpinned the British proposal to enshrine the principle of freedom of association in the ILO Constitution.[301]

6.4. This is further confirmed by the preparatory work of Convention No. 87 (Section A) and subsequent practice (Section B).

A. The preparatory work of Convention No. 87 confirms that the right to strike comes within the ordinary meaning of its terms

6.5. Those in the minority nevertheless maintain that the preparatory work does not support the existence of a right to strike. For instance, Switzerland observes that the resolution adopted by the International Labour Conference in its 30th session, whereby the protection of freedom of association was added to the agenda of the 31st session, "ne fait aucune mention du droit de grève."[302] Further, Switzerland points out that "les discussions lors de l'élaboration de la convention n° 87 n'ont pas abordé le droit de grève".[303] Similarly, Japan sees the lack of discussion as proof that the delegates did not intend to include the right to strike.[304]

6.6. Yet the preparatory work need not specifically mention the word "strike" for it to be included in Convention No. 87. As stated in the foregoing chapters, the Article 31 VCLT interpretation of the terms in Articles 3 and 10 is that their ordinary meaning is broad and includes, *inter alia*, collective action "for furthering and defending the interests of workers and employers" such as strikes (rather than limited to only the organisation's "internal" activities).

6.7. As the IOE often emphasises, the preparatory work demonstrates beyond doubt that Article 3 was intended to be a general statement of principles of freedom of association, rather than a codification that sets out every single activity that workers' and employers' organisations may or may not do. It was for this reason that, as Japan and Switzerland correctly observe, amendments tabled by Portugal relating to the right to strike of public officials – among other

[301] See Written Statement of the ITUC, paras. 4.195-4.199.
[302] Written Statement of Switzerland, para. 76.
[303] *Ibid.*, para. 81.
[304] Written Statement of Japan, para. 45.

amendments on specific matters – were not adopted.[305] In fact, the Portuguese delegation supported avoiding any drafting implicitly prejudging the right to strike for public servants, which demonstrates that the existence of the right to strike *per se* was accepted.[306] Similarly, the fact that Convention No. 87 protects the right to strike was the very reason behind India's proposal to exclude police and armed forces from the scope of the Convention,[307] which eventually led to Article 9.[308] This *confirms* the Majority Interpretation.

6.8. Another source of confusion is the fundamental distinction between (*a*) the "existence and recognition of the right to strike *per se*" (as the IOE aptly puts it), on the one hand, and (*b*) the scope and modalities of that right, on the other.

6.9. For one, as Japan, the United Kingdom, Switzerland, the IOE, and others have highlighted, during and after the negotiation of Convention No. 87, differences arose as to whether *public officials* had a right to take part in strike action. The right to strike of *public officials* was, indeed, the whole point of the question on the Office's questionnaire, which these participants refer to.[309] However, that question pertained to the scope *ratione personae* of the right to strike, rather than the existence of a "right to strike *per se*".

6.10. It is notable that only two States – Italy and Norway – argued at the time that the right to strike was not part of freedom of association.[310] Not only do both States take an opposite view now,[311] but the dissent of two outliers cannot trump the collective view of the Conference, much less the ordinary meaning of the text.

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[305] Written Statement of Switzerland, para. 81; Written Statement of Japan, para. 40 and footnote 35.

[306] See ILC, 31st Session, 1948, Record of Proceedings, p. 232 [Document No. 161]; see also Written Statement of the ITUC, para. 4.217.

[307] See ILC, 30th Session, 1947, Record of Proceedings, Appendix X, Freedom of Association and Industrial Relations, p. 570 [Document. No. 152] (opining that "the armed forces and the police could not be included in the field of application of freedom of association, because they were not authorised to take part in collective negotiations and *had not the right to strike*") (emphasis added); see also Written Statement of the ITUC, para. 4.217.

[308] See ILC, 30th session, 1947, Record of Proceedings, p. 570 [Document No. 149]; ILC, 31st Session, 1948, Record of Proceedings, Appendix X, p. 478 [Document No. 164]; see also Written Statement of the ILO, para. 312.

[309] Written Statement of Switzerland, paras. 77-80; Written Statement of the IOE, para. 286.

[310] See ILC, 31st Session, 1948, Report VII (Supplement), Freedom of Association and Protection of the Right to Organise, pp. 11-12 [Document No. 159].

[311] See Written Statement of Italy; Written Statement of Norway.

6.11. In sum, as the ITUC submitted in its Written Statement, the discussions during the drafting of Convention No. 87 reflect that freedom of association implicitly included the right to strike.

B. Subsequent practice confirms that the right to strike comes within the ordinary meaning of the terms

6.12. Finally, and as alluded by several participants, the ITUC now briefly addresses subsequent practice as another supplementary means under Article 32 of the VCLT.[312]

6.13. The IOE refers to the practices of several States as subsequent practice inconsistent with the existence of the right to strike.[313] However, as the ITUC submitted above, the isolated positions of a couple of States do not put into question the consistent and clear interpretation of Convention No. 87 developed over time by the vast majority of its 158 States Parties. Moreover, the IOE failed to acknowledge the significance of the authoritative interpretations by the CFA and the CEACR, which in the ITUC's submission is an important supplementary means under Article 32 even if they do not constitute subsequent practice under Article 31(3)(b) of the VCLT.

6.14. Japan refers to the preparatory work at the 32nd Session of the International Labour Conference (1949) regarding Convention No. 98, where proposals to include the right to strike were made but ruled as out of scope.[314] As explained in Chapter 2 above, the Court is asked to consider whether the right to strike is included in Convention No. 87, not the exact scope of Convention No. 98 or whether the right to strike falls thereunder.[315]

6.15. The United Kingdom argues that the subsequent developments from 1953 to 1991, including the Governing Body's decisions and the lack of express mention of the right to strike in significant ILO documents, support its interpretation that Convention No. 87 does not cover the right to strike.[316] The ITUC notes that the exclusion of the year 1952 from the temporal scope is telling. As mentioned in Section 3.C.2 above, in 1952, the CFA – then composed of

[312] This is without prejudice to the ITUC's position that it constitutes subsequent practice under Article 31(3)(b), as noted in Chapter 4 above.

[313] Written Statement of the IOE, paras. 294-296.

[314] Written Statement of Japan, paras. 49-53.

[315] See also Written Statement of the ILO, para. 373.

[316] Written Statement of the United Kingdom, para. 76.

many of the same delegates who adopted Convention No. 87 and even the Treaty of Versailles itself – expressly confirmed that the scope of the Convention included the right to strike.[317] The fact that 143 over 158 States Parties ratified Convention No. 87 after 1952 speaks for itself.[318]

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6.16. For the foregoing reasons, the supplementary means of interpretation confirm the Majority Interpretation arrived at under Article 31 VCLT that Convention No. 87 protects the right to strike.

[317] CFA, Case No. 28 (United Kingdom of Great Britain and Northern Ireland), Complaint date: 01-JUL-51, Definitive Report - Report No 2, 1952, para. 68 [Annex No. 15 to the Written Statement of the ITUC].

[318] *Ratifications de C087 - Convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948*, Normlex (last accessed on 9 May 2024). See also Written Statement of the ITUC, paras. 4.219-4.220.

Chapter 7.
Conclusion:
Wider Implications of the Court's Advisory Opinion

7.1. Apart from its arguments on the VCLT, the IOE also purports to bring a set of "wider implications" to the attention of the Court.[319] The ITUC will address here the wider implications of the Court's advisory opinion, as well as conclude its submissions.

7.2. According to the IOE, the first purported "wider implication" is that, if Convention No. 87 "protected the right to strike, the majority - if not all - State parties to C87, would be found in violation of the Convention under the CEACR's guidance of the right to strike" due to the diversity of industrial action and industrial relations in the world.[320] Second, the IOE alleges the violation of the "rule of law" and "principle of legal certainty" in bypassing the "ILO specific tripartite consensus-based process".[321] Third, the IOE claims that "other existing forums" can resolve the question based on "tripartite consensus".[322] Fourth, the IOE invokes "due process" and warns of supervisory bodies "trump[ing] the genuine intentions of the drafters of C87".[323]

7.3. Undoubtedly, there will be wider implications flowing from the Court's advisory opinion, which the ILO Governing Body will need to address at its first opportunity. But they are not the ones suggested by the IOE. All of these so-called "contextual elements"[324] are mere repackaging of the arguments repeated throughout the IOE's Written Statement. Most are irrelevant to the legal question before the Court. And none have merits.

7.4. To begin with, it is precisely because of the diversity in industrial relations and industrial action across national laws that the ILO Member States found the need for a lowest common denominator in international law: here, the existence of the right to strike. It cannot be overemphasised that *all* stakeholders – Governments, Workers, and Employers alike – have accepted that the right to strike is an inherent corollary of the "principle of freedom of

[319] Written Statement of the IOE, paras. 300-304.
[320] *Ibid.*, para. 301.
[321] *Ibid.*, para. 302.
[322] *Ibid.*, para. 303.
[323] *Ibid.*, para. 304.
[324] *Ibid.*, para. 300.

association" in the ILO Constitution, even though it similarly does not explicitly include the word "strike". As alluded in Chapter 1,[325] this not only binds the States Parties to Convention No. 87, but reaches all ILO Member States, which have agreed that:

> "all Members, even if they have not ratified [Convention No. 87], have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of [the Convention], namely […] freedom of association".[326]

7.5. To this date, the IOE does not dispute that this is the basis for over 70 years of detailed conclusions and recommendations on the right to strike by the CFA, which together have formed a corpus of principles based on tripartite consensus applicable to all Member States, not only those that have ratified Convention No. 87. If the Court deviates from the long-standing tripartite consensus by finding that Convention No. 87 does not protect the right to strike as a corollary of freedom of association, this risks pulling the rug from under the entire ILO system, putting it into a profound constitutional crisis. Again, this would undermine "the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled."[327]

7.6. Pausing here, the ITUC reiterates that the question before this Court is clear and narrow: as established in Chapter 2, it concerns neither (*i*) the limitations or modalities of the right to strike, nor (*ii*) the mandate of the ILO supervisory bodies. Subject to that caveat, as seen throughout the foregoing chapters, the supervisory system has functioned exactly as intended, transparently, and with the full participation of the Member States and social partners, as supported by the Office. Contrary to the IOE's assertion, the tripartite constituents have more influence on the development of the rights to freedom of association and collective bargaining than in the context of any other conventions. The members of the CFA represent various legal systems and institutional perspectives. Together with the CEACR, which is composed of 20 experts also from diverse legal systems, they have consistently endeavoured to align their

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[325] See *supra* para.1.3.

[326] ILO Declaration on Fundamental Principles and Rights at Work (1998), as amended in 2022, para. 2(a) [Document No. 128].

[327] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 664, para. 66.

observations to ensure consistency, coherence and legal certainty across the ILO's supervisory bodies.

7.7. And again, most States Parties – despite having different legal systems – ratified Convention No. 87 *after* various ILO supervisory bodies, including the tripartite CFA, affirmed that the right to strike is protected by freedom of association and the right to organise. Moreover, the CEACR has operated in accordance with customary principles of treaty interpretation. It would severely undermine global governance and legal predictability – values shared by all constituents, including the ITUC and the IOE – if members and social partners could not rely on the guidance of the supervisory bodies as highly persuasive, though non-binding, authorities as to the meanings of the conventions.

7.8. But the reverberations of such a groundbreaking reversal would go much further than the ILO system. Even if the ILO Constitution would somehow still protect a right to strike at the ILO, the rug would nevertheless have been pulled from under the broad corpus of international human rights law on the subject. As explained in Chapters 4 and 5, numerous international and regional human rights instruments refer explicitly to ILO Convention No. 87 (including the ICESCR). And the supervisory systems, including human rights commissions and courts, have referred directly to Convention No. 87 in defining the scope of freedom of association and the right to strike under their respective instruments.[328] Further, as the International Labour Office points out, this risks unravelling the established interpretation of other human rights instruments that protect freedom of association without expressly referring to the right to strike.[329]

7.9. This is true, too, for a large number of international economic agreements, such as trade agreements, preference programmes and bilateral investment treaties, which have incorporated labour protections with reference to ILO Convention No. 87.[330] In short, were the Minority Interpretation to prevail, it would also destabilise global labour, human rights and economic governance.

7.10. Finally, even constitutional guarantees at the national level will be affected, as the high courts of several countries have referred to Convention No. 87 and the views of the ILO's

[328] See Written Statement of the ITUC, paras. 4.158-4.179.

[329] See *supra* paras. 3.13 and 5.14. See also Written Statement of the ILO, para. 13.

[330] See Written Statement of the ITUC, para. 4.187.

supervisory bodies to draw the contours of the right to strike in its national laws.[331] Indeed, industrial relations systems and practices the world over, which have been built up over more than a century of tripartite disputes and negotiations, have rested on the recognition of the principle of freedom of association, including the right to strike. Were the Minority Interpretation to prevail, it would destabilise the practice of industrial relations in every country. As documented in the ITUC's 2024 Global Rights Index, "[t]he right to strike was violated in 87% of countries",[332] and this situation would certainly only worsen.

7.11. The IOE's effort to deny the existence of a right to strike protected by Convention No. 87 and recognise instead merely a right under domestic law that may be regulated without encumbrance – even to the point of effective elimination – would essentially disempower workers from organising their activities and programmes for the furtherance and defence of their interests, as well as their effective participation in a democratic society.[333] This has not led and will not lead to a "lasting peace […] based on social justice".

7.12. In the ITUC's submission, the existence of a social compact and an industrial relations system based on bargaining between employers and organised workers for a fair wage and labour conditions is the only way forward. This is what the founders of the ILO had in mind as the conditions necessary for a lasting peace. And they understood that this vision could only be realised when the fundamental rights of workers, including the right to strike, were fully respected.

7.13. The Court has before it a relatively simple task, namely to affirm the well-founded and universally accepted interpretation of Convention No. 87 and to return the ILO and its constituents to the *status quo ante* before one group decided to abandon that agreement in 2012. The reasons for doing so are legally compelling. It would also allow the ILO, its Member States and supervisory system to function in line with its institutional objectives. The consequences of doing otherwise would be dire.

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[331] *Ibid.*, paras. 4.130-4.150.

[332] ITUC, Global Rights Index 2024, pp. 8, 43-44 [Annex No. 1].

[333] As UN Special Rapporteur on Freedom of Peaceful Association and Assembly Maina Kiai explained in 2017, "[P]rotecting the right to strike is not simply about States fulfilling their legal obligations. It is also about them creating democratic and equitable societies that are sustainable in the long run. The concentration of power in one sector – whether in the hands of government or business – inevitably leads to the erosion of democracy, and an increase in inequalities and marginalization with all their attendant consequences. The right to strike is a check on this concentration of power." UN Press Release, "UN rights expert: Fundamental right to strike must be preserved", 9 March 2017 [Annex No. 32].

* * *

7.14. In view of the foregoing, the ITUC respectfully requests that the Court deliver an Advisory Opinion which confirms that:

(a) it has jurisdiction to respond to the request for an advisory opinion submitted by the ILO Governing Body in its Resolution of 10 November 2023;
(b) no reason exists for the Court to decline to give the Advisory Opinion requested;
(c) the right to strike of workers and their organisations is protected as a corollary of freedom of association and the right to organise under the Freedom of Association and Protection of the Right to Organise Convention (No. 87); and
(d) by virtue of Article 37(1) of the ILO Constitution, the Advisory Opinion is authoritative and binding on the ILO and its constituents.

* * *

The International Trade Union Confederation (ITUC) has designated its General Secretary, Luc Triangle or his authorised representative, as its agent. All communications relating to the participation of the ITUC in these proceeding should be sent to:

Luc Triangle
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13 September 2024

CERTIFICATION OF ANNEXES

I certify that the copies of the documents annexed to these Written Comments are true copies of the original documents referred to.

13 September 2024

Luc Triangle
General Secretary, ITUC

List of Annexes

Annex 1 ITUC, Global Rights Index 2024, pp. 8, 43-44, available at https://www.ituc-csi.org/IMG/pdf/2024_ituc_global_rights_index_en.pdf

Annex 2 Report of the Commission of Inquiry appointed to consider the complaint alleging the non-observance by the Bolivarian Republic of Venezuela of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), made under article 26 of the ILO Constitution by several delegates to the 104th Session (2015) of the International Labour Conference GB.337/INS/8 337th Session, Geneva, 24 October–7 November 2019. Available at: https://www.ilo.org/resource/gb/337/report-commission-inquiry-appointed-consider-complaint-alleging-non

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Annex 11 German Federal Labour Court (Bundesarbeitsgericht), Case 1 AZR 822/79, Judgment 10 June 1980. Available at: https://www.prinz.law/urteile/BAG_1_AZR_168-79

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