INTERNATIONAL COURT OF JUSTICE

Right to Strike under ILO Convention No. 87

(Request for Advisory Opinion)

Written Comments of the Government of Japan

13 September 2024

Introduction

1. In accordance with the Court's Order of 16 November 2023,[1] the Government of Japan hereby presents its Written Comments in response to the written statements submitted by other States and organisations. It again conveys its appreciation to the Court for the opportunity to furnish its observations.

2. It is recalled that, in its resolution adopted at its 349th *bis* (special) session on 10 November 2023, the Governing Body of the International Labour Organization ('ILO') requested the Court to render an advisory opinion on the following question:

> Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?[2]

3. In its Written Statement of 16 May 2024, the Government of Japan observed that the right to strike of workers and their organisations falls outside the scope of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) ('ILO Convention No. 87' or the 'Convention'). Having carefully considered all of the written statements submitted to the Court, the Government of Japan reaffirms its position that the right to strike is not covered by the Convention.

4. The present Written Comments address the most important issues raised in certain written statements submitted by other participants. The absence of comment on any other matter should not be construed as agreement by the Government of Japan. Observations contained herein and in the Written Statement are exclusively concerned with the interpretation of ILO Convention No. 87 and, accordingly, in no way prejudice the right to strike as guaranteed within the domestic legal system of Japan and pursuant to other relevant international instruments such as the International Covenant on Economic, Social and Cultural Rights.

5. Section I reaffirms the interpretation that the right to strike of workers and their

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

[2] Resolution adopted by the Governing Body at its 349th *bis* (special) session on 10 November 2023.

organisations falls outside the scope of ILO Convention No. 87, not only by supplementing some additional elements of interpretation but also by refuting arguments advanced by some written statements in favour of upholding the said right under the Convention.

6. Section II argues that the interpretation reaffirmed in Section I is to be maintained in light of the developments subsequent to the adoption of ILO Convention No. 87.

7. In light of the conclusion reached in Sections I and II pursuant to the customary rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties of 1969 (the 'Vienna Convention'),[3] it will not be necessary in the present proceedings for the Court to address the possible scope and conditions of the right to strike, the issues that fall outside the limited purview of the question as clearly formulated by the Governing Body of the ILO. Notwithstanding this, several written statements went into detail on these issues. Section III of the present Written Comments address them, but only for the sake of assisting the interpretative exercise by the Court of the relevant provisions of ILO Convention No. 87, in the event that the Court may wish to contemplate these issues. The observations therein are without prejudice to the position of the Government of Japan that the Convention does not cover the right to strike and, therefore, that addressing the question of the possible scope and conditions of the said right is unnecessary and unwarranted.

8. Section IV concludes by reiterating the Government of Japan's position that ILO Convention No. 87 does not encompass the right to strike of workers and their organisations.

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

I. The ordinary meaning of the terms of ILO Convention No. 87 cannot encompass the right to strike of workers and their organisations

9. The Written Statement of the Government of Japan showed that, in accordance with the customary rules of treaty interpretation as embodied in Articles 31 to 33 of the Vienna Convention, the ordinary meaning attributed to the terms of ILO Convention No. 87 does not convey the right to strike of workers and their organisations.[4] It also pointed out that the above interpretation is to be maintained irrespective of the opinions held by ILO supervisory bodies to the contrary, insofar as their interpretation had not been made in accordance with the customary rules on treaty interpretation.[5]

10. The Government of Japan does not repeat what is set out in its Written Statement while fully maintaining and relying upon the evidence and arguments contained therein. The present Section corroborates the interpretation that the rights enshrined in ILO Convention No. 87 are only those that can be attributed to both workers' *and* employers' organisations (A.) before showing that various international instruments such as human rights treaties referred to by some written statements have no bearing upon the interpretation of the relevant provisions of the Convention and cannot inform the coverage of the right to strike thereunder (B.). It also suggests that, contrary to some participants' allusions, the interpretation that the Convention does not cover the right to strike may instead prompt a constructive dialogue within the tripartite framework of the ILO (C.).

A. The holders of the right guaranteed under ILO Convention No. 87 are both workers' and employers' organisations

1. A right that can only be attributed to workers' organisations cannot be accommodated in the provisions of the Convention

11. While the vast majority of the written statements referred to Article 3, paragraph 1, of ILO Convention No. 87, only a few of them paid attention to the beginning of the text indicating that the holders of the right guaranteed under that paragraph are both

[4] Sections I and II of the Written Statement of the Government of Japan.

[5] Section III of the Written Statement of the Government of Japan.

workers' *and* employers' organisations.[6] This language cannot be ignored, since treaty interpretation 'must be based above all upon the text of the treaty',[7] and any particular phrases contained in that paragraph need to be read in conjunction with '[t]he rest of that paragraph'.[8] As a result of this reference to both workers' *and* employers' organisations to possess the right under Article 3, the right 'to organise their administration and activities and to formulate their programmes' in paragraph 1 can only refer to the right that is beneficial and attributable to *both* workers' *and* employers' organisations, guaranteeing that respective organisations are able to structure, arrange and systematize themselves to exist as a coherent associative body between members.[9] A right that could belong only to either of these organisations — such as the right to strike of workers and their organisations — cannot therefore be accommodated in Article 3 or any other provisions of the Convention.

12. Some participants purport to vindicate a contrary reading by referring to various elements of treaty interpretation. As will be shown below, however, none of them meaningfully explain the language that the rights envisaged under the Convention are attributed to both workers' *and* employers' organisations.

2. The interpretation that the right to strike is not covered does not deprive the Convention of its effet utile

13. It has been suggested that the guarantee under Article 3 would lose its *effet utile* without the protection of the right to strike.[10] However, various aspects of the right to organise administration and activities and to formulate programmes guaranteed

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[6] Only the Written Statements of the Government of Japan (paras. 13–14 and 21–28) and of the IOE (para. 144) referred to this point.

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

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

[9] See also, Written Statement of the IOE, paras. 144 and 156.

[10] Written Statement of France, para. 50; Written Statement of the ITUC, para. 4.66; Written Statement of Germany, paras. 17–19.

under Article 3 are of the nature that can be exercised without strike actions. An organisation is able to determine its own rules providing, for instance, for the holding of an annual general meeting, the keeping of minutes of meetings, the required quorum and majority for decision-making by its members and the obligation to keep the accounts of the organisation.[11] These are of the nature that can be exercised freely insofar as adequate protection against interference on the part of the public authorities or of employers is guaranteed under Articles 2 and 11 of the Convention. The guarantee of the freedom of association under Article 3 cannot therefore be devoid of its meaning merely because of the absence of the right to strike.

3. The French text of the Convention equally indicates that the rights enshrined therein are only those that can be attributed to both workers' and employers' organisations

14. It has been suggested that the choice of the terms '*liberté syndicale*' and '*droit syndical*' in the French text of ILO Convention No. 87 should be taken into account,[12] even to 'contextualise[] the trade union character' of the freedom of association under the Convention.[13] However, the French text of the Convention, as much as the English text, consistently refers to '*[l]es travailleurs et les employeurs*' as the holders of the '*liberté syndicale*' — or the freedom of association in the English text — throughout Part I of the Convention. In the same vein, '*le libre exercice du droit syndical*' under Part II is guaranteed '*aux travailleurs et aux employeurs*' simultaneously. The compatibility of these English and French texts cannot be ignored when interpreting the terms of the Convention in accordance with the customary rules of treaty interpretation as embodied in Article 33, paragraphs 3 and 4, of the Vienna Convention.

4. A reading purporting to include a right that can only be attributed for workers' organisations could entail unexpected and far-reaching

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[11] ILC, 43rd Session, 1959, Report III (Part IV), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 113–114, para. 63 **[ILO's Document No. 232]**.

[12] Written Statement of France, paras. 78–81.

[13] Written Statement of the ITUC, para. 4.50.

consequences

15. Many written statements focused upon particular terms and phrases of Article 3, paragraph 1, of the Convention, notably 'organise their administration and activities' and 'formulate their programmes', to argue that these terms and phrases could cover a wide range of actions, including strike actions which are taken only by workers' organisations.[14]

16. However, the suggested reading could result in far-reaching consequences that even the proponents of that reading would not have anticipated: if a right that could belong only to workers' organisations — such as the right to strike — were to be guaranteed merely by way of generic terms such as 'activities' and 'programmes', without regard to the terms designating both workers' *and* employers' organisations as the holders of the right under Article 3, a right of employers' organisations to take their own industrial actions could equally be guaranteed under Article 3 by way of the same reasoning. The written statements in favour of upholding the right to strike under the Convention kept silent as to the possible far-reaching consequences of their expansive — or even 'unqualified'[15] — reading of the terms of Article 3, which is tellingly 'detached from the context'.[16]

5. *The tripartite structure of the ILO reinforces the interpretation that the rights guaranteed under the Convention are those that can be attributed to both workers' and employers' organisations*

17. A number of written statements referred to the tripartite structure of the ILO to draw implications upon the interpretation of ILO Convention No. 87.[17] The

[14] See, e.g., Written Statement of Vanuatu, para. 23; Written Statement of the OACPS, para. 41; Written Statement of the ITUC, paras. 4.17–22; Written Statement of Norway, para. 15; Written Statement of Australia, paras. 26–30; Written Statement of Mexico, paras. 44–45; Written Statement of the Netherlands, para. 2.7; Written Statement of Brazil, paras. 22–26.

[15] Written Statement of the ITUC, Annex 6, p. 79.

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

[17] See, e.g., Written Statement of France, para. 86; Written Statement of the ITUC, para. 4.74; Written Statement of BusinessAfrica, para. 31; Written Statement of the IOE, para. 128; Written Statement of Switzerland, para. 45.

Government of Japan is also of the view that tripartism within the ILO is relevant to the interpretation of the Convention, inasmuch as it reinforces the interpretation that the rights guaranteed under ILO Convention No. 87 are those that can attributed to both workers' *and* employers' organisations. In particular, reference to both workers' and employers' organisations throughout ILO Convention No. 87, including Article 3, is seen to be deliberate insofar as the ability of respective organisations to structure, arrange and systematize themselves to exist as a coherent associative body is an indispensable prerequisite of tripartite social dialogue. Accordingly, the protection of a right that could belong only to either workers' or employers' organisations fell outside 'the concern of States parties when drafting th[e] Convention'.[18]

B. The coverage of the right to strike under ILO Convention No. 87 cannot be informed of by other international treaties lacking a similarity or resemblance of language

1. The coverage of a treaty may be informed of by that of another treaty when there exists a similarity or resemblance of language employed

18. Many written statements referred to various international treaties concluded outside the ILO, especially those guaranteeing the protection of human rights, so as to read the provisions of ILO Convention No. 87 purportedly as encompassing the right to strike within the scope of its protection.[19] It is recalled, however, that the Court is not asked in the present proceedings to identify customary international law on the right to strike:[20] it is only asked to interpret the provisions of ILO Convention No. 87 to clarify its meaning.[21] As a matter of treaty interpretation, the mere fact that a

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[18] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment of 31 January 2024,* para. 52.

[19] See, e.g., Written Statement of Vanuatu, paras. 45–49; Written Statement of Italy, paras. 15–17; Written Statement of Colombia, paras. 3.69 *et seq.*; Written Statement of Germany, paras. 63–72; Written Statement of Canada, paras. 10–14; Written Statement of Tunisia, p. 2; Written Statement of Australia, paras. 61 *et seq.*; Written Statement of Mexico, paras. 34-37; Written Statement of the Netherlands, paras. 3.1 *et seq.*

[20] See, to that effect, Written Statement of the OACPS, paras. 24–34; Written Statement of the ITUC, paras. 4.180 *et seq*; Written Statement of Colombia, para. 3.68; Written Statement of South Africa, para. 62.

[21] Written Statement of the ILO, paras. 414 and 416.

certain number of international treaties provide a particular right or obligation within their respective scope does not, in and of itself, inform the coverage of another treaty that does not contain a provision expressly referring to the same right or obligation.

19. In its jurisprudence, the predecessor of the Court paid attention to the 'similarity both in structure and in expression between' the relevant provisions of two ILO conventions to draw inspiration from one convention before arriving at a particular interpretation on the other.[22] The Court, likewise in a recent case, referred to 'a strong resemblance' between the language of Article 10 of the International Convention for the Suppression of the Financing of Terrorism of 1999 and Article 7 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 to draw inspiration therefrom before identifying the meaning of the *aut dedere aut judicare* obligation under the Terrorism Financing Convention.[23] In *Somalia v. Kenya,* the Court equally took note of 'the similarity in wording' between the provisions of a Memorandum of Understanding and those under UNCLOS before it decided to read the former in light of the latter.[24]

20. The following subsection contains a non-exhaustive list of international treaties explicitly or implicitly guaranteeing the right to strike of workers. None of them, however, could have bearing on the interpretation of ILO Convention No. 87 because of the lack of similarity or resemblance of language between the relevant provisions.

2. There exists no similarity or resemblance of language between ILO Convention No. 87 and various international treaties referred to in the present proceedings

(a). International Covenant on Economic, Social and Cultural Rights

21. Article 8, paragraph 1, subparagraph (d), of the International Covenant on

[22] *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night, Advisory Opinion, 1932, P.C.I.J. Series A/B No. 50,* pp. 380–381; See, Written Statement of the Government of Japan, para. 27.

[23] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment of 31 January 2024,* para. 116.

[24] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017,* p. 37, para. 91.

Economic, Social and Cultural Rights of 1966 provides that the States parties to the Covenant undertake to ensure '[t]he right to strike'. However, the preceding subparagraphs (a) to (c) refer only to the rights of, or to form and join, trade unions, and no reference is made in subparagraph (d) — where the right to strike is located — to any comparable rights of employers and their organisations. As such, there exists no similarity or resemblance between the language of the Covenant and ILO Convention No. 87.

(b). Labour chapters in free trade agreements

22. The Labour Chapter of the Canada-United States-Mexico Agreement of 2018 recognizes, in its footnote 6 to Article 23.3, that 'the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike'.[25] However, this linkage is premised upon the characterisation of the rights guaranteed under Article 23.3 as 'labor rights', which, by definition, refer only to the rights of workers and their organisations and not those of employers or their organisations.

23. Similar footnotes are found in certain other trade agreements, such as in footnote 3 to Article 14.3 of the Canada-Ukraine Free Trade Agreement of 2023.[26] However, paragraph 1 provides that the parties to the Agreement are to take into account their commitments 'under the ILO Declaration on Rights at Work' of 1998,[27] which was adopted to contribute to the aim of paragraph 54(b) of the Programme of Action adopted on the occasion of the Copenhagen Summit of 1995, by 'safeguarding and promoting respect for *basic workers' rights*'[28] (emphasis added).

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[25] Article 23.3 of the Agreement between the United States of America, the United Mexican States, and Canada (2018) **[ILO's Document No. 300]**.

[26] Chapter 14: Labour – Text of the Canada-Ukraine Free Trade Agreement (2023), available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/2023/14.aspx?lang=eng.

[27] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010), available at https://www.ilo.org/resource/conference-paper/ilo-1998-declaration-fundamental-principles-and-rights-work-and-its-follow.

[28] U.N.Doc. A/CONF.166/9 (1995), Annex II.

24. Insofar as only the rights of workers are envisaged, these labour chapters in trade agreements could have no assistance in the interpretation of ILO Convention No. 87, providing the rights of both workers' *and* employers' organisations.

(c). European Convention on Human Rights

25. Under the European Convention on Human Rights, strike action has been held to be guaranteed under Article 11, paragraph 1, providing that '[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests'.[29] However, this was due to the construction of paragraph 1 that explicitly refers to the right 'to join trade unions' without regard to any comparable right of employers.

(d). Charter of Fundamental Rights of the European Union

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

> Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.[30]

By the term 'including', the right to take 'strike action' is guaranteed as part of the right 'to take collective action'. As such, Article 28 of the Charter has no similarity or resemblance of language with the provisions of ILO Convention No. 87.

C. *The interpretation that the Convention does not cover the right to strike will prompt a constructive dialogue within the tripartite framework of the ILO*

27. It has been signalled by some written statements that a failure to recognise the

[29] *National Union of Rail, Maritime and Transport Workers* v. *United Kingdom,* No. 31045/10, Judgment of 8 April 2014, para. 77 **[ILO's Document No. 319]**; *Association of Academics* v. *Iceland,* No. 2451/16, Decision of 15 May 2018, para. 24.

[30] *Official Journal of the European Union* (C 202/389, 7 June 2016).

right to strike could have broad adverse consequences.[31] However, they fail to observe the limited purview of the question referred to the Court, which only asks about the coverage of the right to strike under ILO Convention No. 87, and any answer to that question will have no bearing upon other treaties, let alone domestic legal systems. Despite the importance of the referred question within the framework of the ILO, the possible scope of the Court's opinion needs to be fairly observed.

28. Moreover, clarifications to be provided by the Court will prompt a constructive dialogue within the framework of the ILO. The Governing Body decided to request an advisory opinion from the Court because it was '[s]eriously concerned about the implications that [the] dispute [concerning whether the right to strike is protected under ILO Convention No. 87] has on the functioning of the ILO and the credibility of its system of standards'.[32] The Court's advisory opinion clarifying whether the right to strike is protected under the Convention, irrespective of whether it will answer negatively or affirmatively, will assist the ILO in resolving the 'serious and persistent disagreement within the tripartite constituency'.

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29. In light of the foregoing, the Government of Japan reaffirms the interpretation that the right to strike of workers and their organisations falls outside the scope of ILO Convention No. 87.

[31] Written Statement of the ICA, para. 4; Written Statement of Vanuatu, para. 72; Written Statement of the OACPS, paras. 107-109; Written Statement of the WFTU, para. 22.

[32] GB.349bis/INS/1/1/Decision, 10 November 2023.

II. Nothing subsequent to the adoption of ILO Convention No. 87 upholds an interpretation that the right to strike should be covered

30. Having reaffirmed the interpretation that the right to strike of workers and their organisations is not covered by ILO Convention No. 87, the present Written Comments go on to argue that certain developments referred to by some written statements cannot corroborate the contrary reading that the right to strike should be protected by the Convention. The present section observes, *inter alia,* that nothing subsequent to the adoption of the Convention upholds an interpretation that the right to strike should be covered.

A. The opinions and recommendations of ILO supervisory bodies could not constitute 'subsequent practices'

31. It has been maintained by certain written statements that their interpretation that ILO Convention No. 87 protects the right to strike should prevail on the ground that their reading is in line with the opinions and recommendations of ILO supervisory bodies, which would constitute 'subsequent practices' of the Convention.[33] In particular, opinions held by the Committee on Freedom of Association[34] and the Committee of Experts on the Application of Conventions and Recommendations[35] were often invoked, to the extent that these opinions and recommendations had been 'consistently confirmed by a large number of States Parties to the Convention'[36] or that no objection had been raised against these pronouncements by the tripartite

[33] Written Statement of Brazil, para. 27; Written Statement of Colombia, paras. 3.37–3.45; Written Statement of France, paras. 92–98; Written Statement of the Netherlands, paras. 2.11–2.24; Written Statement of South Africa, paras. 54–55; Written Statement of Vanuatu, paras. 32–39.

[34] See, e.g., 'Case No. 28 Complaint presented by the World Federation of Trade Unions against the Government of the United Kingdom (Jamaica)', *Sixth Report of the Committee on Freedom of Association*, Appendix V, Reports of the Governing Body Committee on Freedom of Association, Second Report of the Committee on Freedom of Association, p. 210, para. 68.

[35] See, e.g., ILC, 43rd Session, 1959, Report III (Part IV), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 114–115, para. 68 **[ILO's Document No. 232]**.

[36] Written Statement of the Netherlands, para. 2.21.

constituents of the ILO.[37]

32. However, numerous States parties to ILO Convention No. 87 consistently object to the ILO supervisory bodies' pronouncements on the right to strike.[38] In the case of Japan, for instance, it ratified the Convention on 14 June 1965 on the understanding that neither the Convention nor the Committee of Experts deals with the right to strike.[39] The same applies to Switzerland.[40] Both Switzerland and Japan, among others, constantly express their views that the right to strike is not covered by the Convention.[41] Furthermore, a State party recently observed that 'the right to strike is not expressly provided for in the Instrument of the ILO; rather, the ILO supervisory bodies derive the right to strike from Article 3 of Convention No. 87, despite the fact that the legality of this interpretation has been questioned'.[42] Insofar as numerous States parties consistently refuse to accept the opinions and recommendations of ILO supervisory bodies, these could not constitute subsequent practices which establish the agreement of the parties regarding the interpretation of the Convention.[43] The Court will be in a position to arrive at this conclusion without identifying the appropriate threshold as to the number or proportion of State Parties to a treaty required to constitute a subsequent practice establishing a subsequent agreement on

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[37] Written Statement of South Africa, para. 55(e); see also, Written Statement of France, para. 97.

[38] See, Written Statement of BusinessAfrica, para. 37.

[39] House of Representatives, Special Committee on ILO Convention No. 87, 25 June 1963, available at https://kokkai.ndl.go.jp/txt/104304313X00319630625/25; House of Councillors, Plenary Session, 29 January 1965, available at https://kokkai.ndl.go.jp/txt/104815254X00519650129/28.

[40] Written Statement of Switzerland, para. 6.

[41] *Ibid.*, para. 67; International Labour Conference, 58th Session, 1973, *Record of Proceedings*, p. 544, paras. 26–27. See also Direct Request (CEACR) - adopted 2006, published 96th ILC session (2007), Switzerland ('The Government also indicates that the Committee's interpretation of the Convention's provisions on the right to strike is not authoritative'); Government of Japan, Comments by States parties on Concluding observations, UN Doc. E/C.12/2002/12, 29 November 2002, para. 5(1) (noting that 'ILO Convention No. 87 is not understood to deal with issues related to the right to strike, and that there are no ILO documents explicitly dealing with the right to strike').

[42] ILC, 109th Session, 2021, Report III/Addendum (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations (Belarus), p. 96 **[ILO's Document No. 178]**.

[43] See, Section III.C. of Written Statement of the Government of Japan.

its interpretation.[44]

33. Certain participants, having faced difficulties in ascribing weight to the opinions and recommendations of ILO supervisory bodies by way of the notion of 'subsequent practice', attempt to discuss that their pronouncements could instead constitute 'supplementary means of interpretation' within the meaning of Article 32 of the Vienna Convention as embodying the customary rules of treaty interpretation.[45]

34. However, this is mere repackaging of the contention that the opinions and recommendations of ILO supervisory bodies should be relevant to the interpretation of ILO Convention No. 87, which was initially raised by way of the notion of 'subsequent practice' mentioned above.[46] Having ascertained that little or no weight could be given to them under the rules enshrined in Article 31, paragraph 3, subparagraph *(b)*, of the Vienna Convention, there exists no need to give a second chance to ascribe weight to them under another rubric of the rules of treaty interpretation. In its jurisprudence, the Court has never overridden an interpretation it reached pursuant to Article 31 of the Vienna Convention by having recourse to 'supplementary means of interpretation' within the meaning of Article 32.[47] There is no reason to deviate from this approach in the present circumstances in light of the nature of the controversy within the ILO leading to the present advisory proceedings.

B. The statement of the Government Group adopted at the Tripartite Meeting in 2015 cannot corroborate the reading that the right to strike is guaranteed under ILO Convention No. 87

35. It has also been suggested that the statement of the Government Group issued at

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[44] On the question of threshold, see, e.g., Written Statement of the Government of Japan, para. 71; Written Statement of the IOE, para. 223; Written Statement of the United Kingdom, paras. 43–45; Written Statement of Colombia, para. 3.38.

[45] Written Statement of Australia, paras. 68–83.

[46] Written Statement of Australia, paras. 43–45.

[47] See, e.g., *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, paras. 98–101.

the tripartite meeting in 2015[48] should reinforce the reading that the right to strike is guaranteed under ILO Convention No. 87.[49] The text of the statement reads, in its relevant part:

> 3. […] the Government Group 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.
> 4. The Government Group recognizes that the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO. The Government Group specifically recognizes that without protecting a right to strike, Freedom of Association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized.
> 5. However, we also note that the right to strike, albeit part of the fundamental principles and rights at work of the ILO, is not an absolute right. The scope and conditions of this right are regulated at the national level. The document presented by the Office describes the multi-faceted regulations that States have adopted to frame the right to strike.
> 6. We are ready, right from this Tripartite Meeting, to consider discussing, in the forms and framework that will be considered suitable, the exercise of the right to strike. We believe that the complex body of recommendations and observations developed in the past 65 years of application of Convention 87 by the various components of the ILO supervisory system constitutes a valuable resource for such discussions, which will also be informed by the multi-faceted regulations that States and some regions have adopted to frame the right to strike.
> 7. […] in conclusion, Governments will spare no effort to achieve a tangible outcome in the days to come through sustained consultations and dialogue.[50]

36. A plain reading of the statement as a whole indicates that its crux is located in paragraph 5, expressing that the right to strike is 'not an absolute right' and that '[t]he

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[48] Government Group Statement (23 February 2015), GB.323/INS/5/Appendix I, Annex II **[ILO's Document No. 106]**.

[49] Written Statement of Mexico, paras. 49–52; see also Written Comment of Colombia, para. 3.68; Written Statement of France, paras. 87–88.

[50] Government Group Statement (23 February 2015), GB.323/INS/5/Appendix I, Annex II **[ILO's Document No. 106]**.

scope and conditions of this right are regulated at the national level'. Given that the sentence providing the main idea is intervened by a qualifying phrase 'albeit part of the fundamental principles and rights at work of the ILO', the link between the right to strike and the freedom of association as recognized in the preceding paragraph 4 needs to be read in conjunction with paragraph 5 and not in isolation.

37. Read in context, it is observed that the source of the right to strike is not identified in any of these paragraphs. This is in contrast to the language that the freedom of association is characterized as 'a fundamental principle and right at work of the ILO' and that the scope and condition of the right to strike is conceived as being 'regulated at the national level'. ILO Convention No. 87 is referred to only in paragraphs 3 and 6, which are the preface and postface of the statement in nature, and any of the sentences contained therein cannot be read as acknowledging that the Convention could be a source of the said right.

38. In light of the purpose of the 2015 statement, the lack of reference to the source of the right to strike in paragraphs 4 and 5 is seen to be deliberate. The statement ends in paragraph 7 with the aspiration of the Government Group towards 'a tangible outcome in the days to come through sustained consultations and dialogue', a prospect presupposing that the interpretative debate had not been settled. Paragraph 7, read in conjunction with the preceding paragraphs, thus indicates that the Government Group refrained from taking a particular position on the existing controversy. A reading that any of the preceding paragraphs acknowledge that the right to strike is protected under ILO Convention No. 87 is in contradiction with paragraph 7, insofar as the said interpretation would pre-empt the definitive settlement of the controversy with the anticipation of a particular outcome.

39. In light of the foregoing, the 2015 statement, particularly paragraphs 4 and 5, merely acknowledges a link between the right to strike and the freedom of association at an abstract level without regard to the question of whether ILO Convention No. 87 encompasses the said right. 'Were th[ese] paragraph[s] to have the potentially far-reaching consequences' of affirming the coverage of the right to strike under the

Convention, 'it would in all likelihood have been the subject of some discussion'.[51] Yet, members of the Government Group rather reiterated that reference to the right to strike in the 2015 statement has nothing to do with the Convention.[52]

40. Consequently, the 2015 statement cannot corroborate the reading that the right to strike is guaranteed under ILO Convention No. 87.

[51] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017,* p. 41, para. 103.

[52] Minutes of the 349th bis (Special) Session of the Governing Body of the International Labour Office, GB.349*bis*/PV, 10 November 2023, para. 95; Written Statement of Switzerland, para. 73.

III. The referred question can be answered without detailing the right to strike at stake

41. Insofar as the right to strike of workers and their organisations is found not to be covered by ILO Convention No. 87, it will not be necessary in the present proceedings for the Court to address the possible scope and conditions of the right to strike, the issues that fall outside the limited purview of the question as clearly and deliberately formulated by the Governing Body of the ILO.[53] Put differently, while a negative answer to the referred question will, in any event, make it unnecessary to address these issues, any eventual finding by the Court on these issues would go beyond the purview of the referred question, and it should, therefore, be unwarranted. As a matter of fact, many participants, including the Government of Japan, refrain from addressing these issues irrespective of their conclusions.

42. Notwithstanding this, certain written statements went further to discuss in detail the possible scope and conditions of the right to strike.[54] In examining the merits of these contentions, the Court might wish to contemplate hypothetically or incidentally the contents of the said right to some extent. Only for the sake of assisting the intellectual exercise by the Court of treaty interpretation, therefore, the rest of the present section briefly addresses these issues.

A. The referred question can be answered without postulating the details of the right to strike

43. The referred question specifically asks the Court to clarify the coverage of 'the right to strike of workers and their organizations' under 'the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)'. The resolution adopted by the Governing Body requesting the Court to render an advisory opinion does not define the right to strike within the meaning of the referred question. The formulation of the question '[i]s the right […] protected under the […] Convention' is of a nature that anticipates and enables the Court to discharge its function merely by

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[53] See, e.g., Written Statement of France, para. 25; Written Statement of the ITUC, para. 1.7; Written Statement of Norway, paras. 5, 25–26.

[54] Written Statement of the United Kingdom, paras. 79 *et seq*.; Written Statement of Germany, paras. 35–41, 45; Written Statement of Australia paras. 39–41; Written Statement of the Netherlands, paras. 4.1 *et seq*.

responding either in the negative or in the affirmative without postulating the details of the said right. In fact, many written statements submitted by the participants to the present proceedings devoted few words detailing the right to strike before observing its coverage under the Convention.

44. This is because of the context leading to the adoption by the Governing Body of the resolution. The referred question as to the coverage of the right to strike under ILO Convention No. 87 was linked with the second but abandoned question of whether the Committee of Experts had been acting within its powers when affirming that the right to strike should be covered by the Convention.[55] Notwithstanding this, the workers' group was satisfied with the referral of only the first question to the Court as it 'would suffice to resolve the dispute'.[56] Insofar as the core of the dispute had been broadly shared by the tripartite constituents of the ILO, there was no need to detail the components of the right to strike in the context of the controversy leading to the present advisory proceedings. Under these circumstances, the Court is in a position to provide an answer to the referred question without detailing the right to strike.

B. Any specification that goes beyond the proposition that the right to strike is not absolute will in any event be unnecessary

45. In the event that the Court may nonetheless wish to contemplate the contents of the right to strike for certain purposes,[57] attention may be drawn to the convergence of the views among participants that the right to strike that has been subject to debate is 'not absolute',[58] 'not limitless',[59] 'limited'[60] and 'subject to restrictions'.[61] On the

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[55] ILO, *The dispute on the interpretation of Convention No. 87 in relation to the right to strike – Background report,* GB.349*bis*/INS/1/1 (10 November 2023), para 33; Written Statement of the ILO, para. 96.

[56] ILO, GB.349*bis*/PV (10 November 2023), para. 70.

[57] See, e.g., Written Statement of Australia, para. 19.

[58] Written Statement of the United Kingdom, para. 133; Written Statement of Australia, para. 39.

[59] Written Statement of Germany, para. 73(ii).

[60] Written Statement of South Africa, para. 65.

[61] Written Statement of the Netherlands, para. 4.1; Written Statement of Norway, para. 23; see also Written Statement of Australia, para. 97.

occasion of the 349th *bis* (special) session of the Governing Body of the ILO, the Government of Japan also observed that a right to strike could by no means be absolute.[62] The Court is asked to identify the absence or presence of such a non-absolute right to strike in ILO Convention No. 87.

46. Without prejudice to its position that ILO Convention No. 87 does not cover the said right, the Government of Japan humbly suggests that the Court take note, if any, of the convergence of the views of the participants described above and observe that any further specification would be unnecessary in the present proceedings.

[62] ILO, GB.349*bis*/PV (10 November 2023), para. 95.

IV. Conclusion

47. For the reasons set out in its Written Statement and herein, the Government of Japan remains firmly of the view that ILO Convention No. 87 does not encompass the right to strike of workers and their organisations. It holds the judicial functions of the International Court of Justice, including its advisory proceedings, in high regard. It believes that the Court's opinion will help to illuminate the path forward for the tripartite constituents of the ILO.

Respectfully submitted,

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to the Kingdom of the Netherlands

13 September 2024

Appendix

Pursuant to Article 37, paragraph 1, of the Labour Relations Adjustment Act of Japan (No. 25 of 27 September 1946), an entity must notify the competent authorities that it will resort to an act of dispute at least ten days prior to doing so, insofar as the entity engages in "public welfare business" (namely the provision of services essential to the daily life of the general public) and regardless of whether it belongs to the public or private sector.[63] It has come to the attention of the Government of Japan that a written statement submitted by one participant contained a description that is inconsistent with the above statutory requirement.[64] The Government of Japan wishes to draw the attention of the Court to that effect.

[63] Paragraph 1 provides: 'When a party concerned in a case involving public welfare business resorts to an act of dispute, the party must notify the Labour Relations Commission and the Minister of Health, Labour and Welfare or the prefectural governor to that effect, at least ten days prior to the day on which the act of dispute is to be commenced'. Available at https://www.japaneselawtranslation.go.jp/en/laws/view/3810/je.

[64] Written Statement of the United Kingdom, para. 104.