International Court of Justice

Request for Advisory Opinion by the International Labour Organisation

Right to Strike under ILO Convention No. 87

Written Comments of the International Organisation of Employers

16 September 2024

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I. INTRODUCTION

1. The International Organisation of Employers ('IOE') hereby submits its Written Comments pursuant to paragraph 3 of the Court's 16 November 2023 Order. The 30 Written Statements submitted in these Advisory Opinion proceedings to date give rise to three overarching observations:

2. First, a number of Written Statements agree with the IOE's position that the right to strike is not protected by C87.

   i. Japan: "*For the reasons set out in this Written Statement, the Government of Japan respectfully submits to the Court that ILO Convention No. 87 does not encompass the right to strike of workers*";[1]
   ii. Switzerland : "*Il resort de l'analyse ci-dessus que la convention no 87 ne couvre pas le droit de grève*";[2]
   iii. United Kingdom: "*For the reasons set out above, the United Kingdom's primary position is that the right to strike of workers and their organizations is not protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87)*";[3]
   iv. Costa Rica: "*In other words, the right to strike does not emanate from Convention 87 itself, but from its precise definition and regulation established in the constitution and laws specific to each country*";[4]
   v. Bangladesh: "*In other words, the 'right to strike' is not protected under ILO Convention 87 for the reasons elaborated above*";[5]
   vi. Belize: "*While there are several judicial decisions in Belize which speak to the right to form or be a part of a trade union in light of Convention No. 87, the same cannot be said regarding right to strike*";[6] and
   vii. Business Africa: "*[It] sets out its position that the right to strike is not covered in C87*".[7]

[1] Written Statement of the Government of Japan, 16 May 2024, p. 37.
[2] Exposé écrit de la Confédération Suisse, 6 mai 2024, VI. Conclusion.
[3] Written Statement of the United Kingdom of Great Britain and Northern Ireland, 16 May 2024, p. 51.
[4] Letter by Mr Andrés Romero, Minister of Labor and Social Security, Costa Rica, 14 May 2024, III. Conclusions, para 7.
[5] Written Statement of the Government of the People's Republic of Bangladesh, 16 May 2024, para 9.0.
[6] Written Statement of the State of Belize, 21 May 2024, p. 2.
[7] Written Statement of Business Africa, 16 May 2024, p. 6.

3. The very fact that there are States parties to C87 that continue to insist that the right to strike is not protected in that Convention shows that there is no "*subsequent agreement between the parties regarding the interpretation*" or "*subsequent practice in the application of the treaty*" establishing the agreement of the parties regarding its interpretation pursuant to Article 31(3)(a) and (b) of the Vienna Convention on the Law of the Treaties ('VCLT'). This absence of agreement not only concerns the limits and scope of a right to strike protected by C87, but the very existence of a right to strike *per se* in C87.

4. Second, there is a lack of agreement among ILO constituents on the nature of the right to strike, which also casts doubt as to the acceptance of an interpretation that the right to strike derives from the notion of freedom of association in C87. The Workers' Group, the Committee of Experts on the Application of Standards ('CEACR') and the Committee on Freedom of Association ('CFA') have stressed that the right to strike is an intrinsic corollary of the freedom of association, and therefore in C87.[8] However, this view has been strenuously rejected by the Employers' Group and by an array of States.[9] Indeed, in the legal systems of many States the right to strike is linked to the right to collective bargaining, i.e. strikes are in principle only permissble to enforce objectives in collective bargaining. In these States, the right to strike is not corrollative to the right to freedom of

[8] *See* ILO, 'Freedom of Association and Collective Bargaining - General Survey by the Committee of Experts on the Application of Conventions and Recommendations', 1994 **[ILO Dossier Document No. 235]**, para 151: *"In the light of the above, the Committee confirms its basic position that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87*"; ILO, Compilation of decisions of the Committee on Freedom of Association, sixth edition, 2018, pp. 143–182 **[ILO Dossier Document No. 282]**, para 754, *"The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87"*.

[9] ILO, Record of Proceedings, ILC 1994, p. 25/31, para 120, Employers stated that *"The interpretation of the Committee, …, did not allow for the conclusion that the right to strike was an intrinsic corollary of the right to organize,…." See also* Written Statement of Germany, 6 May 2024, p. 17 *"[…]held the position that the right to strike was not an essential element of freedom of association*"; Written Statement of UK, para 126 "*The case law of the European Court of Human Rights (ECtHR) on the right to strike reinforces the United Kingdom's arguments that: (a) the right to strike is not a corollary of freedom of association; and (b) there is a diversity of State practice on the right to strike, even within one region, further undermining any claim to the right to strike being customary international law.*"'; Written Statement of Japan, paras 35 *"The contention that the right to strike is the corollary to the effective exercise of other trade union rights cannot be sustained …"*.

association under C87.[10] Also certain regional instruments link the right to strike to the right to collective bargaining and not to the freedom of association.[11]

5. Third, the Court needs to adopt a cautionary approach to its consideration of some Written Statements which give a misleading impression that there has been general acceptance amongst ILO constituents on a right to strike in C87 for a very long time.

6. For instance, it is not correct to assert that the CEACR has viewed the right to strike as being corollary to the right to freedom of association for over 70 years and that, as such, it is recognized and protected by C87. [12] When the CEACR began to give its interpretations and views about the right to strike 65 years ago in 1959, it did so with precision and care in one paragraph of its General Survey, focusing on only one aspect of the right to strike (that is, the right to strike of public servants), and without any explicit link to C87.[13] It was only many years later, as reflected in the General Surveys of 1973, 1983 and 1994, that the CEACR gradually further developed its interpretations on the right to strike.

7. Moreover, it is also incorrect to state that, apart from the Employers' Group, there has been 60 years of *"an accepted shared understanding that the Convention protects the right to strike as part of freedom of association"*.[14] In fact, as the IOE evidenced in its Written Statement, the governments of States parties have expressly disagreed with this interpretation time and again.[15] It is a fiction to suggest that there has ever been a point in

[10] For example, in Europe: Sweden, Germany, Austria, Switzerland and outside Europe such as New Zealand, United States, Canada and Japan. *See also* Written Statement of Germany, p. 5, "*the right of employers' associations and trade unions to enter into collective agreements, … , is in turn inextricably linked to the general recognition of the right to industrial action, i. e. on the trade union side to the protection of the right to strike*" ; Written statement of the United States of America, May 16, Annex 3, "*We would note that in numerous other countries, and most recently in Canada in January 2015, the right to strike has been held to be an essential and indispensable component of a meaningful collective bargaining process in its labor relations system*"; Written statement by the Kingdom of the Netherlands, 16 May 2024, p. 19. There is no mention of the term "collective bargaining" in connection with the CEACR's considerations of the provisions of C87 in its 2012 General Survey; so the CEACR does not seem to agree with Germany which considers that *"Convention No. 87 also protects the right to enter into collective agreements" (see Written Statement of Germany, p. 5)* and for this reason supports the view that the right to strike is covered by C87.

[11] For instance: Art 28 (Right to collective bargaining and action) of the Charter of Fundamental Rights of the European Union; Art 6 (The right to bargain collectively) of the European Social Charter.

[12] Ibid.

[13] Written Statement by the Government of the Republic of South Africa, 15 May 2024, p. 12 *"The only hard conclusion that it advanced in the 1959 Survey was that if strikes were prohibited, adequate alternative guarantees to safeguard their interests had to be provided."*

[14] Written Statement of ITUC, para 4.1.

[15] *See* Written Statement of IOE, Annex F.

time since C87 was drafted at which there was an *"accepted shared understanding"* amongst all State parties to C87 that the right to strike is protected by C87.

II. COURT JURISDICTION AND REFERRAL QUESTION

8. Although it would have been preferable to resolve the question of whether the right to strike is protected under C87 through social dialogue within the tripartite ILO structures and procedures, the IOE (like the majority of States and other entities who submitted Written Statements) continues to maintain that: (1) it is clear that the Court has jurisdiction to give the opinion requested by the ILO; and (2) the Court should exercise its jurisdiction by answering the question posed to it.

9. However, the IOE remains concerned as to the ambiguity inherent in the advisory opinion question. In particular, does "*the right to strike under C87*" mean: (a) right to strike in abstract; or (b) a right to strike with its scope and limits as defined by the CEACR.

10. If the former, the IOE's clear view is that the Court's answer should be "*no*". An abstract right to strike is nonsensical in the context of C87 which, as an ILO Convention is an instrument meant to provide precise practical rules for implementation which will then be supervised by the issuing of recommendations for concrete corrective action. An abstract right to strike is plainly incapable of leading to these types of supervisory outcomes and would thus contravene the principles of legal certainty and effectiveness. Indeed, as the CEACR has itself stated "*[i]n the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject*."[16] It is no doubt for this reason that there are no CEACR comments issued under C87 in which it has recommended to a government to respect a right to strike 'in principle'.

11. If the latter, the IOE again asserts that the Court's answer should be "*no*". A determination that a right to strike which reflects the CEACR's extensive and detailed views on its scope and limits is protected by C87 would subvert the proper application of the interpretative rules set out in the VCLT to C87. It would result in the codification of a sensitive and contentious area of labour law, outwith the ILO's constitutional tripartite procedure for

[16] ILC, 81st Session, 1994, Report III (Part 4B), Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, pp. 61–78 **[ILO Dossier Document No. 235]**, p. 64, para 145.

standard setting. Further, it would effectively promote the CEACR, a standards supervisory body, to an entity with the competence to issue lawful determinations on the proper interpretation of C87 despite this not being authorised by ILO Member States or permitted by the ILO Constitution.

12. For these reasons, the IOE submits that the only proper answer to the ILO's question must be that the right to strike is not protected by C87.

III. ILO'S MANDATE, STRUCTURE AND PROCESSES

13. The IOE provides important clarifications and corrects below certain factually inaccurate statements regarding the organs of the ILO which were made in some of the Written Submissions provided to date in order to assist the Court in its consideration of the Advisory Opinion question.

A. The ILO

1. The Office

14. The ILO's Written Statement provides:

> *"Informal opinions are systematically accompanied by a disclaimer that indicates that the Constitution confers no special competence on the Office to provide official interpretations of international labour Conventions and that any views expressed are without prejudice to the positions that may be taken by the supervisory bodies of the ILO. Both the reservation that the Office's views are without prejudice to any determination made by the supervisory organs and the constant practice of the Office of taking fully into account the views of these organs in preparing its own opinions suggest that there is an informal hierarchy in interpretations produced within the ILO. Yet, in practice, no conflict has ever arisen between the views expressed by the Office and those of the supervisory organs.*
>
> *Lastly, it is particularly pertinent to note that, since 1953, the Office has refrained from expressing any views on the interpretation of Conventions Nos 87 and 98, owing to the existence of a special procedure for dealing with complaints concerning alleged infringements of freedom of association." (emphasis added)*[17]

15. While it is true that the Office's informal opinions remain primarily administrative and that the Office does not have any special competence to interpret International Labour

[17] Written Statement of ILO, paras. 241 -242.

Conventions, it is important to point out that the Office nevertheless has the *de facto* ability to influence the opinions of the ILO standards supervisory bodies, including on freedom of association and the right to strike. This capacity arises from the fact that the Office prepares all draft documents for consideration and, if adopted, issuance by the CEACR, the CFA, tripartite committees set up to look into Article 24 representations, or Article 26 Commissions of Inquiry. For instance, the NORMES department of the Office, prepares full drafts of CEACR General Surveys and full drafts of CEACR comments and direct requests, including on C87. This preparation of draft outputs for the CEACR, CFA and tripartite committees is designed to facilitate and expedite their work due to the very short periods of time in relation to which they are active each year and due to the large volumes of cases that each of these bodies must consider.[18] Moreover, the Compilation of decisions of the Committee on Freedom of Association is a publication initiated and prepared by the Office; it has neither been approved by the CFA, nor by the International Labour Conference ('ILC') or the Governing Body ('GB'). It is therefore important for the Court to consider the active, unsolicited and influential role that the Office has played in the development of the interpretations on the right to strike in C87.

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

16. The ILO's Written Statement notes with regard to the function and mandate of the CEACR:

> *"The Committee's work is guided by the principles of independence, objectivity and impartiality. As the Committee has stated, it "undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. […] Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work*

[18] The CEACR usually meets in Geneva once every year for two weeks, this year from November 25 to December 7; The CFA meets for two days before each of the three GB meetings per year (March, June, October/November); *see also* Written Statement of IOE, para 81 "*Given the large volume of reports received each year (more than 2000 on ratified Conventions alone), the CEACR heavily relies on the assistance of the Office and, in particular, the International Labour Standards Department ('NORMES'). Indeed, NORMES prepares the draft CEACR General Report, as well as the draft General Survey, which the CEACR then discusses, amends (as required) and adopts at its two weeks meeting held in late November and early December each year. It should be noted that the Office has significant influence on the contents and orientations of the CEACR reports and, consequently, on the outcomes of ILO standards supervision. In particular, the Office ensures continuity and consistency in standards supervisory work irrespective of changes in the composition of the CEACR*"; para 88 "*The CFA meets before each of the GB's triannual meeting to review around 25 complaints from workers' and employers' organisations and provide conclusions and recommendations to the Governments concerned tailored to the specific factual context and national circumstances of each case examined*."

based on its impartiality, experience and expertise" (Document No. 85, para. 31)."

17. As indicated above, while the CEACR is responsible for its reports, it should be noted that the draft reports are prepared in full, in draft form by the ILO Office prior to each session of the CEACR's work. Therefore, the influence of the Office on the interpretation of the right to strike pursuant to the CEACR should not be underestimated.

18. It should be also noted that, new members of the CEACR were previously preselected by the ILO Office before their formal endorsement by the GB. It is only recently that changes have been made to the appointment procedure for CEACR members so as to increase transparency, accountability and tripartite participation in their selection process.[19]

19. Furthermore, the IOE recalls that the CEACR was originally established to examine the summaries of the reports submitted to the Conference to assist the work of the CAS. As some Written Statements have correctly noted,[20] the CEACR was never given the mandate to interpret ILO instruments.

3. Committee on Freedom of Association (CFA)

20. Certain Written Submissions contain significant inaccuracies regarding the mandate and the work of the CFA. Some examples of this are as follows:

21. First, the ITUC states that "*[t]he CFA receives complaints from organisations of workers or employers or from governments and its conclusions are compiled and published within the Compilation of decisions of the Committee on Freedom of Association*."[21] (emphasis added) This is factually inaccurate. Furthermore, CFA conclusions are, first and foremost,

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[19] *See* Written Statement of IOE, para 80; ILO, Minutes of the 343rd Session, GB 343/PV, November 2021, para 556.

[20] *See* Exposé écrit de la Confédération Suisse, para 113 *"En 1977, la CEACR a réaffirmé que « sa fonction consiste à déterminer si les prescriptions d'une convention donnée sont remplies, quelles que soient les conditions économiques et sociales existant dans un pays donné » et a rappelé qu'« aux termes de son mandat, la commission n'est pas appelée à donner une interprétation des conventions, cette compétence étant confiée à la Cour internationale de justice par l'article 37 de la Constitution »"* ; Written Statement of UK, para 11 "*It simply notes that the mandate of the experts in the CEACR is to provide a technical, non-binding assessment of the measures taken by ILO Member States to give effect to ratified Conventions*" and para 54 "*The role entrusted to the CEACR is to 'provide an impartial and technical evaluation of the application of international labour standards in ILO member States.' It is not mandated to make general pronouncements on the correct interpretation of the Conventions. Its practice cannot, therefore, establish the agreement of the parties to Convention No. 87*"; Written Statement of Business Africa, para 27 "*The CEACR's actions are not only outside its mandate but also undermine the legitimacy and authority of the ILC, setting a precedent for external bodies to introduce 'interpretations' and rules contrary to the drafters' intentions.*"

[21] Written Statement of ITUC, para 4.78.

published in the reports of the CFA. In fact, only a limited selection of CFA conclusions are also published in the ILO Office's "Compilation of decisions" publication. This "Compilation of Decisions" is not therefore authored by the CFA or approved or endorsed by the GB or the ILC. It is an administrative document only rather than a document indicating any kind of approval or adoption by States or by either of the social partners.

22. Second, the ITUC misrepresents the status of the CFA conclusions claiming that "*[i]mportantly, the CFA 'always endeavours to reach unanimous decisions'. Therefore, the conclusions reached by the CFA concerning the application of Convention No. 87 reflect the practice of ILO Member States, expressed collectively*."[22] First of all, it needs to be recalled that the CFA is not making conclusions "*concerning the application of Convention No. 87*". The CFA looks into complaints of infringement of freedom of association but it has no mandate to supervise the application of C87. Secondly, it is important to recall that the CFA is composed of 18 members of the GB (six from each constituents' group), each of whom participates in the CFA's work in his or her personal capacity and not as a representative of a particular member State.[23] Finally, there is no indication that all those countries against which complaints related to the right to strike have been filed go on to accept the respective conclusions of the CFA. Indeed, it would be more likely that those countries which reject CEACR interpretations on a right to strike in the context of C87 would also reject similar CFA conclusions regarding the right to strike. Therefore, for all the above reasons, there is no proper basis for asserting that CFA conclusions regarding the right to strike reflect the practice of the ILO Member States collectively.

23. Third, one Written Statement incorrectly states that "*the Committee of Freedom of Association's mandate has never been challenged by any member.*"[24] But CFA members from the Employers' group have regularly found it necessary to state their own understanding of the mandate of CFA,[25] noting that it is limited to determining whether specific legislation or practice complies with the principle of freedom of association and effective recognition of collective bargaining enshrined in the Constitution of the ILO

[22] Id, para 4.76.
[23] Written Statement of UK, para 51.
[24] Written Statement of Colombia, para 2.19.
[25] *See* ILO, Minutes of the 350th Session, GB 350/PV, 4-14 March 2024, para 641; ILO, Minutes of the 351st Session, GB 351/PV, 15 June 2024, para 210.

(Preamble), Declaration of Philadelphia and 1970 International Labour Conference ('ILC') Resolution, and not C87 or C98.[26] This point has also been recognized by others.[27]

24. Fourth, and even more problematically, some Written Statements have mistaken these supervisory bodies as being akin to judicial courts that have authority to create legal jurisprudence.[28] This is entirely incorrect as these are mere technical bodies, and their conclusions and recommendations are non-binding.[29] It would be wholly improper to regard them otherwise.

B. Important Events

25. The IOE wishes to respond to some remarks made in other submissions concerning particular events by way of clarification.

1. Cold War Period (1947-1989)

26. It is not accurate to assert that, for more than 60 years, the Employers' group did not challenge the assertion that C87 protects a right to strike.[30] As noted above, in the early

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[26] *See* ILO, 'Freedom of Association - Compilation of decisions of the Committee on Freedom of Association', 2018, para 1 **[ILO Dossier Document No. 282]**.

[27] Written Statement of UK, para 51.

[28] *See* Written Statement of South Africa, para 39 "*Both the CFA and CEACR operate very much like common law courts do – they apply the wording of the ILO Constitution or the Convention to the facts presented to them on a case by case basis. And over time, in accordance with precedent (uniformity over time) and equal application (uniformity across member states), a jurisprudence is created and developed. This jurisprudence is embodied in different editions of the Digest of Decisions of the CFA and the General Surveys prepared by the CEACR*." (emphasis added); Written Statement of ITUC, para 4.77 and Written Statement of Australia, 16 May 2024, para 70 citing the Supreme Court of Canada decision of *Sakatchewan "The relevant and persuasive nature of the Committee on Freedom of Association jurisprudence has developed over time through custom and practice and, within the ILO, it has been the leading interpreter of the contours of the right to strike*.'"

[29] *See* also Written Statement of the UK, para 11 "*CEACR is to provide a technical, non-binding assessment of the measures taken by ILO Member States to give effect to ratified Conventions" and the "CFA is not a judicial entity, and its conclusions and recommendations are not-binding and are intended to guide the actions of national authorities only. The Committees' decisions must be understood in that context and not as a statement on the scope of Convention No 87*." Written Statement of Norway, 15 May 2024, para 22 "*As has been noted in Part II of this written statement, this is also the position consistently communicated by the CEACR since its first statement on the issue in 1959. Norway maintains that statements and recommendations issued by the latter are not legally binding and, consequently, neither governments nor the Court are required to model their interpretation of the Convention on that of the CEACR*." Exposé Écrit de la Suisse, para 123 "*La CEACR n'a, par conséquent, ni le mandat de créer de nouveaux droits ou de nouvelles obligations ni celui d'interpréter une norme pour définir les contours de droits ou d'obligations existants. Elle n'a donc pas la compétence de définir les modalités du droit de grève, et ce indépendamment de la réponse fournie par la Cour à la question de savoir si la convention n° 87 protège ou non le droit de grève.*"

[30] *See* Written Statement of ITUC, para 4.1 "*For more than 60 years after Convention No. 87 entered into force on 4 July 1950, the employers' group did not challenge the accepted shared understanding that the convention protects the right to strike as part of freedom of association. During the Cold War, the employers and workers groups had acted together to oppose repression of trade union rights in the Soviet bloc. But as the Cold War ended, that solidarity began to fray. Still, the employers' group continued to generally respect the accepted understanding until the start of the International Labour Conference in May 2012*." Written Statement of South Africa, para 8 "*In the 1990 CAS deliberations, Employer members raised the issue of the Committee's interpretation of Convention*

stages of this period, there was insufficient clarity of any assertions on this issue such as to warrant objection. The Employers Group did not make specific statements on the right to strike during this time for the following reasons: (i) the CEACR's comments and observations on the 'right to strike' in C87 were developed only gradually and were not nearly as visible and dominant in the context of C87 supervision as they are today; (ii) it was clear for all of the ILO's constituents that the CEACR's comments and observations were not legally binding; (iii) the CEACR's comments and observations on the 'right to strike' did not attract broad acceptance even within the ILO, let alone outside of it; and (iv) there was a need for unity (or at least the appearance of unity) amongst the tripartite constituents of Western countries during the period of the Cold War for geopolitical reasons.[31]

2. Immediate Post Cold War Period (1989 – 2012)

27. From the very moment when it became apparent that the the CEACR's 'guidance' was creating confusion among both the ILO's constituents and legal practitioners,[32] that is as

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87 stating that they did not agree with the Committee on the right to strike and that it 'had progressively deduced from Convention No. 87 a right to strike which was hardly limited' and that its opinion was 'questionable in law' and 'touched directly on employers' interests'." Written Statement of Colombia, para 1.9 "*Around 1989, the Employers' Group began to question the interpretation of Convention No. 87 by the Committee of Experts and challenged the authority of the committee to interpret conventions. The dispute gradually intensified and, in 2012, led to a major institutional crisis as the Conference Committee on the Application of Standards was not allowed to exercise its examining functions for the first time. There is a widespread feeling that the persistent disagreement on such important aspects of the normative mandate of the ILO negatively affects the credibility of the supervisory system and the reputation of the ILO as a normative organization*." Exposé Écrit de la République Française, 14 mai 2024, "*Pourtant, pour la première fois en 1989 et régulièrement depuis, le groupe des employeurs, l'un des mandants tripartites de l'OIT, a remis en cause cette interprétation. Selon ce groupe, le droit de grève ne pourrait être inclus dans le champ d'application de la Convention n° 87 puisqu'aucune de ses dispositions ne reconnaît, expressément ou implicitement, un tel droit. Encore récemment, le groupe des employeurs affirmait que la Convention n° 87 ne fait nullement référence à un 'droit de grève' et ne comporte même pas le terme 'grève'. Les rédacteurs de la convention ont délibérément exclu ce sujet de son champ d'application, estimant que ce droit devait être régi par une norme distincte*."

[31] *See* Written Statement of IOE, paras. 95-97.

[32] ILC, Record of Proceedings, 1989, para 21, p. 26/6 "*As regarded the interpretation of Conventions, the Employers' members indicated that, if the report of the Committee of Experts was the very basis of the Committee's work, this was not to say that all the opinions and evaluations of the Committee of Experts had to be shared, and different views would be expressed if necessary in concrete cases. The Employers' member of the United States stated, basically, that the jurisprudence of the Committee of Experts was sometimes unstable, evolving and variable. The Employers' member of Sweden recalled the views expressed by the Employers' members on the supervisory system and on the respective roles played by the Committee of Experts and the Conference Committee. Only one body - the International Court of Justice - could make authoritative interpretations of international labour Conventions*"; p. 26/35 "*The Committee of Experts considered that restrictions on the right to strike were too stringent; the Employers did not want to raise the point as they were not in agreement with criteria applied by the Committee of Experts. However, there were clear violations of the Convention and they were very concerned about the situation*."; p. 26/43 "*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*

of 1989 (35 years ago), the Employers began to explicitly and clearly object to the CEACR interpretations on the right to strike.

28. For the reasons set out above, the absence of explicit objection by the Employer Group during a specific period cannot be regarded as tacit acceptance by them of the CEACR's views on the right to strike.

3. 101st Session of the ILC, 2012

29. In its Written Statement the ITUC purports to blame the Employers' Group for the "2012 crisis", noting that: "*there is no doubt that before the unilateral blockage of the CAS by the employers, the matter appeared to be clearly settled.*" (emphasis added)[33] This is misleading at best.

30. First, as discussed above, the Employers' Group as well as some Governments have voiced their disagreement with the CEACR's interpretation on the right to strike in C87 well before 2012.[34] As evidenced by some Written Statements to the Court, these disagreements still remain valid today.[35]

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health of the population. Far from challenging the right to strike and of lock-out, they merely wanted the exercise of that right submitted to reasonable restrictions. No member State could accept the restrictions proposed by the Committee of Experts which, indeed, were not respected in practice."; and p. 26/51 "*The Employers' members noted that this case concerned a series of provisions relating to and interfering with freedom of association, and that some were useless and therefore should be eliminated. They referred the Committee of Experts' comments on the restrictions imposed on the right to strike, recalling that these were the sort of cases where the employers had a differing view as to the requirements of the Convention*".

[33] Written Statement of ITUC, para 4.126.

[34] *See* Written Statement of IOE, Annex C.

[35] *See* Written Statement of UK, para 10 "*The United Kingdom's primary position is that the right to strike is not protected by Convention No. 87. The right is not, and was not intended to be, included in the Convention, either expressly or implicitly. This position is confirmed by application of the well-established rules of treaty interpretation*."; Written Statements of Costa Rica, Conclusions, para 7 "*In other words, the right to strike does not emanate from Convention 87 itself, but from its precise definition and regulation established in the constitution and laws specific to each country*."; Written Statement of Japan, paras 62-63, 76 "*It has been suggested by ILO supervisory bodies that the right to strike is an 'intrinsic corollary' of the right to organise protected by ILO Convention No. 87.[…] However, the Committee of Experts has fallen short of explaining how the term in its ordinary meaning could encompass strike action.[…] the Government of Japan respectfully submits to the Court that ILO Convention No. 87 does not encompass the right to strike of workers*", Written Statement of Bangladesh, paras. 8.0-9.0 "*In view of the points raised above, there appears to be no justification for CEACR, even if it were well-intentioned, to fill a perceived gap in the Convention, and to progressively develop self-determined rules on the scope and limits on the right to strike for compliance by the State parties. Any attempt to legitimize such purported progressive development of the right to strike by CEACR would constitute an impingement on State sovereignty. […] In other words, the 'right to strike' is not protected under ILO Convention 87 for the reasons elaborated above*." Written Statement of Norway, 15 May 2024, para 22 "*As has been noted in Part II of this written statement, this is also the position consistently communicated by the CEACR since its first statement on the issue in 1959. Norway maintains that statements and recommendations issued by the latter are not legally binding and, consequently, neither governments nor the Court are required to model their interpretation of the Convention on that of the CEACR.*" Exposé Écrit de la Suisse, paras 136-137 "*Il ressort de l'analyse ci-dessus que*

31. Second, the cause for the 2012 crisis was the General Survey, in which the CEACR had dealt with the right to strike issue in a biased manner by disregarding the views of ILO constituents. Consequently, it was not possible for the Employers' and Workers' Vice Chairs to agree to the discussion of the General Survey or any individual cases. Contrary to the Workers' assertion, the Employers did not, 'unilaterally block', or 'walk out' at any point during negotiations.[36] Instead, when the Employers' Vice Chair insisted on excluding right to strike cases from the CAS discussions, the Workers' Vice Chair refused to discuss any cases (even those that did not concern the right to strike or C87) in the CAS. Therefore, the 2012 crisis occurred due to a difference of views in relation to which all parties involved were equally responsible and accountable for finding an agreeable compromise solution. In this regard it should be noted that it is in fact the Workers' Group that right up to the present day systematically refuses to permit any substantive discussion on the scope and limits of right to strike in a tripartite manner either in the GB or the ILC.[37]

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la convention n° 87 ne couvre pas le droit de grève, comme la Suisse l'affirmait déjà en 1973. Ce droit est toutefois un corollaire de la liberté syndicale et il revient soit aux législateurs nationaux, soit à la CIT, soit à un tribunal interne (art. 37, par. 2 Constitution de l'OIT) d'en définir les modalités."

[36] ILO, Conference Committee on the Application of Standards, Extracts from the Record of Proceedings, 2012, para 151 "*The Employer members highlighted that on Friday, 1 June 2012, after the negotiations had irretrievably broken down, the Employer Vice-Chairperson returned to the Committee room, as he was informed that the Worker Vice-Chairperson had done so. His position was that the negotiations had failed so there was confusion concerning why it was necessary to return to the Committee room. During the period he was in the room, he observed officials of the International Labour Office in discussions with Worker and Government members of the Committee. It was important to be aware that Employer members had made it clear that the list of cases to be supervised could only be agreed in direct negotiation with the Worker members. The Government members could not be involved as they had a conflict of national interest. The International Labour Office could not be involved as it was not an ILO constituent and had to be impartial. Members of the Employers' group had been waiting in the Committee room from 5 p.m. awaiting confirmation concerning the negotiations. The Employer Vice-Chairperson informed the Employer members that the negotiations had failed. At 8.31 p.m., when the meeting was 91 minutes past its scheduled close of 7 p.m., as no one from the International Labour Office had communicated to him what was happening, he had then informed the Deputy Director of the International Labour Standards Department that the Employer members were leaving the Committee room for the evening. The Employer members had then left. There had been no meeting of the Conference Committee occurring at the time so it had not been a walk-out. The Employer members had left the room after the scheduled close and while private meetings involving others had been happening, of which the Employer members had known nothing about. Many other delegates had either left or were leaving. The Employer members had attended the next scheduled meeting*."

[37] *See* ILO, *Draft Minutes of the 349th ter (Special) Session of the Governing Body, November 2023,* **[ILO Dossier, Document No. 33]**, para 12 "*While standard-setting was the most appropriate solution to the problem, her group remained flexible regarding other options – such as holding a general discussion or a tripartite meeting of experts on the matter – and regarding the outcomes and timing of standard-setting action. Its proposals were fully aligned with the ILO's values of tripartism and social dialogue. She called on all governments to demonstrate their commitment to those values and to give their views on the options presented in her group's amended version of the draft decision*."

IV. APPLICATION OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

A. Article 5: Treaties constituting international organisations and treaties adopted within an international organisation

32. Article 5 VCLT is of primary relevance to the issues currently before the Court, however the ITUC does not expressly engage with the consequences of Article 5 to the Court's interpretative task. There is no dispute that C87 is a treaty adopted within the ILO, an international organisation. There should therefore be no dispute that the application of the VCLT in the present dispute is *"without prejudice to any relevant rules"* of the ILO. As set out in the IOE's Written Statement, there are important aspects of the ILO's 'relevant rules' which shape the Court's interpretive task in respect of C87.[38] First, tripartism: a fundamental principle and structural feature of the ILO. In the specific context of an ILO treaty, when considering the object and purpose of particular treaty provisions, the Court's interpretation must respect and advance the ILO's *modus operandi*: tripartite interaction and cooperation, both in the setting of standards and in their subsequent implementation and supervision. The Court must not sanction unilateral evolution of principles beyond the bounds of tripartite cooperation.[39] Moreover, the Court must also ensure that analysis of subsequent practice occurs by reference to tripartite interaction and cooperation. Second, special importance must be attached to preparatory work. As the observer of the ILO, Dr C. Wilfred Jenks, noted at the 1968-9 Vienna Conference, ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in the eventual Article 32 of VCLT.[40]

B. Article 31: General Rule of Interpretation

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

[38] Written Statement of IOE, paras. 124-130.

[39] The IOE notes the understandable and principled stance taken by Indonesia in its Written Statement, para 5 *"Indonesia is of the view that the most prudent course of action to resolve the dispute is to seek tripartite consensus in line with the core spirit and the unique character of the ILO."*

[40] UN Conference, Official Records - First Session, A/CONF.39/11, March-May 1968, p. 37, para 12. Dr C. Wilfred Jenks, who was the ILO Director General from 1970-1973, mentioned that "*ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in the related article of the VCLT (article 28 at the time*)." *See further* Written Statement of IOE, para 129.

(a) Ordinary meaning

33. It is clear on any sensible reading that Articles 2, 3(1) and 10 – all of which are rights concerning workers and employer's organisations – are ambiguous in respect of the right to strike. By contrast, the ITUC's Written Statement suggests that C87 provides an unambiguous right to strike, solely by reference to the 'ordinary meaning' of the material terms (i.e. absent consideration of context, or the object and purpose, of those terms). This is not a credible argument, and it reveals ITUC's case as extreme.

34. In fact, it will be apparent to the Court, solely from reading the relevant provisions, that the bare text of the words is ambiguous. In considering the ordinary meaning of the material terms of C87, the ITUC's case proceeds from a mischaracterisation of the IOE's position. The ITUC states that the IOE's position is that the words 'right to strike' or similar terms *"would have to"* be used in C87 for 'ordinary meaning', on its own, to give rise to a right to strike.[41] IOE's position is, in fact, more nuanced: it maintains that the matter *"would have been clear" if* there was such a reference;[42] but the material terms here exclude such a reference - and are, taken as a whole, ambiguous. Contrary to what the ITUC claims, the IOE's case is therefore not premised on a general proposition of law that 'ordinary meaning' can only ever give rise to an unambiguous right, if the right is expressly mentioned. Further, the ITUC's reasoning draws on broader considerations than the bare text when purporting to explain what the bare text means.[43] As one example, the ITUC frequently repeats the incorrect assertion (going to object and purpose) that Articles 3 and 10 would not be effective if they did not include a right to strike, because that is *"the raison d'être of workers' organisations"*.[44] This is plainly an issue for analysis under 'object and purpose' notwithstanding that even under that analytical head, the argument is wrong.[45]

35. The ITUC's extreme position is in part explained by the false premise its argument proceeds from. At paragraph 4.13, the ITUC caveats its analysis of the material terms under C87, by saying *"the analysis below primarily focuses on the right to strike of workers' organisations"*. The ITUC seems to admit, in terms, that it is outside the scope

[41] Written Statement of ITUC, para 4.13.
[42] Written Statement of IOE, para 141.
[43] Written Statement of ITUC, paras. 4.13-4.26.
[44] Id, paras. 4.21 and 4.25.
[45] *See infra* section IV.B.1(c).

of its analysis to consider what the significance of employers' organisations being included in Article 3 is. The ITUC analysis is obviously incomplete: they simply assume away the problem raised by the words 'employers' organisations'.[46]

36. Further, the ITUC frequently makes arguments that presuppose the right to strike must be within C87 - but these arguments are based on missing premises, in which explanation is substituted for mere assertion. The following examples are instructive.

    i. At paragraph 4.13 the ITUC states that its argument is that *"under Articles 2 and 3(1), read together with Article 10, workers have the right to strike based on the right of their organisations to organise and plan for strikes with a view to furthering and defending workers' interests"*. This is circular: it asserts that there is a right for organisations to organise and plan for strikes. It is also question-begging: it presupposes that the definition in Article 10 (that workers' organisations are those that further and defend their interests) necessitates a right to strike.

    ii. The ITUC sets out various definitions from paragraph 4.14, and then at paragraph 4.19 purport to draw a conclusion from those definitions. At paragraph 4.19, it states that *"when these terms* [organise their activities] *are read together, it is clear that the "activities" that workers' organisations are entitled to "organise" are collective activities or action."* It then proceeds to state at paragraph 4.20 that the 'programme' such organisations are entitled to 'formulate' *"must specifically mean[s] plans of collective action rather than individual action"*. The ITUC's argument is perplexing – it identifies that 'organise their activities' and 'formulate their programmes' must in some sense be collective, rather than individual; then jumps from this to a conclusion that those phrases *"must"* cover the specific activity of collective bargaining through strikes. The fault in this reasoning should be obvious. Whilst 'activities' and 'programmes' are collective in a sense, because they are the activities and programmes of an organisation (which is a collective of individuals); that is all the bare words necessarily mean. Just because the 'activities' and 'programmes' belong to the organisation, that does not mean the words also necessarily give a right to all collective action – let alone to strike action. Many workers' organisations

[46] *See* Written Statement of IOE, para 144.

which, by their very existence, enjoy hard won rights, do not undertake any form of collective bargaining, let alone strike action.

iii. The fact Article 28 of the Charter of Fundamental Rights of the European Union refers to a right to *"take collective action…including strike action"* does not help the ITUC.[47] Instead, it underscores that collective action is not equivalent to strike action; the former is broader than, and merely includes the latter. It therefore undermines the ITUC case by showing the leap between identifying that 'activities' and 'programmes' belong to the organisation and are in that sense collective; to asserting that this amounts to collective action (something conceptually distinct); to then asserting that this includes strike rights (itself conceptually distinct from collective action).

iv. Taking a step back, the ordinary meaning, on its own, does not offer an unambiguous answer that C87 comprises a right to strike. Far from it. It is (at very best to the ITUC) ambiguous.

(b) Context

37. In its Written Statement the ITUC contends that relevant context not only includes the entire text of C87 (on which there is no dispute); but also *"the entire text of…related instruments such as the ILO Constitution and the Declaration of Philadelphia"*. It is not accepted, as a matter of principle, that the entire text of related instruments forms part of context for the purposes of Article 31(1) of VCLT. The treaty as a whole, including its entire text and associated protocols is, of course, relevant context. However, not even Article 31(2), which considers related agreements and instruments made in connection with the conclusion of the treaty, goes as far as suggesting that the entire text of treaties mentioned in preambular text is part of the contextual matrix for the purposes of Article 31(1). It is telling that the ITUC offer no authority to support this proposition of law stated to be a *"threshold matter"*.[48]

38. In its Written Statement the ITUC mischaracterises the IOE's position regarding 'context' – and, so, attacks a straw man. At paragraph 4.31, ITUC suggests that the IOE's case is

[47] Written Statement of ITUC, para 4.23.
[48] Id, para 4.28.

that the relevant context *"must somehow refer to the right to strike"* – the implication being that the words 'right to strike' must be mentioned by name somewhere in the text of C87.[49]. However, IOE's arguments in its Written Statement are plainly more thorough and sophisticated than that single argument.[50] Whilst the absence of reference to those words *anywhere* in C87 is plainly relevant context, this is only one argument made by the IOE regarding the contextual matrix.[51] The IOE's case rests on ten arguments put forward in its Written Statement.[52]

39. The ITUC's Written Statement considers Article 3 of C87 at paragraph 4.37. Its argument is logically flawed and, consequentially, unconvincing. The ITUC posits that because the other rights specified in Article 3 are *consistent* with a right to strike, this means that Article 3 must include a right to strike. But just because *"the right of a trade union to organise its administration"* can be broad enough to allow it to *"'administer' strikes"*, this does not mean it produces a right to strike. The logical flaw is obvious: X can be consistent with Y without entailing it - not least because the inverse (not X) can be equally consistent with Y. The ITUC adopts this logical fallacy instead of actually interrogating the conceptual thread running through Article 3, as the IOE has done. That is presumably because the conceptual thread of Article 3 supports the IOE's case,[53] it is about an organisation being able to exist as a coherent and defined body, and to then order and govern itself – meaning 'activities' relates to activities for and amongst members, rather than the propagation of social conflict through strikes.

40. Similarly, the ITUC's argument that it is at odds with the broad framing of Article 3 to mention specific activities such as strikes is unconvincing. [54] However, the unqualified breadth of those rights is precisely a fact that means it is unlikely that 'activities' encompasses strike: since the right to strike necessarily interferes with the rights of others, it is unreasonable to suggest that strike rights would be included without any qualification or restriction on that right. Indeed, the strict language against *restricting* the rights in

[49] *See also* Id, para 4.35.
[50] *See* Written Statement of IOE, paras. 143-158, 169-175.
[51] *See* Id, paras. 150-151.
[52] *See* Id, paras. 143-158, 169-175.
[53] *See* Id, paras. 145-149.
[54] *See* Written Statement of ITUC, para 4.38.

Article 3(1) found in Article 3(2)[55] makes it all the more *unlikely* that Article 3(1) extends to strikes.

41. Further, the other rights in Article 3 regard the right of organisations to cohere and govern themselves; and are themselves hard won rights, which are meaningful and effective, without introducing a right to strike into Article 3 by the back door.

42. Written Statements by certain other parties suggest that, whilst a right to strike is protected in C87, it is not without limits; and the definition of these limits is set at the national level. Germany, for instance, considers that "*certain restrictions of the freedom of association that are based on conflicting fundamental rights of third parties and on other rights of constitutional rank in the national context are in principle possible*".[56] There is an internal inconsistency in such a submission, which is of paramount importance. The assumption of a right to strike in C87 that is absolute, but which at the same time can be freely limited according to national preferences and circumstances, has no principled contour and is unreasonable. As it would not be permissible to interpret C87 unreasonably, due to the requirement of good faith interpretation, this militates against C87 including a right to strike. As set out below, regional courts apply a substantial margin of appreciation to their response to strikes, leaving aside, for now, the fact that many do not recognise a right to strike *per se*. This is revealing not only in relation to lack of agreement among States parties to C87, and lack of subsequent practice indicating agreement, for the purposes of Article 31(2),[57] but also to the issues under Article 31(1).

43. Similarly, the ITUC's reasoning is unconvincing when it examines the significance of the other Articles in C87 in its analysis of 'context'. [58] The ITUC notes that these other Articles relate to the autonomy that a workers' organisation should be given; but then assert that this must mean that C87 *"necessarily entails"* a right to strike in appropriate circumstances – presumably because *some* autonomous workers organisations may wish to strike. The ITUC ignore that, in fact, the clear context of C87 evident from the other Articles, is about the creation of basic and sequential *associational right*, regarding the ability of workers' and employers' organisations to order themselves and exist as coherent

[55] *See* Id, para 4.41.
[56] Written Statement of Germany, para 38.
[57] *See infra* section IV.B.1.(a).
[58] *See* Written Statement of ITUC, paras. 4.39-4.46.

entities, and conduct activities for and amongst members. The ITUC provides no meaningful analysis to dispute the IOE's position as set out in its Written Statement.[59]

44. Finally, the ITUC makes an argument by reference to *"the qualifier 'syndical(e)'"*. However, this takes matters no further. As before, their argument proceeds by begging the question. They state *"this object* [to organise activities and formulate programmes] *aligns with and is indeed fulfilled by means of 'grêve'…"* This is, firstly, a repetition of the logical fallacy that because X aligns with Y, it in fact entails it. Secondly, it is mere assertion, which disregards the fact that there are many forms of collective action short of strike action and that the two are distinct. Finally, despite the use of the word '*syndicale'* in the French version of C87, the text of the Convention leaves no doubt as to its intention to guarantee the freedom of association of workers and employers in exactly the same way, i.e. without giving one more or stronger rights than the other. Strikes are not a form of action for employers, suggesting strikes are not therefore included in *"activities"* in Article 3.

(c) Object and purpose

45. As will already be clear from the above, there is an axiomatic mistake made by the ITUC in its analysis of object and purpose. The ITUC assumes, and then repeatedly asserts, that strike is (in effect) the sole, necessary and uncontroversial method of improving conditions of labour.

i. In fact, as already set out, strike is not the sole such means, let alone a definitive or unambiguous means of doing so.

ii. Indeed, the broader social conflict propagated through strikes explains precisely why it is a right that requires plain qualification and regulation, which is found nowhere in C87.

iii. Workers' organizations that do not have a right to strike nevertheless have other effective means to draw attention to their members' needs and to defend their interests, e.g. manifestations, marches, protests, media campaigns, petitions, recommendations to vote or not to vote for certain parties, medication and arbitration

[59] *See* Written Statement of IOE, para 155.

etc.[60] In addition, they often also provide services to defend the interests of individual members, such as legal advice in disputes with their employers. Indeed, these measures are even widely used by workers' organisations that *do* have a right to strike, corroborating that they are relevant and effective means of action *per se*. Neither do all employers' organizations have corresponding rights to industrial action (lock-out) under C87, yet they still have a *raison d'être*.

46. These defects in the ITUC analysis are compounded by its wholesale failure to consider the Court's interpretive task by reference to tripartism and standard-setting,[61] which is the mechanism by which constituent elements of the ILO create international labour standards and resolve issues of controversy.

47. Several submissions by States support the IOE's position that the right to strike was not part of the object and purpose of C87.

    i. The Government of Costa Rica noted that "*there is no indication that the object and purpose could have been more specific and included a regulation on the right to strike*".[62]

    ii. The Government of Japan went a step further by correctly pointing out *(inter alia)* that "*the notion of the right to strike had already existed at the time of the adoption of the Convention in 1948.*"[63] It argued that if the object and purpose of C87 was to include the right to strike, the drafters would have included it.

    iii. The Government of UK argued that "*the treaty's text as a whole is tightly focused on freedom of association and the right to organise […] it cannot be construed from the preamble of the Convention that it protects the right to strike*."[64]

(d) Good faith and effectiveness

48. The position adopted by the ITUC is extreme: that if C87 does not contain a right to strike, this *"would deprive the convention of <u>any</u> practical effect"* (emphasis added).[65] This is a clear indication that the ITUC disregards the significance of the hard-won associational

[60] Written Statement of ITUC, para 4.25-4.26.
[61] *See* Written Statement of IOE, paras. 165-167.
[62] Written Statement of Costa Rica, p. 5.
[63] Written Statement of Japan, para 69.
[64] Written Statement of UK, para 28.
[65] Written Statement of ITUC, para 4.59.

rights that C87 does provide. Without a right to strike, the right of workers' and employers' organisations to organise their activities and formulate plans is not *"deprived of all practical effect"*. To the contrary, workers (and employers) still enjoy C87's substantial and hard-won associational rights.[66]

49. The ITUC repeats this defective argument, on C87 lacking any practical effect, absent a right to strike.[67] For example, firstly, at paragraph 4.63 the ITUC begs the question by presupposing that the right to strike is an 'appropriate effect' of C87. The ITUC ignores the reality that an unqualified right to strike (as the logical force of the ITUC's argument produces, as recognised by ITUC itself at paragraph 4.64) is not an appropriate effect. Rather, it is an unreasonable one. Second, at paragraph 4.66, the ITUC again repeats the heavily contested assertion that *"workers' organisations would have <u>no</u> leverage to defend the economic and social interests of workers"* (emphasis added), as if this was a fact.[68]

50. It is worth emphasising that in the context of the ILO, as an international organisation grounded on tripartism, the task of good faith interpretation requires interpreting in fidelity with the principles of tripartite involvement and standard setting. The history of this dispute[69] is CEACR's unilateral development of a comprehensive and integrated set of rules on the right to strike which would have required a broad tripartite discussion, as it directly affects relations between employers, workers and their organisations. The IOE's view that if the CEACR had considered that there was a regulatory gap in ILO standards in relation to the right to strike or the right to industrial action more broadly, the appropriate resolution existed through the ILO's tripartite processes – rather than introduction by the CEACR into C87 a meaning the parties did not intend.[70]

51. Indonesia's Written Statement on this issue is powerful: "*It is important to preserve the social dialogue within the ILO, especially in the ILC where all member states are present…[T]he tripartite process within the ILC serves as the essential mechanism to adopt the international labour standard…efforts to resolve the dispute through social*

[66] Id, para 4.62; *see also* Written Statement of IOE, paras. 145-149, 158, 160-167; *see also infra* paras 154-155.
[67] *See* Written Statement of ITUC, paras. 4.63-4.67.
[68] *See supra* para 48.
[69] *See* Written Statement of IOE, paras. 94-121.
[70] Written Statement of IOE, para 165. There is a simple response to any suggestion that the CEACR merely relied on the existing 'jurisprudence' of the tripartite CFA. The CFA is not representative of the ILO constituency and therefore its views cannot be considered a fair reflection of the views of the ILO constituency. It is difficult to believe that the CEACR (and the Office) was unaware of all this.

dialogue in the ILC have not been properly carried out…"[71] In this context (where Article 5 of VCLT is plainly engaged), for the Court to sanction the back-door introduction of a right manufactured by the CEACR, in disregard of the tripartite system that exist within the ILO, would be a particular affront to the requirements of good faith interpretation.

2. Article 31(3): Factors for consideration "together with the context": "subsequent agreement", "subsequent practice" and "any relevant rules of international law

52. Due consideration of subsequent agreement, subsequent practice and any relevant rules of international law, indicate that C87 does not include a right to strike. Four observations are made at the outset.

53. First, the only relevant examples of subsequent agreement and practice are those which relate to *C87, and whether it protects/includes a right to strike*. The core issue to be resolved by the Court is <u>not</u> concerned with the existence and recognition of a right to strike *as such*. Many of the submissions made in support of the proposition that C87 includes a right to strike do not actually relate to C87, but rather to the question of a right to strike generally. Even if there was such a right to strike for a particular person or persons in a given circumstance, whether on the basis of national law, an international treaty, or otherwise, it does not thereby become the content of C87. The dispute is <u>exclusively</u> about a right to strike <u>in C87</u>, whether States parties to C87 are bound to respect it, and whether ILO supervisory bodies are thus competent to supervise implementation of a right to strike for States parties to C87.

54. In its 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018' the International Law Commission noted that what is relevant is subsequent agreements and subsequent practice which are "*objective evidence of the understanding of the parties <u>as to the meaning of the treaty</u>*" (emphasis added).[72] Their status as "*authentic means of interpretation <u>of the treaty</u>*" (emphasis added) depend upon their capacity to indicate the "*common will of the parties, which underlies the treaty*".[73]

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[71] Written Statement of Indonesia, paras. 31-32.
[72] International Law Commission, '<u>Draft Conclusions on Subsequent Agreements and Subsequent Practice to the interpretation of treaties</u>', A/73/10, 2018, Draft conclusion 3.
[73] Commentary to draft conclusion 3(3). *See also* Commentary to draft conclusion 4(1) ('definition of "subsequent agreement" under article 31, paragraph 3 (a))', of which paragraph 13 states (emphasis added): "(13) A subsequent

55. Draft conclusion 6(1) states that "*[t]he identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty*". Further, "*subsequent agreements under article 31, paragraph 3 (a), must be 'regarding the interpretation of the treaty or the application of its provisions' and subsequent practice under article 31, paragraph 3 (b), must be 'in the application of the treaty' and thereby establish an agreement 'regarding its interpretation'*".[74]

56. Similarly, draft conclusion 6(3) states that "*[t]he identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty*" (emphasis added). The commentary in relation to this states that "*in identifying subsequent practice under Article 32, the interpreter is required to determine whether, in particular, conduct by one or more parties is in the application of the treaty*."[75]

57. The question noted by the ILO of whether "*the right to strike is an internationally recognized workers' right, or, as some would suggest, that it has acquired the status of customary international law*"[76] therefore does not address the issue before the Court. Indeed, the ILO goes on to observe "*[y]et, that is not necessarily a determining factor in answering the question at hand, which essentially pertains to the legal basis for the supervision of the application of Convention No . 87 based on the premise that it includes the right to strike*". This obvious observation should be particularly emphasized as it alone undermines a large amount of the submissions made to the Court.

58. Furthermore, the fact that the issue before the Court is that of interpretation of C87 specifically, shows that the ILO is wrong to assert that the question before the Court "*goes to the heart of freedom of association, an enabling human right that not only permeates*

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agreement under article 31, paragraph 3 (a), is an agreement "regarding" the interpretation of the treaty or the application of its provisions. The parties must therefore intend, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied." (citing WTO Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June, paras. 366–378, in particular para. 372; e.g. agreements which are arrived at under a clause in a bilateral tax treaty mirroring article 25, paragraph 3, of the Organization for Economic Cooperation and Development Model Tax Convention; Linderfalk, *On the Interpretation of Treaties*, pp. 164 *et seq*.

[74] Draft conclusion 6, para 1 and Commentary thereto, para (3); *see also* Draft conclusion 4, paras. 1–3, and Commentary thereto, paras. 17–20.

[75] Commentary to draft conclusion 6(3), para 24; referring to A/CN.4/671, paras. 3–5.

[76] Written Statement of ILO, para 416.

the entire fabric of international labour standards but is also a primal aspect of a multitude of international human rights instruments".[77] The Employers' Group in the ILO has explicitly expressed its recognition of the right to take industrial action by workers and employers in support of their legitimate industrial interests.[78] They also recognize entirely that the national law and practice of many countries includes a right to strike (albeit with different scope, conditions and limits) and that certain international and regional instruments explicitly or in the interpretation of the competent regional and international courts, recognize a right to strike. However, the Employers' Group does not recognise that C87 protects the right to strike.

59. Second, the only examples of subsequent agreement and practice which are relevant to Article 31(3) are those which show the agreement of *all* States parties to C87. The case in favour of the proposition that C87 contains a right to strike depends upon ignoring this requirement. The commentary to International Law Comission's draft conclusion 4(1) notes that "*[t]he term "the parties" indicates that such an agreement must be reached between all the parties to the treaty*" (emphasis added). Similarly as to subsequent practice, paragraph 16 of the commentary to draft conclusion 4(2) makes clear that this is limited to that establishing *the agreement of all the parties to the treaty.* What is required is "*firm agreement*" supported by all States parties on the correct interpretation of the treaty.[79]

60. It is only if subsequent agreement or practice indicates agreement between *all* states parties to C87 that it must be considered as regards the content of the convention. As per the commentary to the International Law Commission's draft conclusion 2(1), paragraph 4, Article 32 contains a list of supplementary means of interpretation, which can include subsequent practice in the application of the treaty not, establishing agreement of all parties to the treaty. However, the use of the discretionary phrase "*recourse may be had*" in Article 32 shows clearly differential treatment compared to the mandatory character of "*shall be taken into account*" in respect of Article 31(3) subsequent agreements and subsequent practice. That having been said, it is also vital not to overlook the principle

[77] Id, para 13.
[78] ILO, 'Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in Relation to the Right to Strike and the Modalities and Practices of Strike Action at National Level' (March 2015) **[ILO Dossier Document No. 106]**.
[79] *See* Richard Gardiner, *Treaty Interpretation* (2nd ed, OUP 2015), p. 244; *Whaling in the Antarctic (Australia v. Japan; New Zealand Intervening)*, Judgment, ICJ Reports 2014, p. 257, para 83; *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, Award, 29 June 1990, 105 ILR 1, pp. 25, 53.

that even if subsequent agreement and/or subsequent practice under Article 31 is established, that is not determinative of the content of the treaty concerned.[80]

61. The commentary to draft conclusion 4, paragraph 1 ('definition of "subsequent agreement" under Article 31, paragraph 3 (a)') sets out the difference between the concepts of subsequent agreement and subsequent practice, but makes clear that each is material to Article 31 only if it establishes agreement between all States parties.[81] Further The commentary to draft conclusion 10(1also emphasises the critical importance of "*the agreement between the parties*"[82] regarding the interpretation of the treaty when assessing whether a subsequent agreement or practice may be used as an authentic means of interpretation under ArticleS 31(a) and (b).[83]

62. Third, the views of the CFA and CEACR are incapable of indicating the agreement or practice of States parties to C87.[84] This point merits particular emphasis as the observations of those seeking to persuade the Court that C87 contains a right to strike are

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[80] *See infra* para 146.

[81] *See* Commentary to draft conclusion 4, para 1 at sub-paras 9-11: *(9) […] a "subsequent agreement between the parties" ipso facto has the effect of constituting an authentic means of interpretation of the treaty, whereas a "subsequent practice" only has this effect if its different elements, taken together, show "the common understanding of the parties as to the meaning of the terms". (10) Subsequent agreements and subsequent practice under article 31, paragraph 3, are hence distinguished based on whether an agreement of the parties can be identified as such, in a common act or undertaking, or whether it is necessary to identify an agreement through separate acts that in combination demonstrate a common position. A "subsequent agreement" under article 31, paragraph 3 (a), must therefore be "reached" and presupposes a deliberate common act or undertaking by the parties, even if it consists of individual acts by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions. (11) "Subsequent practice" under article 31, paragraph 3 (b), on the other hand, encompasses all (other) relevant forms of subsequent conduct by the parties to a treaty that contribute to the identification of an agreement, or "understanding", of the parties regarding the interpretation of the treaty. It is, however, possible that "practice" and "agreement" coincide in specific cases and cannot be distinguished. This explains why the term "subsequent practice" is sometimes used in a more general sense, which encompasses both means of interpretation that are referred to in article 31, paragraph 3 (a) and (b). See also Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 113, pp. 127–128, para 53: in this case, even an explicit subsequent verbal agreement was characterized by one of the parties as "subsequent practice".

[82] Commentary to draft conclusion 10, para 1, referring to Crawford, "*A consensualist interpretation of article 31 (3) …*" p. 30*"There is no reason to think that the word 'agreement' in para. (b) has any different meaning as compared to the meaning it has in para. (a)."*

[83] Commentary to draft conclusion 10(1), citing the *case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other,* Award of 16 May 1980, UNRIAA, vol. XIX, part III, pp. 67–145, pp. 103– 104; see also *WTO Appellate Body Report, European Communities — Customs Classification of Certain Computer Equipment,* WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, 22 June 1998, para 95.

[84] This has prior, distinct relevance from the observations below that there are in any event many examples of rejection of the views of the CFA and CEACR by States parties.

replete with reliance upon the views of the CFA and the CEACR in a number of different contexts.

63. As the International Law Commission has made clear that, "*[s]ubsequent agreements and subsequent practice […] are not to be confused with interpretations of treaties by international courts, tribunals or expert treaty bodies in specific cases*", precisely because the latter are not "*expressions of the understanding of the treaty by the parties themselves*", and they are relevant only if they "*reflect, give rise to or refer to such subsequent agreements and practice of the parties themselves*".[85] Moreover, "*[a] pronouncement of an expert treaty body cannot as such constitute a subsequent agreement or subsequent practice under article 31 […], since this provision requires an agreement of the parties or subsequent practice of the parties that establishes their agreement regarding the interpretation of the treaty*".[86] The commentary goes on to note that "*[w]hereas a pronouncement of an expert treaty body can, in principle, give rise to a subsequent agreement or a subsequent practice by the parties […] this result is not easily achieved in practice. Most treaties that establish expert treaty bodies at the universal level have many parties. It will often be difficult to establish that all parties have accepted, explicitly or implicitly, that a particular pronouncement of an expert treaty body expresses a particular interpreation of the treaty.*" [87]

64. Whilst draft conclusion 13 does not apply to bodies that are organs of an international organization,[88] the International Law Comission makes clear that the exclusion was made only for reasons of consistency, because the draft conclusions were "*not focused on the relevance of the practice of international organizations for the application of the rules of interpretation of the Vienna Convention except as far as the interpretation of their constituent instruments is concerned*".[89] The International Law Commission goes on to observe that the substance of conclusion 13 may, therefore apply, *mutatis mutandis*, to pronouncements of independent expert bodies that are organs of international

[85] Commentary to draft conclusion 3, para 11
[86] Commentary to draft conclusion 13, para 9.
[87] Id, para 12.
[88] Id, para 4.
[89] Id, referring to draft conclusion 12, para 3.

organizations,[90] and also notes that the CEACR in particular is an "*example of an expert body that is an organ of an international organization*".[91]

65. The question, then, is whether agreement between all States parties is in fact established as "*the practice of, or within, an organization is in principle attributable to the organization itself and does not necessarily demonstrate the specific concurrence of the individual parties to the treaty setting it up*".[92] In the *Whaling in the Antarctic* case, the International Court of Justice referred to (non-binding) recommendations of the International Whaling Commission, and held as follows:

> *"Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties."*[93]

66. In applying the principles set out above, it is also vital to be clear about the nature and mandate of the CEACR and the CFA. In particular: the CEACR is comprised of "*20 eminent jurists appointed by the Governing Body for three-year terms*",[94] who are *not* State representatives. Its role is to "*provide an impartial and technical evaluation of the application of international labour standards in ILO member States*."[95] It is *not* to make general pronouncements on the correct interpretation of the Conventions.

    i. The CEACR's General Survey and Annual Report reflect the views of the members of the CEACR only and are not approved by ILO's tripartite bodies. The content of the CEACR's surveys is not negotiated or agreed upon by States parties to the Convention, and there have been significant objections to the opinions expressed by the Experts.

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[90] Commentary to draft conclusion 13, para 4.
[91] Commentary to draft conclusion 13, fn 602.
[92] Gardiner, *Treaty Interpretation* (2nd ed, 2015), p. 280.
[93] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, ICJ Reports 2014, p. 257, para 83.
[94] ILO, ILO Supervisory system - Committee of Experts on the Application of Conventions and Recommendations (CEACR).
[95] Ibid.

ii. The CFA is composed of nine regular members, participating in "*a personal capacity*" but drawn from the Government, Employer and Worker groups of the Governing Body.[96] It "*examines infringements of the principles of freedom of association and the effetective recognition of the right to collective bargaining enshrined in the Constitution of the International Organisation (Preamble), in the Declaration of Philadelphia and as expressed by 1970 Resolution*".[97] The CFA's function is "limited to examining the allegations submitted to it" i.e. "not to formulate general conclusions concerning the trade union situation in particular countries on the basis of vague general statements, but simply to evaluate specific allegations". [98]

67. As several submissions pointed out, neither the CEACR nor the CFA have the mandate to interpret Conventions:

- UK: "*the United Kingdom does not consider that the Committees are authoritative interpreters of Convention No. 87; their competence is limited to technical, non-binding pronouncements*."[99] Furthermore, "*[a]s the mandate of the CFA makes it clear that its determinations are only of limited application, silence and inaction by other States cannot be treated as significant*."[100]

- Switzerland: *"Les conclusions sur les accords et la pratique ultérieurs ne s'appliquent pas aux organes ayant le statut d'organe d'une organisation internationale"*[101] "*Les décisions adoptées par la CEA[C]R ne constituent, par conséquent, pas une forme de pratique des États qui agiraient collectivement dans ce cadre*"[102] "*[CEACR] observations ne sont pas contraignantes et elle n'a pas reçu le mandat d'interpréter les conventions*." [103] "*Le CLS n'a, par conséquent, pas le mandat pour interpréter la convention n° 87 ou pour définir de manière générale les modalités du droit de grève*."[104]

- Norway: "*[T]he interpretations expressed by the CEACR with regard to the question of a right to strike has not been consistently endorsed by all Members of the ILO or*

[96] ILO, 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, 2021 **[ILO Dossier Document No. 90]**, para 7.
[97] Id, para 14.
[98] ILO, 'Freedom of Association - Compilation of decisions of the Committee on Freedom of Association', 2018, para 1 **[ILO Dossier Document No. 282]**.
[99] Written Statement of UK, para 37.
[100] Id, para 52.
[101] Exposé écrit de la Confédération Suisse, para 62 "*The conclusions on subsequent agreements do not apply to bodies having the status of organs of an international organisations*."
[102] Id, para 63: (English translation) "*CEACR comments cannot constitute a form of state practice acting collectively within this framework.*"
[103] Id, para 116: (English translation) "*Its [CEACR] observations are not binding and it has no mandate to interpret the conventions*."
[104] Id, paras. 111: (English translation) "*CFA does not have the mandate to interpret C87 or to generally define the modalities of the right to strike.*"

parties to the Convention."[105] "*Statements and recommendations issued by CEACR are not legally binding and consequently, neither governments nor the Court are required to model their interpretation of the Convention on that of the CEACR*."[106]

68. It is therefore absolutely clear that the pronouncements of the CEACR and the CFA cannot constitute subsequent agreement for the purposes of Article 31(3). Nor can they indicate or contribute to subsequent practice in the application of C87 pursuant to Article 31(3), in the absence of explicit agreement by the States parties.

69. Fourth, even if subsequent agreement and/or subsequent practice under Article 31 is established, it is *not* determinative of the content of the treaty concerned. As per the International Law Commission's draft conclusion 9(1), "*[t]he weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, inter alia, on its clarity and specificity.*" In the case concerning the *Maritime Dispute (Peru v. Chile)*, the Court prioritised practice that was closer to the date of entry into force.[107] Furthermore, the interpretative weight of subsequent agreements or practice in relation to other means of interpretation also depends on their clarity and specificity in relation to the treaty concerned.[108] This is confirmed, for example, by decisions of the International Court of Justice, arbitral awards and reports of the WTO Panels and Appellate Body.[109]

(a) Subsequent agreement

70. It is notable that the ITUC makes no attempt to claim that there is any subsequent agreement, for the purposes of Article 31(3), that C87 contains a right to strike. As previously submitted the IOE maintains, there is no evidence whatsoever of any "*subsequent agreement*" for the purposes of Article 31(3)(a) amongst all 158 States parties to C87 that a right to strike is protected in C87.

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[105] Written Statement of Norway, para 11.
[106] Id, para 22.
[107] *Maritime Dispute (Peru v. Chile)*, *Judgment*, *I.C.J. Reports 2014*, p. 3, at p. 50, para 126.
[108] Id, cited in Commentary to draft conclusion 9(1), para 3.
[109] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 55, para 38; *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, p. 231, at p. 259, para 74; WTO Panel Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, WTO Appellate Body Report, *United States — Subsidies on Upland Cotton (US — Upland Cotton)*, WT/DS267/AB/R, adopted 21 March 2005, para 625.

71. Several submissions make reference to other agreements (including labour cooperation agreements and free trade agreements, for example) which make reference to a right to strike, but without any reference to C87.[110]

72. Those who seek to assert that "*subsequent agreement*" for the purposes of Article 31(3)(a) does establish a right to strike *in C87* rely heavily upon the General Surveys of the CEACR from 1959 onwards;[111] and "*decisions of the CFA since 1952*".[112] The principal subsequent ILO Convention exhorted upon in the Written Statements is the Abolition of Forced Labour Convention, 1957 (No. 105).[113] General assertions are also made in relation to "*resolutions adopted in different contexts at the ILO*" which "*made express reference to the right to strike*",[114] but in practical reality they refer only to the following:

    i. The Recommendation concerning Voluntary Conciliation and Arbitration, 1950 (No. 92) (and paragraph 7 thereof in particular);[115]

    ii. The Resolution Concerning Trade Union Rights and Their Relation to Civil Liberties, 1970;[116]

    iii. The Resoution concerning the Policy of Colonial Oppression, Racial Discrimination and Violation of Trade Union Rights, 1972.[117]

73. Convention 105 will be addressed first, followed by the documents emanating from the CFA and CEACR, and then ILO resolutions and recommendations.

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[110] *See for example*, Written Statement of Canada, para 11; Written Statement of Colombia, para 3.50; Written Statement of OACPS, para. 32; Written Statement of ITUC, para 4.172.
[111] *See* Written Statement of Colombia, para 5.7; Written Statement of ITUC, para 4.83; Exposé Écrit de la République Française, para 93; Written Statement of Netherlands, paras 2.17 and 2.19; Written Statement of Republic of Vanuatu, 15 May 2024, paras 35-37.
[112] *See* Written Statement of Colombia, para 5.8; Written Statement of ITUC, para 4.78; Exposé Écrit de la République Française, para 94; Written Statement of Netherlands, paras 2.17-2.18; Written Statement of Vanuatu, para 36.
[113] Written Statement of Colombia, para 2.15.
[114] Id, citing ILC, 101st Session, 2012, General Survey, para 121.
[115] Written Statement of Australia, para. 44, referring to ILO, 34th Session of ILC, 1951, Record of Proceedings, pp. 451, 666; *see also* Written Statement of Colombia, paras. 2.15 and 3.6.
[116] Id, referring to ILO, 54th Session of ILC, 1970, Resolution concerning Trade Union Rights and Their Relation to Civil Liberties pp. 6-9 **[ILO Dossier Document No. 136]**.
[117] Id, referring to ILO, 57th Session of ILC, 1972, Resolution concerning the Policy of Colonial Oppression, Racial Discrimination and Violation of Trade Union Rights Pursued by Portugal in Angola, Mozambique and Guinea (Bissau) **[ILO Dossier Document No. 137]**.

The Abolition of Forced Labour Convention, 1957 (No. 105) ('C105')

74. C105 is irrelevant. As previous noted,[118] the only reference to "*strike*" in C105 is in Article 1, which simply prohibits certain types of punishment for participation in strikes.[119] As per the submissions of the IOE and Japan,[120] this clearly does not pre-suppose that the right to strike is guaranteed under C105, let alone under C87. ILC discussions giving a proper account of the content and context of C105 makes this absolutely clear.[121]

CFA and CEACR

75. Those who seek to persuade the Court that C87 entails a right to strike rely very heavily upon the views of the CFA and the CEACR. The Netherlands, for example, seeks to rely upon CFA, Report No. 2 (1952), Case No. 28 (UK-Jamaica)[122] and the CEACR's 1959 General Survey on Freedom of Association as subsequent agreements for the purposes of Article 31(3)(a) VCLT. Colombia refers to the CEACR in its General Surveys from 1959 to 2023,[123] and CFA decisions since 1952.[124]

76. As set out above, the views of the CFA and CEACR are incapable of indicating the agreement of states parties to C87.[125] Furthermore, States parties *have* made clear that they do not agree with the views expressed as to the right to strike and C87 in the content of the CEACR's surveys. In the CAS discussion of the 1994 and 2012 General Surveys, a number of Governments openly and comprehensively expressed their opposition to the CEACR observations and comments on the 'right to strike' in C87.[126]

77. It has been suggested that silence on behalf of States parties to C87 constitutes acceptance of CFA, Report No. 2 (1952), Case No. 28 (UK-Jamaica)[127] and the CEACR's 1959 General Survey on Freedom of Association. The Netherlands argues that such silence, as regards states ratifying C87 since the above-mentioned report of the CFA and the CEACR

[118] *See* Written Statement of IOE, para 187.
[119] ILO, Abolition of Forced Labour Convention (1957) **[ILO Dossier Document No. 122]**.
[120] Written Statement of Japan, para 30.
[121] ILC, Fourth Item on the Agenda: Force Labour, Report IV(1), 40th Session (1957), p. 8.
[122] Written Statement of Netherlands, para 2.20, referring to CFA, Report No. 2 (1952), Case No. 28 (UK-Jamaica), para 68.
[123] Written Statement of Colombia, para 5.7.
[124] Id, para 5.8.
[125] *See supra* paras. 66-68.
[126] *See* Written Statement of IOE, para 72.
[127] Written Statement of Netherlands, para 2.20, referring to CFA, Report No. 2 (1952), Case No. 28 (UK-Jamaica), para 68.

General Survey is made out because of the lack of "*any declarations rejecting the right to strike as inherent in the Convention*". As regards those who ratified C87 prior thereto the Netherlands submits that acceptance by silence is apparent from a lack of subsequent "*declarations, reservations or objections indicating that they consider that the right to strike is not protected under the Convention*".

78. Likewise, ITUC's Statement adopts the unconvincing argument that many countries ratified C87 only after the CEACR presented its interpretations on the right to strike and therefore "*understood that the convention included a right to strike*".[128] But CEACR's 1959 General Survey refers to a 'right to strike' in only one paragraph and only in respect of public services.[129] Subsequently, the CEACR expanded its comments and observations on this matter to seven paragraphs in 1973, 25 paragraphs in 1983 and to a separate chapter in both 1994 and 2012.[130] In this regard:

    i. Whilst the International Law Commission's draft conclusion 10(2) notes that *"[s]ilence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction*", the commentary emphasises that *"[t]he relevance of silence or inaction […]depends to a large extent on the circumstances of the specific case*", and that *"[d]ecisions of international courts and tribunals demonstrate that acceptance of a practice by one or more parties by way of silence or inaction is not easily established*".[131] Here, reports of the CFA and the CEACR's General Surveys are not such as to warrant a response in order for a State Party to avoid becoming bound by them. The ICJ held, in the case concerning the *Temple of Preah Vihear*, that "*where it is clear that the circumstances were such as called for some reaction, within a reasonable period*", the State confronted with a certain subsequent conduct by another party "*must be held to have acquiesced*".[132]

    ii. The issue at hand does not arise from the conduct of another party. In the *Kasikili/Sedudu Island* case, the ICJ held that a State that did not react to the findings of a joint commission of experts, which had been entrusted by the parties to determine

[128] Written Statement of ITUC, pp. 91-92; Written Statement of South Africa, p. 16.
[129] ILC, Report III (Part IV), Report of the Committee of Experts on the Application of Conventions and Recommendations, 43rd Session (1959) pp. 101–129 **[ILO Dossier Document No. 232]**, p. 114, para 68.
[130] *See* Written Statement of IOE, Annex A.
[131] Commentary to draft conclusion 10(2), para 18.
[132] *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment of 15 June 1962, ICJ Reports 1962, p 23.

a particular factual situation with respect to a disputed matter, did not thereby provide a ground for the conclusion that an agreement had been reached with respect to the dispute.[133] As per the International Law Commission's draft conclusion 13, paragraph 3, "*[s]ilence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body*". Furthermore, the CEACR itself has regularly pointed out that its *"opinions and recommendations are non-binding"*.[134]

iii. Even if a response were warranted, as noted above, the views of the CFA and CEACR as to the question of whether there is a right to strike in C87 and/or their views as to the parameters of any such right, have been explicitly rejected by certain States parties.[135]

79. Australia's Written Submission refers to a 1948 ILO questionnaire circulated to States to facilitate discussion on the adoption of an instrument on freedom of association which included the following question: *"(c) Do you consider that it would be desirable to provide that the recognition of the right of association of public officials by international regulation should in no way prejudge the question of the right of such officials to strike?*". As acknowledged by Australia, "*three States' responses to the questionnaire call into question whether the right to strike is protected under Convention 87 in general*".[136]

ILC resolutions

80. It is argued by some that "*resolutions adopted in different contexts at the ILO*" made express reference to the right to strike citing ILC, 101st Session, 2012, General Survey, paragraph 121, and that subsequent ILC resolutions could amount to subsequent agreements.[137] These submissions should be rejected. None of these resolutions contain a clear statement that the right to strike is protected in C87, which makes it obvious that they can in no way amount to the requisite "*firm agreement*" between all States parties on this issue. Furthermore, a decision of Conferences of States Parties can evince subsequent

[133] *Case concerning Kasikili/Sedudu Island (Botswana v Namibia)*, Judgment, ICJ Reports 1999, pp. 1089–1091, paras. 65–68.
[134] ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution): General Report and observations concerning particular countries, Part I, para. 30.
[135] *See* paras 67, 68,77.
[136] Written Statement of Australia, para 90.
[137] Id, paras 42-45; Written Statement of Colombia, paras. 2.15 and 3.6.

agreement under Article 31(3)(a) *only* if it is adopted by a unanimous vote, in which all parties participate.[138] As set out below, none of the resolutions and recommendations that have been proferred as indicative of subsequent agreement that C87 contains or entails a right to strike were adopted unanimously:

i. As to the Voluntary Conciliation and Arbitration Recommendation (No. 92), 1951, there were two abstentions.[139] In any event, the only provision to make any reference to a right to strike is paragraph 7, which states that "*[n]o provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike*".[140] The purpose of this provision is clearly not concerned with the question of whether such a right is protected by C87, which is not mentioned at all, rather it is to make clear that it is not intended to represent agreement about the extent of any right to strike. Furthermore, it is apparent from the negotiations that led to the Recommendation that paragraphs 4 and 6 were viewed as diminishing any right to strike.[141] Paragraph 7 (following those provisions) does no more than to preserve the *status quo*.

ii. As to the Resolution concerning the Policy of Colonial Oppression, Racial Discrimination and Violation of Trade Union Rights, 1972,[142] as previously noted by the IOE there were a number of absentions.[143]

iii. As to the Resolution concerning Trade Union Rights and Their Relation to Civil Liberties,[144] there were 84 abstentions, thus amounting to evidence of a *lack* of subsequent agreement. During the discussion, various States pointed out that *"while the right to strike was provided for in certain instruments adopted by other international organisations,* - such as the Covenant on Economic, Social and Cultural

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[138] This position is shared by the UK Government: *see* Written Statement of UK, para 41.
[139] ILC, Record of Proceedings, 1951, pp. 451, 666.
[140] ILO, Voluntary Conciliation and Arbitration Recommendation (No. 92) **[ILO Dossier Document No. 126]**.
[141] ILC, I. Collective Agreement, II. Voluntary Conciliation and Arbitration, Report V(2), 34th Session (1951), p 26. "*The Polish Government proposes to eliminate the provisions concerning the encouragement to the workers to abstain from strikes and lockouts during the process of conciliation or arbitration. Such obligations have been imposed on the workers in numerous capitalist countries, colonial or semi-colonial. Experience shows that these restrictions on the right to strike result in the suppression of that right, of which the free exercise constitutes a fundamental guarantee of social progress and trade union freedom. In encouraging such restrictions of the right to strike, the proposals of the Office are unsuitable and should be eliminated*."
[142] ILO, 57th Session of ILC, 1972, Resolution concerning the Policy of Colonial Oppression, Racial Discrimination and Violation of Trade Union Rights Pursued by Portugal in Angola, Mozambique and Guinea (Bissau) **[ILO Dossier Document No. 137]**.
[143] *See* ILC, Record of Proceedings, 1972, p 634, para 40 (Canada), para 41 (Australia), para 42 (Türkiye), para 43 (New Zealand).
[144] ILO, 54th Session of ILC, 1970, Resolution concerning Trade Union Rights and Their Relation to Civil Liberties pp. 6-9 **[ILO Dossier Document No. 136]**.

Rights and the European Social Charter - *no ILO instrument dealt with this right and the adoption of standards on this subject should be considered by the ILO."*(emphasis added)[145] Moreover, the *"Government member of Lebanon ... pointed out that, although there was no ILO instrument guaranteeing the right to strike in absolute terms, the Committee on Freedom of Association had in many instances examined this right, but always within the framework of national legislation."*[146]

Government Group Statement of 2015

81. Finally, some submissions argued that the 2015 Government Group Statement could be seen as a subsequent agreement by the c87 parties. However, the Government Group present at this meeting were only from members of the GB, not the ILC. This statement was drafted by only 32 States (compared to the 158 States that have ratified Convention No. 87), and therefore fails to establish the "*agreement of the parties*".[147] This point is further addressed below in the context of subsequent practice.[148]

(b) Subsequent practice

82. Like Article 31(3)(a), there are divergent views among the submissions on which practices constitute "*subsequent practices*" under Article 31(3)(b) of the VCLT.

Subsequent Practice by Governments

83. Many submissions recognise, as was set out in the IOE's Written Statement, that reports by governments of State parties to C87 sent to the CEACR under Article 22 of the ILO Constitution constitute a significant source for assessing whether there has been subsequent practice "*in the application of*" C87 "*which establishes the agreement of the parties*" regarding the interpretation of a right to strike in C87.

84. The ITUC claims that the subsequent practice of States parties to C87, expressed both collectively and individually, confirms that they "*have continuously understood the right to strike to be an inherent component of freedom of association*". It refers to the endorsement by certain State parties to C87 of CEACR's views on the right to strike. It

[145] ILC, Record of Proceedings, 1970, pp. 580, 583, paras. 12 and 25.
[146] ILC, Record of Proceedings, 1970, p. 590, para. 65.
[147] Written Statement of ITUC, paras 4.87-4.89; *cf.* Written Statement of UK, para 55; Written Statement of IOE, paras 214-215; Written Statement of Bangladesh, para 5.0; Written Statement of Business Africa, para 36.
[148] *See infra* para 88.

suggests that these views "*are widely accepted*" by the States Parties or examined by the CEACR "*most frequently without being challenged*". There are two answers to this.

85. First, even on the basis of ITUC's own Written Statement, the conditions for an interpretation of C87 based on Article 31(3)(b) are not fulfilled. As ITUC accepts, subsequent practice in the application of the treaty must establish "*the agreement of the parties*" regarding the interpretation of C87. Wide acceptance or absence of objections is, in most cases, insufficient. Rather, the subsequent practice in the application of C87 would have to demonstrate that "*a consensus between the parties regarding the interpretation of specific parts of the treaty might be deduced*", i.e. that all State parties to C87, at a particular point of time, have agreed that a right to strike, of a particular scope, is protected in C87. The ITUC has not even attempted to show that this very demanding threshold has been met.

86. Second, and in any event, while subsequent agreement by all State parties does not need to be explicit, explicit disagreement precludes an inference that an agreement has been reached. As to this:

    i. Six State parties (Japan, Switzerland, United Kingdo, Costa Rica, Bangladesh and Belize) have made it unequivocally clear in their submissions before this Court that they do not consider C87 to contain any right to strike.
    ii. Others who consider that C87 contains a right to strike *per se* accept that there is no agreement as to its scope.
    iii. As was set out in paragraph 216 and Annex F of the IOE's Written Submission, many states have expressly indicated that they do not consider C87 to contain a right to strike. Notably, Bangladesh, Japan and Switzerland continue in this litigation to adopt this same position and Algeria, Belarus, Cyprus, Nigeria, Sweden, Turkey, Uruguay and Venezuela, while they have not filed submissions, can accordingly be taken not to have changed their views. Colombia[149] and Germany[150] have previously made statements to the effect that C87 does not contain a right to strike, but now

[149] ILO, 'Agenda of the 81st (1994) Session of the Conference', GB.253/2/3 (Rev.), Appendix I.
[150] Note that between 1949 and 1990, Germany was divided into German Democratic Republic ('*Deutsche Demokratische Republik'*) and Federal Republic of Germany ('*Bundesrepublik Deutschland'*). In 1990, Germany reunified as the Federal Republic of Germany. The German Democratic Republic ceased to exist. The IOE mistakenly referred to the position of the German Democratic Republic as being the position of Germany in its Written Statement at para 216 (3) referring the statemenet made by German Democratic Republic in ILC, Record of Proceedings, 1986, pp. 31/33-32/33.

maintain that subsequent practice gives rise to one. This lack of a consistent approach within the same State parties over time is a yet further indication that the requisite consensus is lacking.

iv. Further to this, as Poland notes in its written submissions, in 1983 following the setting up of a Commission of Inquiry to examine alleged breaches of Article 3 of C87 by reason of limitations imposed on the right to strike in Poland and following the ensuing Report, Poland suspended its relationship with the ILO altogether and ignored the Report entirely. This is hardly an application of C87 consistent with acceptance of a right to strike being contained therein.

v. Finally, as the Table in Annex H of the IOE's Written Submission shows, a very large number of State parties of C87 have been the subject of CEACR comments but have not taken action to address what are said to be breaches of the right to strike contained in C87. That too is inconsistent with a consensus either that C87 contains a right to strike or as to its scope.

87. It follows that there is no endorsement by State parties to C87 of CEACR's views on any right to strike in C87 and therefore subsequent practice for the purposes of Article 31(3)(b).

88. Similarly, in relation to the views expressed at the 2015 Tripartite Meeting on Convention No. 87 in relation to the right to strike and the modalities and practices of strike action at national level, while the ITUC quotes individual governments of State parties that explicitly support the interpretation of a right to strike in C87, the ITUC fails to draw attention to the Statement of the Government Group in which it did not confirm that the right to strike is contained in C87 and instead expressed its readiness to discuss the right to strike in the appropriate forms, including through standard-setting, suggesting that the right to strike is not yet included in ILO standards. When the ITUC concludes that "*[n]o State expressed a different view at that tripartite meeting nor did they outside of the ILO*" to suggest that all States parties at the meeting supported the interpretation of a right to strike in C87, that is simply incorrect.

89. A number of submissions suggest that ratification of C87 by State parties after the CEACR first mentioned a right to strike in 1959 in its third General Survey on C87 constitutes subsequent state practice. That is wrong for three reasons.

i. First, ratification is not "*the application of the treaty*" and accordingly does not fall within the scope of Article 31(3)(b).

ii. Second, even if it could amount to the application of the treaty in principle, ratification of C87 is, without more, ambiguous as to whether it is indicative of acceptance of an otherwise contested interpretation of C87.

iii. Third, even if, contrary to the above, ratification was capable of amounting to subsequent practice in the application of the treaty, the suggestion that it could do so in respect of every State party that has ratified C87 since 1959 is absurd. In so far as it is suggested (as appears to be the case) that ratification amounts to an endorsement of the CEACR's interpretation – in 1994 – of a right to strike, it can only sensibly be the 41 States that have ratified since 1994, not the 122 States ratifying since 1959.

90. Notably, 37 of the 41 States who ratified C87 after the CEACR's interpretation of the claimed right to strike in its 1994 General Survey, have been the subject of Direct Requests and/or Observations by the CEACR, many over a large number of years. Looked at objectively, ratification without seeking to comply with the CEACR's views on the right to strike is a clear indicator of an absence of subsequent practice by even those States who have ratified after the fullest working out of the CEACR's opinion on what the claimed right to strike in C87 entails.

Subsequent Practice by National Courts

91. Several submissions provided jurisprudence from their national courts demonstrating that the right to strike is not absolute and is governed under their national law in accordance with each State's legal and cultural traditions. To take but one example, the obligation to maintain industrial peace ("*la paix du travail*") is a concept which, according to the submission on behalf of Switzerland, is "*est fondamentale dans l'ordre social suisse*." [151]

92. It is worthy of note that only national courts of 12 State parties, out of the 158 that have ratified C87, have made reference to CEACR's interpretations on the right to strike in their judicial decisions. This point was also recognised by Switzerland.[152] Therefore, there is

[151] Exposé écrit de la Confédération Suisse, para 87: (English translation) "*This obligation is fundamental in the Swiss social order*". *See also* paras 86-88.
[152] Id, para 67.

not widely accepted subsequent practice by national courts that C87 protects the right to strike, nor wide agreement on what the scope and limits are of such a right.

93. The ITUC provides a number of examples of decisions of national courts that support the interpretation of a right to strike in C87.[153] While such decisions could in principle be relevant under Article 31(3)(b), the ITUC's presentation of decisions is selective rather than being representative. It excludes from its presentation court decisions, that opposed the interpretation of a right to strike in C87.[154]

94. Quite apart from that, many of these court decisions relied on by the ITUC are based on the flawed perception of a consensus on the interpretation of the right to strike in the ILO in that they invoke views expressed by the CEACR and the CFA only. However, as noted above, the views of the CFA and CEACR are incapable of indicating the agreement of states parties to C87. It is striking that not one of the quoted court decisions refers to the CAS, which as part of the ILC, is the highest ILO standards supervisory body and which, as a tripartite committee, does not support the interpretation in question.

95. In light of the above, it cannot be said that there is any subsequent practice establishing the agreement of the parties which may be found in decisions on national courts supporting the proposition there is a right to strike contained in C87.

Subsequent Practice by Regional Courts

96. The Written Statements of many of those seeking to argue that C87 includes a right to strike assert that judicial decisions from regional treaty-based courts (namely the European Court of Human Rights ('ECtHR'), and the Inter-American Court of Human Rights ('IACtHR'), constitute subsequent practice. There has been no suggestion of any indication in the findings of the African Court on Human and Peoples' Rights of support for the proposition that C87 entails a right to strike.

97. In relation to these decisions, the IOE contends as follows:

    i. The decisions of regional courts including those noted above are not capable of indicating practice on behalf of those States which are not party to the treaties that they apply.

[153] Written Statement of ITUC, paras 4.133-4.153.
[154] *See, for example,* Supreme Court of Norway, Judgment of 10 April 1997 (Rt 1997/580).

ii. General reference to the case-law of regional human rights courts addressing the nature and extent of protection of strike action where the decisions make no reference to C87, cannot constitute practice as to the interpretation of C87 for the purposes of Article 31(3). As the International Law Commission in its commentary on draft conclusion 3 stated *"[s]ubsequent agreements and subsequent practice as authentic means of treaty interpretation are not to be confused with interpretations of treaties by international courts".* To the extent that decisions which do not cite C87 may assist the Court at all, it is purely in demonstrating the broad margin of appreciation accorded by regional courts to states as regards the scope and limitations upon any right to strike at implemented in domestic law. Indeed, this is also apparent in those decisions which do refer to C87. Indeed, the existence of this broad margin of appreciation in itself undermines the proposition that there may be agreement between the States parties to C87 as to the existence of a right to strike within C87, as it shows divergence in practice (and indeed recognition of the importance of such divergence. It also reinforces the observation above, in the context of Article 31(1), that the assumption of a right to strike in C87 that is absolute, but which at the same time can be freely limited according to national preferences and circumstances, has no principled contour and is unreasonable.

iii. Further, it is clear both from cases that mention C87 and from those which do not, that regional courts have often upheld the practices of States parties to C87, in placing restrictions on the right to strike, which would not conform to the CEACR guidelines. This reflects the broad margin of appreciation accorded to states as regards the regulation of strikes and is important given the centrality of the CEACR's views (and the CFA's views) to the case for those seeking to persuade the Court that C87 contains a right to strike.

iv. There are differences in the approach taken to the regulation of strikes between the various regional courts. They cannot, therefore, contribute to any indication of practice showing agreement between all C87 States parties under Article 31(3). Rather, the case law of the regional courts confirms the IOE's position that there is a diversity of State practice on the right to strike, and no agreement on the limits and the scope of such a right.

v. To the extent that regional courts have referred to the existence of a right to strike in connection with C87, in each and every example, relevant Court is simply referring to the views of the CEACR and/or CFA without making any finding that C87

includes a right to strike. The views of bodies such as the CEACR and/or CFA are of no consequence to the question of either subsequent agreement or subsequent practice for the purposes of C87. Whilst an international court may refer to the views of an expert treaty body, that in itself does nothing to change the status of the views of the CEACR and/or CFA as a matter of international law.[155] In actuality, there are examples, among the case law, of regional courts making explicit findings explicitly diverging from the views of the CEACR and/or CFA.

98. Because the issue before the Court is concerned only with the content of C87, only those decisions which refer thereto will be addressed in detail.

1) ECtHR: Federation of Offshore Worker's Trade Unions and Others v Norway, App no 38190/97 (27 June 2002)

99. This case concerned the lawfulness of a prohibition on strike by a Government ordinance providing for compulsory state arbitration. The Applicants were a federation of trade unions of offshore workers (the 'OFS'), and two members thereof. Negotiations concerning a new wage agreement failed and the OFS issued a strike warning. The Minister stated that he would recommend the Government to issue a provisional ordinance imposing compulsory arbitration of the dispute. The Applicant unsuccessfully sought to have the compulsory arbitration declared invalid. The Supreme Court held that the longstanding practice of using compulsory arbitration to settle labour disputes in respect of major societal interests did not contravene the general legal principles of constitutional law and that it was established that the right to strike was not unlimited.

100. The Court found the application inadmissible under Article 11, noting that restrictions imposed by a Contracting State on the exercise of the right to strike do not in themselves give rise to an issue under Article 11. It was noted that the limit upon the strike could reasonably be regarded as pursuing the legitimate aims of public safety, the protection of the rights and freedoms of others and the protection of health. As to whether the interference was necessary in a democratic society, the members of the OFS were able to exercise their right to strike as protected under Norwegian law.

[155] *See supra* paras 62-64.

101. The only reference to C87 in the decision arises in the context of its recapitulation of submissions made by the parties, and in its description of the decision of the impugned decision. As to the latter it was noted that

> *[…] the court did not find that Norway was required by international law to limit the use of compulsory arbitration in a labour dispute where such intervention was necessary in order to safeguard substantial societal interests. In any event, neither the Convention nor the International Covenant on Civil and Political Rights contained any detailed standards limiting State restrictions on the right to strike, such as those derived by the ILO bodies from the ILO Convention nos. 87 and 98 and the Philadelphia Declaration. Accordingly, it concluded that the provisional ordinance of 1 July 1994 was not at variance with Norway's obligations under international law. Thus, it was not necessary to examine the question of any conflict between Norway's obligations under international law and its domestic law.* (emphasis added)

102. The reference here is only to the fact of the views expressed by the CEACR and CFA: there is no acceptance that those views reflect the content of C87 as a matter of law.

103. With this decision, the ECtHR agreed with the opinion of the Norwegian Supreme Court, which had diverged from the CEACR interpretations regarding the requirements for compulsory arbitration.

104. The Norwegian Ministry of Labour and Social Affairs stated that the decision on compulsory arbitration in the labour dispute in question was within the framework of the Conventions that Norway had ratified.[156]

2) ECtHR: Demir and Baykara v. Turkey, App. no 34503/97 (12 November 2008)

105. This case concerned the annulment, with retrospective effect, of the collective agreement that a trade union had entered into following collective bargaining with the administration, and the prohibition on forming trade unions imposed on the applicants, municipal civil servants.

106. The Grand Chamber held that there had been a violation of Article 11 on account of the interference with the exercise of the applicants' right to form trade unions and a violation of Article 11 on account of the annulment *ex tunc* of the collective agreement. It noted in particular that the list of elements of the right of association was not finite but was "*subject*

[156] Norway, Supreme Court of Norway, Judgment of 10 April 1997 (Rt 1997/580).

to evolution depending on particular developments in labour relations". Having regard to "*developments in labour law, both international and national, and to the practice of Contracting States in such matters*", it held that "*the right to bargain collectively with the employer ha[d], in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11, it being understood that States remain[ed] free to organise their system so as, if appropriate, to grant special status to representative trade unions*". The Court noted that it had not been shown that the absolute prohibition on forming trade unions imposed on civil servants by Turkish law, met a pressing social need. It further noted that the right of civil servants to form and join trade unions was already recognised by instruments of international law, both universal and regional. It made explicit reference to C87 as securing, internationally, the right of public officials to form trade unions.

107. The ECtHR noted that its case-law as to the substance of the right of association enshrined in Article 11 was marked by two guiding principles: first, the Court took into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, allowing for its margin of appreciation; and second, the Court did not accept restrictions that affected the essential elements of trade-union freedom, without which that freedom would become devoid of substance. The following essential elements of the right of association could be established: the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek to persuade the employer to hear what it had to say on behalf of its members. However, there was no indication of a right to strike – a point that is of particular importance given the reference to C87 noted above. To the contrary, the case demonstrates the margin of appreciation accorded to states as regards determination of the lawfulness of strike action.

3) ECtHR: Enerji Yapi-Yol Sen v. Turkey, App. no. 68959/01 (1 April 2009)

108. This case concerned disciplinary measures taken against public-sector workers who had participated in a one-day national strike for the recognition of their right to collective agreement. In 1996 the Prime Minister's Public-Service Staff Directorate published a circular five days before industrial action planned by the Federation of Public-Sector Trade Unions to secure the right to a collective-bargaining agreement, stating, in particular, that "*information has been received concerning a possible gathering of civil servants for the purpose of strikes and go-slows, in violation of the prohibition in the*

legislation establishing civil servants' legal status" and that "*public-sector employees are to be prevented by their hierarchy from taking part in the above-mentioned meetings or protests*". The Court held that there had been a violation of Article 11 of the Convention. In so-doing (as the ILO notes in its request) the Court considered that "*[s]trike action, which enables a trade union to make its voice heard, is an important aspect for the members of a trade union in the protection of their interests*" and noted that "*the right to strike is recognized by the supervisory bodies of the International Labour Organization [...] as an intrinsic corollary of the right to organize protected by ILO Convention C87*".[157]

109. As with the *Federation of Offshore Worker's* case, the reference here is only to the fact of the views expressed by the CEACR and CFA: there is no acceptance that those views reflect the content of C87 as a matter of law.

4) ECtHR: National Union of Rail, Maritime and Transport Workers v. the United Kingdom, App. no. 31045/10 (8 April 2014)

110. The Applicant – a trade union with a membership of more than 80,000 persons employed in different sectors of the transport industry in the UK – complained about statutory restrictions on secondary industrial action (strike action against a different employer aimed at exerting indirect pressure on the employer involved in the industrial dispute). The Applicant union also complained that the rules of national law governing the organisation of a strike ballot were too strict and detailed. As a result, an employer had succeeded in obtaining an injunction restraining it from calling a strike over pay and conditions on the grounds that the applicant had failed to specify clearly enough the exact job descriptions of the workers concerned.

111. It is also relevant to note the Court's indication that it did not "*discern any need in the present case to determine whether the taking of industrial action should now be accorded the status of an essential element of the Article 11 guarantee*".[158]

112. The Court held that there had been no violation of Article 11 of the Convention (indeed that the Application was inadmissible as it was manifestly ill-founded), finding that there was nothing in the facts raised by the Applicant union to show that the general prohibition

[157] ECtHR, *Enerji Yapi-Yol Sen v. Turkey (2009)*, paras 17–24 **[ILO Dossier Document No. 318]**, para 24.
[158] ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (2014), paras 26–33, 75–78 and 83–106 **[ILO Dossier Document No. 319],** para 84.

on secondary strikes had had a disproportionate effect on their rights under Article 11. The UK had therefore remained within its margin. Furthermore, it did so having heard submissions from the Applicant relying upon the views of the CEACR,[159] and its criticisms of the UK that were material to the facts of the case. The Court, however, found against the Applicant having noted that

> "*76 […] Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention of "any relevant rules of international law applicable in relations between the parties", and in particular the rules concerning the international protection of human rights (see X v. Latvia [GC], no. 27853/09, § 92, ECHR 2013, with further references therein). In this regard, it is clear from the passages set out above (see paragraphs 26-37) that secondary action is recognised and protected as part of trade-union freedom under ILO Convention No. 87 and the European Social Charter. Although the Government have put a narrower construction on the positions adopted by the supervisory bodies that operate under these two instruments, these bodies have criticised the United Kingdom's ban on secondary action because of a perceived risk of abuse by employers, and have illustrated this with some examples. The Government further queried the authority, for the purposes of the Convention, to be attributed to the interpretative pronouncements of the expert bodies tasked with supervising compliance with these specialised international standards. […]*"

113. It is clear from this, as it is from the judgment as a whole, that the reference here is to the views of the CEACR, rather than any indication that C87 should be viewed as containing a right to strike. It is also clear that the ECtHR's findings disagreed with the CEACR, to the extent relevant to the case.

114. Finally, as to the margin of appreciation, the ECtHR noted as follows (citing "*among many authorities*", *Stummer v. Austria* [GC], app. no. 37452/02, para. 89):

> "*89 […] the subject matter in this case is certainly related to the social and economic strategy of the respondent State. In this regard the Court has usually allowed a wide margin of appreciation since, by virtue of their direct knowledge of their society and its needs, the national authorities, and in particular the democratically elected Parliaments, are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds and which legislative measures are best suited for the conditions in their country in order to implement the chosen social, economic or industrial policy […]*"

[159] Id, paras 26-33.

5) *ECtHR: Humpert and Others v. Germany, App. nos. 59433/18, 59477/18, 59481/18 and 59494/18 (14 December 2023)*

115. In this case, the Court found no violation of Article 11 where disciplinary sanctions had been imposed on teachers (with civil-servant status) for participating in strikes organised by their trade union (Trade Union for Education and Science), in breach of the constitutional ban on civil servants striking. They unsuccessfully challenged the sanctions before different administrative courts and the Federal Constitutional Court.

116. The Court noted that its case law had built up a non-exhaustive list of the essential elements of trade-union freedom without which that freedom would become devoid of substance, including the right to form and join a trade union, the prohibition of closed-shop agreements, the right for a trade union to seek to persuade the employer to hear what it had to say on behalf of its members, and the right to collective bargaining. The judgment made clear that the case law had not, to date, established that a prohibition on strikes affected an essential element of trade-union freedom under Article 11.

117. The Court noted that whilst strike action was a part of trade-union activity, it was not the only means by which trade unions and their members could protect the relevant occupational interests. The Court considered that the variety of different institutional safeguards, in their totality, enabled civil servants' trade unions and civil servants themselves to effectively defend the relevant occupational interests. The prohibition on strikes by civil servants was a general measure reflecting the balancing and weighing-up of different, potentially competing, constitutional interests, which did not render civil servants' trade-union freedom devoid of substance. The Court thus concluded that the measures taken against the Applicants did not exceed the margin of appreciation afforded to the respondent State and had been shown to be proportionate in the pursuit of important legitimate aims.

118. Two points are of importance here:

i. Again, the reference here is *only* to the fact of the views expressed by the CEACR and CFA[160] there is no acceptance that those views reflect the content of C87 as a matter of law.

ii. Furthermore, the ECtHR accepted the decision of the German Federal Constitutional Court, which diverged from the CEACR's interpretation of the right to strike in C87 (according to which the right to strike can be only restricted for public servants exercising authority in the name of the state), which was not the case for teachers with civil servant status in Germany. The ECtHR did not object to this restriction of the right to strike and did not find that it was incompatible with Article 11.[161] It is noted in this regard that the ECtHR did so, having noted that

> *"The Court, in defining the meaning of terms and notions in the text of the Convention [European Convention on Human Rights], can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. Any consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases [...].*

6) IACtHR: Advisory Opinion OC-27/21

119. The Advisory Opinion OC-27/21 of the Inter-American Court of Human Rights[162] responded to the Inter-American Commission on Human Rights' request that the IACtHR clarify the scope of States' obligations regarding trade union freedom in the Americas and how they should be applied from a gender-based perspective. The Inter-American Commission raised various questions in its consultation, which the Court, with methodological depth, reformulated into three questions, of which the relevant one for present purposes is the first:

> "*What is the scope of the right to organize, the right to collective bargaining, and the right to strike, and how do they relate to the rights to freedom of*

[160] ECtHR, *Humpert v. Germany (App nos. 59433/18, 59477/18, 59481/18, 59494/18) (2023); [2024] IRLR 222*, paras 55-56.
[161] Id, paras. 101, 103 ,109, 126, 127, and 147.
[162] IACtHR, Advisory Opinion OC-27/21, Right to freedom of association, right to collective bargaining and right to strike, and their relation to other rights, with a gender perspective (2021).

expression, freedom of association, the right of assembly and the right to work and do so under fair, equitable, satisfactory conditions?"

120. Whilst the IACtHR clearly recognises a right to strike, it is emphasised that:

i. The relevance of the advisory opinion of the IACtHR is as "*an opinion interpreting the American Convention or other treaties that address human rights protection in the American states, and this is defined within the scope of its jurisdiction*".[163]

ii. The IACtHR noted that "*the right to strike is not expressly recognized in the ILO conventions*",[164] and then went on to note the CFA's view that the right to strike is a "*corollary to the right to organize protected by Convention No. 87*". This reflects the theme apparent in the ECtHR case law noted above: reference is made merely to the fact of the CFA having expressed its views about the right to strike. There is no finding by the IACtHR that the CFA's views correctly reflected the content of C87.

iii. Despite making reference to C87, the IACtHR made no finding at all that subsequent agreement or subsequent practice in relation to C87, for the purposes of VCLT, indicates that C87 protects a right to strike.

Subsequent Practice by the ILO

121. Many submissions argue that subsequent practices have been established by ILO standards supervisory bodies, namely CEACR and CFA.[165] However, as set out above,[166] the non-binding recommendations and conclusions of these bodies cannot constitute subsequent practice under Article 31(3)(b) of the VCLT.

122. In any case, the practice of organs of international organisations is only relevant in the context of Article 31(3)(b) VCLT if it is not counteracted by acts or representations of the parties to the treaty in question.[167] Therefore, even if there existed an "*ILO practice on the right to strike in C87*", the long-standing and ongoing opposition by many States parties to C87 with regard to the CEACR recommendations regarding a right to strike, both through statements made and disregard for CEACR recommendations, as illustrated

[163] Id, para 15.
[164] Id, para 96.
[165] Written Statement of South Africa, para 55; Written Statement of OACPS, Chapter III.
[166] *See supra* paras 67, 78.i.
[167] Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg 2018), Article 31, para 87.

above, shows that the requirement of the "*agreement of the parties*" with regard to the interpretation of the right to strike in C87 is not fulfilled.

123. In relation to the CFA, ITUC suggests that in its decisions the CFA "*has consistently reaffirmed that the right to strike is protected under ILO standards, including by Convention No. 87*."[168] CFA decisions are also relied on in a number of other submissions. However, the IOE notes that in certain submissions by States parties there is a remarkable confusion between the CFA procedure regarding freedom of association and ILO regular standards supervision of C87. In these submissions, the CFA seems to be considered to be an ILO supervisory body that, alongside the CEACR, is mandated to supervise application of C87.[169] The IOE is surprised by the extent of the apparent misunderstanding of these two distinct procedures which seems to be used by certain parties to seek to show agreement amongst ILO supervisory bodies on a right to strike in C87. The IOE would therefore reiterate the following matters that show that any CFA recommendations in relation to a right to strike are not relevant for the question of subsequent practice of States parties to C87 in that regard:

i. The CFA is not competent to interpret C87. The basis for its assessments and subsequent recommendations is the principle of freedom of association in the ILO Constitution (Preamble; Declaration of Philadelphia). Ratification of C87 is consequently of no relevance for the question of whether a complaint against an ILO member State is receivable.
ii. Accordingly, CFA recommendations, including regarding a right to strike, are non-binding. This makes them different from provisions of C87 which, if they contained a right to strike, would be binding upon States parties to C87.
iii. The CFA considers complaints on an individual basis and makes assessments that are tailored to the situation of the respective countries. The CFA is not applying the same yardstick to every country, as would be required if it were supervising compliance with C87.

[168] Written Statement of ITUC, 15 May 2024, p. 40.
[169] *See for instance* Written Statement of South Africa, pp. 9-11*"… the CFA had recourse to the content of Conventions 87 and 98 and … interpreted and applied the text of the two Conventions to the allegations contained in the complaints brought before it. … There is accordingly an interlocking jurisprudence developed by these two supervisory bodies. … It is important to recognise that both the CFA and the CEACR operate very much like common law courts do …."*.

iv. The *Compilation of decisions of the Committee on Freedom of Association* is not a publication authorised by the CFA but has been developed on the initiative and along the lines of the understandings of the ILO Office, particular the NORMES department. The "*principles*" regarding the right to strike in this publication have been selected and declared "*principles*" by the ILO Office, not by the CFA itself.

v. The views expressed in CFA decisions, including on the right to strike, are the views of its few tripartite members, which participate in the meetings of the CFA in their personal capacity, not as representative of the ILO Constituents.

vi. In any case, the views expressed in CFA decisions cannot represent the views of the States parties to C87.

124. Thus, CFA decisions cannot be considered evidence for subsequent practice establishing the agreement of (all) States parties to C87 regarding the existence or scope of any right to strike in C87.

125. Indeed, the ITUC appears to recognise that, even if there were subsequent practice indicative of agreement as to the existence in C87 of a right to strike *per se*, there was disagreement in relation to "*the contours of the right*",[170] i.e. its scope and content. The IOE notes that ITUC attempts to create here an artificial differentiation between the right to strike as such on the one hand, and its contours on the other. This differentiation does not seem to have been shared by the CEACR which has not limited itself to stating that a right to strike as such exists in C87 but has determined in detail its contours.[171] For the same reasons it is it unrealistic to assume that States parties have only objected to the contours of the right to strike, as established by the CEACR, but have accepted a right to strike as such, knowing that recognizing a right to strike as such would inevitably bear the risk of being criticized by the CEACR for not complying with the contours of the right to strike.[172] As was already mentioned, five States parties (UK, Japan, Bangladesh, Costa Rica, Switzerland) have made it unambiguously clear in their submissions to the ICJ that they disagree that the right to strike is contained in C87 and that their disagreement thus does not just concern the contours of the right to strike but the very existence of it. For

[170] Written Statement of ITUC, para 4.151.

[171] ILO, General Survey, 1994, para. 145: *"In the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject."*

[172] It is not true to say that the CEACR has accepted a "dialogue" with States parties in terms of a negotiation of its definitions of the scope and limits of the right to strike; the CEACR has always insisted that its recommendations to align national law and practice on the right to strike with its own definitions are respected by States parties.

these reasons, it cannot be assumed that the conditions for "*subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*" are met as regards the right to strike in C87.

126. Finally, various States have relied on Resolutions of the International Labour Conference as indicative of subsequent practice for the purposes of Article 31(3)(b).[173] However, as set out above,[174] none was unanimously passed and they are thus incapable of giving rise to subsequent practice. Moreover, the 1970 Resolution concerning Trade Union Rights and Their Relation to Civil Liberties is positively *inconsistent* with a right to strike being recognised by C87.

127. There is accordingly no relevant subsequent practice evidencing an agreement on the interpretation of C87 for the purposes of Article 31(3)(b) of the VCLT.

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

128. Certain Written Statements misapply Article 31(3)(c) VCLT by seeking to include within "*relevant rules of international law applicable in the relations between the parties*" materials which do not fulfil this criteria.[175]

129. It will be recalled that for a "*relevant rule*" to be taken into account for the purposes of Article 31(3(c) VCLT it must be "*applicable in the relations between the parties*". The leading commentators have been clear that a restrictive approach to the meaning of "*the parties*" is to be adopted, such that only rules may be considered in relation to whom all parties to the treaty which is the subject of interpretation are bound, and not just a smaller group, or even a majority of those parties. This is because "*it would be incongruous to allow the interpretation of a treaty to be affected by rules of international law that are not applicable between all parties to the treaty, but not by a subsequent practice, which does not establish the agreement of all parties regarding the meaning of that treaty*".[176] In

[173] *See for example*, Written Statement of Vanuatu, para 38.
[174] *See supra* para 80.
[175] *See for example*, Written Statement of ITUC, paras 4.155-4.188; Written Statement of Colombia, paras 3.47-3.68.
[176] Dorr & Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, 2nd edition, 2018, Springer, pp. 610-611 citing Villiger and Thiele as concurring with the restrictive approach.

relation to a treaty with wide participation, such as C87, this restrictive approach severely limits the relevance of Article 31(3)(c).[177]

130. Further, even where a relevant rule is applicable between all the parties to C87, reference to that rule may only be taken into account in interpreting a treaty pursuant to Article 31(3)(c) to clarify the content of that treaty.[178] It is not permissible to defer the provisions being interpreted to the scope and effect of those "*relevant rules*".[179] That is, any "*relevant rules*" may not "*override or limit the scope or effect of a provision*" under interpretation.[180]

International Conventions

131. It is not disputed that a number of treaties contain a right to strike. For example, International Covenant on Economic, Social and Cultural Rights ('ICESCR'); Charter of the Organization of American States, the Inter-American Charter of Social Guarantees, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"; the European Social Charter; the Charter of Fundamental Rights of the European Union; and a number of free trade agreements between various states, some of which are noted in observations to the Court). However, these treaties do not constitute "*relevant rules ... applicable in the relations between the parties*" such as to permit their being taken into account pursuant to Article 31(1)(c) VCLT when interpreting C87. This is because:

i. These conventions do not cover all States parties to C87, in particular Botswana, Comoros, Cuba, Kiribati, Mozambique, Saint Kitts and St Nevis, Saint Lucia, Samoa and Vanuatu are parties to C87 but are not parties to ICESCR.
ii. In its observations, ITUC provides examples of regional instruments, statements by the supervisory committees of these regional instruments, as well as regional trade agreements that contain references to a right to strike or have been interpreted in this sense.[181] There is no reference to any regional instrument from the Asian region.

[177] *See for example*, WTO Panel EC-Approval and Marketing of Biotech Products WT/DS316/AB/R, paras 844-846 (2011).
[178] Gardiner, Treaty Interpretation, 2nd edition, 2017, p. 231 referring to A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', (2003) 14 EJIL 529 at 537.
[179] Ibid.
[180] Ibid.
[181] Written Statement of ITUC, pp. 73-77.

iii. The meaning and content of the various rights in these conventions which are described as a 'right to strike' vary to a considerable extent, and cannot therefore indicate agreement as to the existence or scope of a right to strike between the States Parties to C87.

iv. The nature, contents and supervision of the above-mentioned conventions vary considerably from ILO Conventions, such as C87.

v. States are permitted to make reservations in relation to some of these treaties, many states have availed themselves of this right in relation to the right to strike.[182]

132. For all these reasons, it would not be correct to suggest that these international and regional instruments constitute "*relevant rules*" according to which their States parties which are also States parties to C87 have agreed to an interpretation of C87 in which a right to strike is protected by that Convention.

133. Applying Article 31(3)(c) to the contrary would be to impermissibly take into account international and regional conventions in a manner which overrides the provisions of C87 by deferring its clear text in favour of the scope and effect of the international and regional conventions in question.

134. This would also breach the *pacta sunt servanda* rule encompassed in Article 26 VCLT, which implies that "*a party may not unilaterally free itself from the engagements of a treaty, or modify the stipulations thereof, except by the consent of the contracting parties*".[183] In other words, as long as a treaty remains in force, it must be "o*bserved as it stands*"; it is not for the treaty to "*adapt itself to conditions*".[184] In the present case, there has been no consent by all States Parties to C87 to a right to strike being protected by it. Overriding the drafters of C87's deliberate decision to exclude a reference to the right to strike in its text by reading in a right to strike gleaned from international and regional conventions to which not all State parties to C87 have agreed would be a breach of the good faith *pacta sunt servanda* principle. In effect, it would be forcing a treaty to "*adapt*

[182] Written Submission of IOE, paras 259-260, fn 408-412. "*For example, Japan reserved its right to restrict the right to strike for fire service personnel; Kuwait reserved its right to forbid strikes; Mexico reserved its right to restrict Article 8 pursuant to its constitution and national laws; Norway made a reservation regarding the right to strike so as to allow compulsory arbitration; and Trinidad and Tobago reserved the right to restrict the right to strike of those engaged in essential occupations*."

[183] Cheng, General principles of law as applied by international courts and tribunals (2006), p. 113.

[184] Ibid.

itself to conditions" rather than simply requiring the parties to C87 to observe the rights and obligations contained within it in good faith "*as it stands*".

Customary International Law

135. The IOE submits that, contrary to the position of ITUC,[185] the right to strike has not crystallised into a norm of customary international law and therefore there is no customary "*relevant rule*" which may be properly taken into account by the Court in interpreting C87 pursuant to Article 31(3)(c) VCLT. It is accepted that a right to strike has been implemented into domestic law in a variety of countries, however, as explained below, this fact alone does not prove its existence as a customary international law norm.[186]

136. In particular, the IOE notes the detailed survey on State practice undertaken by another party to these proceedings in its Written Statement.[187] This diversity of state practice highlighted in this survey is pronounced. It clearly indicates that: (i) there does not seem to be an unconditional recognition of a right to strike in principle all countries;[188] and (ii) there is no consistent, widespread and representative state practice on the limitations to the right to strike such as to imbue any such qualified right with the character of a norm of customary international law.

137. Indeed, that survey reveals vast diversity in State practice on the scope of the right to strike, in particular with respect to the position in domestic legislation on:

i. the extent of a union's democratic mandate required to approve industrial action;
ii. limitations relating to strikes by civil servants;
iii. essential service and minimum service levels;
iv. procedural requirements before industrial action can be taken;
v. the extent to which substitute workers can be used to replace striking workers;
vi. secondary strikes;
vii. political strikes; and
viii. protection of striking workers.

[185] Written Statement of ITUC, pp. 77-81; paras 4.180-4.188.
[186] Id, para 4.181.
[187] Written Statement of UK, pp. 53-71, paras. 79-125.
[188] Id, p. 103.

138. The limitations on the right to strike in State practice expose such divergence as to be akin to the situation described in the Asylum Case where Court observed that there had been

> "*So much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the officia1 views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence*."[189]

139. Further, even if, contrary to the submissions above as to divergency of state practice, the Court were to find that there was consistent state practice on the right to strike, there remains an absence of opinion juris. This is because, the implementation of a limited right to strike in national legislation was not undertaken in the belief that it was obligatory by the existence of a rule of customary international law requiring it.[190] Rather, the implementation of such legislation was either undertaken purely as a matter of domestic policy or was carried out pursuant to the relevant State "*in application of*" their ratification/s of one or more of the international or regional conventions referenced in paragraph 133 above. When considering States implementing rules pursuant to treaty obligations in the North Sea Continental Shelf case, the ICJ Court held "*no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law*".[191]

140. The ITUC's Written Statement in addition suggests that the right to strike has attained the status of customary international law on the basis of:[192] (i) a 2014 statement by the Office of the Spokesperson for the UN Secretary-General and a 2016 statement by the UN Special Rapporteur on the rights to peaceful assembly and association;[193] (ii) a 2012 decision of the Higher Labour Court in Brazil and a 2013 decision of the Industrial Court of Kenya;[194]

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[189] *Asylum Case (Colombia / Peru)*, Judgment, ICJ Reports 1950, p. 277; *see also* International Law Commission, Conclusions on identification of customary international law, with commentaries, International Law Commission Yearbook 2018, Vol II, Part II, Annex, Conclusion 2 commentary, para 3.
[190] *North Sea Continental Shelf (Germany / Netherlands)*, Judgment, ICJ Reports 1969, p. 44, para 77.
[191] Ibid, pp. 43-44, para 76.
[192] To the extent that ITUC relies on the decision of *Case of the Former Employees of the Judiciary v Guatemala* (2021) in its Written Statement at para 4.182, the IOE maintains that this is evidence of a general practice in relation to the region of South America only. *See* International Law Commission, Conclusions on identification of customary international law, with commentaries, International Law Commission Yearbook 2018, Vol II, Part II, Annex, Conclusion 16 'Particular Customary International Law'.
[193] Written Statement of ITUC, para 4.183, fn 268.
[194] Id, para 4.186.

(iii) the inclusion of a right to strike in recent US and EU trade agreements;[195] and (iv) the 1998 Declaration on Fundamental Principles and Rights at Work which noted that all ILO members have an obligation pursuant to the ILO Constitution to respect the principles concerning freedom of association and collective bargaining.[196] Each will be dealt with in turn.

141. The two UN statements relied upon by ITUC are not *per se* general practice for the purpose of determining whether a customary international law norm exists.[197] In relation to the 2014 example cited, this was an 'off the cuff' one line comment given by a Deputy Spokesman during a wide-ranging press conference on a host of different topics including armed conflicts in a variety of countries. During that "*noon briefing*", the UN press officer stated in response to a journalist's question on a strike by UN staff that "*[w]e believe the right to strike is part of customary international law*".[198] The IOE finds the ITUC's reliance on this statement as purported evidence that the right to strike amounts to customary international law surprising given the clear guidance issued by the International Law Commission as to when a statement by an international organisation may be relied upon for this purpose.[199] Likewise, the 2016 statement by a UN Special Rapporteur cannot, in the absence of supportive reactions by States to such statements, be regarded as a general practice for the purpose of determining whether a customary international law norm exists. The UN Special Rapporteur's assertion follows a five-paragraph analysis of the right to freedom of association and the right to strike. In the words of the International Law Commission in relation to the outputs of expert bodies *"the value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the extent to which the output seeks to state existing law, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body, and the reception of the output by States and others"*.[200] It is submitted that acceptance that the right to strike amounts to customary international law requires a

[195] Id, para 4.187.
[196] Id, para 4.184.
[197] International Law Commission, Conclusions on identification of customary international law, with commentaries, International Law Commission Yearbook 2018, Vol II, Part II, Annex, Conclusion 4 commentary, paras 8-9.
[198] Written Statement of ITUC, fn 268 citing ("Daily Press Briefing by the Office of the Spokesperson for the Secretary-General", 16 March 2018, available at https://www.un.org/press/en/2018/db180316.doc.htm (last accessed on 7 May 2014).
[199] Id, paras 6-7.
[200] Id, para 5.

stronger foundation and juridical analysis than that contained in the UN Special Rapporteur's opinion.

142. Further, the two court decisions relied upon are not a proper basis for inferring the existence of a rule of customary international law. This is because: (i) the decisions are not in application of a possible principle of customary international law but rather are based on the constitutional protections of the right to strike in Brazil and Kenya;[201] (ii) the decisions are not those of the highest courts in Brazil and Kenya, namely the Supreme Federal Court of Brazil and the Supreme Court of Kenya respectively;[202] and (iii) the reasoning of these cases does not contain any analysis of customary international law position with respect to the right to strike.[203] It is no doubt for reasons such as this that the International Law Commission call for caution when seeking to rely on decisions of national courts as a subsidiary means for the determination of rules of customary international law.[204]

143. The ITUC also points to the inclusion of the right to strike in US trade agreements, especially NAFTA and the inclusion of freedom of association in EU trade agreements. The limitations of this argument are manifest. First, US and EU practice is not sufficiently widespread and representative, including all the various geographic regions, as to be indicative of customary international law.[205] Second, even within these two limited examples, it is only the US trade agreements and not the EU trade agreements that include a right to strike, thus demonstrating a lack of consistent practice.[206] Third, as the International Law Commission has pointed out, entering into treaties in relation to a

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[201] *See* Article 9 of Brazilian Constitution and Article 31 of Kenyan Constitution.

[202] International Law Commission, Conclusions on identification of customary international law, with commentaries, International Law Commission Yearbook 2018, Vol II, Part II, Annex, Conclusion 6 commentary, para 6: "*Decisions of national courts at all levels may count as State practice (though it is likely that greater weight will be given to the higher courts)*".

[203] Id, Commentary to conclusion 13, para 3: "*The value of such decisions varies greatly, however, depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law)*."

[204] Id, Commentary to conclusion 13, para 7: "*National courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Their decisions may reflect a particular national perspective. Unlike most international courts, national courts may sometimes lack international law expertise and may have reached their decisions without the benefit of hearing argument advanced by states*".

[205] Id, Commentary to conclusion 8, para 3.

[206] Id, Commentary to conclusion 8, para 5: "*where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist)*."

purported customary right may equally "*show the contrary*" in the sense that States enter into treaties because of the absence of any rule.[207]

144. Finally, in relation to the 1998 ILO Declaration, it is noted that inferring a customary law right to strike from this document would be extraordinary given that: (i) the right to strike is not mentioned anywhere within its terms; (ii) the obligations to respect freedom of association and the principle of collective bargaining are expressly said to flow from the ILO Constitution itself, rather than from any customary rule; and (iii) the ILO Constitution itself does require respect for the principles of freedom of association and collective bargaining. For example, ILO Constitution Preamble,[208] ILO Constitution Annex, Part I (b)[209] and Part III (e).[210]

145. In conclusion, there is no substantial evidence that the right to strike has attained the level of widespread, consistent and representative general practice that is accepted as law such as to amount to a principle of customary international law. In these circumstances, it would be wholly improper to regard the right to strike as a "*relevant rule*" which may be taken into account pursuant to Article 31(3)(c) VCLT when interpreting C87.

C. Article 32 Supplementary Means of Interpretation

146. There are important misunderstandings in the submissions of other parties in respect of the applicability of Article 32. Several submissions stated that recourse to supplementary means of interpretation is (only) possible when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.[211] The IOE would point out the clear wording of Article 32 which

[207] Id, Commentary to conclusion 11, para 8.
[208] This provision states: "*And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by … recognition of the principle of freedom of association…"*
[209] This provision states: "*The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that: … (b) freedom of expression and of association are essential to sustained progress….*"
[210] This provision states: "*The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: … (e) the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures…*"
[211] Written Statement of Germany, pp.3, 10; Written Statement of ITUC, paras 4.189-4.191.

provides that recourse to supplementary means of interpretation may also be had "*in order to confirm the meaning resulting from the application of article 31"*.

147. The IOE also notes several further mistakes in other parties' Article 32 analysis.

148. First, certain submissions (including by the ITUC) put forward facts in a selective manner, to suggest the preparatory works corroborate a right to strike. A key example is the reference to a question in the preparatory report, which sought to clarify whether the recognition of the right of association of public officials, should in no way prejudge the question of the right of such officials to strike.[212] It is concluded from the fact that only three members States expressly objected to the inclusion of this question whereas some others agreed to it, that *"the Office's commentary in its 1948 report must be understood to refer [sic] the right to strike of public officials, but not the right to strike more generally"*.[213]

149. However, these submissions ignore the important fact that, regardless of the Members' substantive views on the issue, *"the question of the right to strike…many countries point out, is not relevant to the present proposed Convention"*.[214] The Court must not elide over the fact that C87 was simply one Convention that was not intended to deal with everything in the wider context of industrial relations. Indeed, separate instruments on collective bargaining, collective agreements, voluntary conciliation and arbitration, and co-operation at the level of the undertaking were adopted in a period of a few years after the adoption of C87. Japan in its Written Statement also explains this important point.[215]

150. Second, "*the potential exclusion of the right to strike specifically by public officials*" is used to suggest there was a "*clearly assumed…existence of a general right to strike in other cases*." This is an obvious logical fallacy. Even if there is agreement that public officials should not strike, this does not mean by implication that there is agreement that non-public workers do have a right to strike. Agreement amongst parties that public officials should <u>not</u> strike is equally consistent with controversy about whether or not

[212] Written Statement of Germany, p. 10; Written Statement of ITUC, paras 4.209-4.213.
[213] Written Statement of ITUC, para 4.213.
[214] *See* Written Statement of IOE, para 286.
[215] Written Statement of Japan, paras 27-28 included reference to the PCIJ Advisory Opinion in *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night.*

private workers can – it simply reflects that in a subset of all cases, all parties agreed strikes were inappropriate.

151. Third, at paragraph 4.216 of the ITUC's Written Statement, it is stated that the right to strike was implied in the freedom of association, and no formal text was included due to time pressure. That is pure supposition, and an unconvincing response to the clear evidential picture showing that the parties to C87 all understood it to have a circumscribed purpose. Indeed, to that end, the IOE once more emphasises a sentence in the preparatory report to C87 according to which *"the proposed Convention relates only to the freedom of association and not to the right to strike, a question which will be considered in connection with item VIII (conciliation and arbitration) on the agenda of the Conference"*.[216] This simple and straight forward statement, which according to the Minutes of the 1948 ILC was not challenged by any constituent present at the 1948 ILC, corroborates that there was an intention not to address the right to strike in C87, but to do so in the context of a subsequent standard-setting procedure.

152. Taking a step back, it is clear from all the above that it does not matter here if the conclusions drawn in the preparatory report from the analysis of the responses to the preparatory Office questionnaire were justified or not. What matters is that the ILC in 1948 followed the proposal of the preparatory report *not* to deal with the right to strike in C87, but to instead consider doing so in a later standard-setting procedure (even if this did not materialise).

153. Fourth, the discussion in the ITUC's Written Statement of historical context is unconvincing. The ITUC's description of historical events is partial and incomplete. It also contradicts key aspects of its case elsewhere.

154. The historical deep dive at paragraphs 4.195 to 4.197 of the ITUC's Written Statement shows the obvious conceptual distinction between association rights and the right to strike; making clear that the former does not entail the latter. As the ITUC itself makes clear at paragraph 4.197, in the UK it was only by the Trade Union Act 1871 that *"trade unions were legitimised"* – and this is accepted to be an important and distinct step *prior* to the development of strike action: *"even then, however, strike action remained severely restricted…through various crimes and torts…It took a further 35 years before the Trade*

[216] ILC, 'Report VII - Freedom of Association and Protection of the Right to Organise', 1948, p. 87.

Disputes Act 1906 provided immunity to tortious liability due to strike action" (emphasis added). It is striking that the provision of immunity to tortious liability due to strike action is itself a lesser protection than the positive protection of a right to strike (let alone of an unqualified right as the ITUC have suggested exists in C87). This historical material corroborates the IOE's argument that associational rights (i.e. the very right for workers' organisations to cohere and order themselves and conduct activities for and amongst members) are hard won and meaningful rights *per se* – which do not march in lock step with a right to strike, let alone collapse into a right to strike.

155. Much of the historical 'analysis' up until paragraph 4.202 is (attempted) makeweight. First, there is an obvious logical disjunct between the position of four Western countries with a purported historic acceptance of the right to strike (itself hard won and heavily contested); *cf.* the situation of all the parties entering into C87. Second, in any event, there is a further logical disjunct: *even if* there were an implicit recognition of a right to strike *within* member States at the time, that does not mean there was also an intention by all parties to C87 to recognize and regulate it at the international level, *by way of C87*. No evidence has been put forward for the existence of such an intention.

156. In conclusion, the supplementary means of interpretation under Article 32 confirm the Article 31 analysis that the right to strike is not protected in C87. The ITUC's reasoning is not such as to call this result into question.

V. WIDER IMPLICATIONS

157. Several submissions have stressed concerns as to the impact of the Courts' Advisory Opinion on the ILO more generally beyond the interpretation of C87 and the right to strike. In this regard, Japan advised the Court that "*a cautious approach based on the established rules of treaty interpretation needs to be applied here so as not to cause unintended consequences*". [217] The IOE concurs with this view for the following reasons.

158. First, the IOE is mindful of the importance of legal certainty when interpreting ILO instruments. As Spain stressed:

> *"When it comes to the interpretation of international labour Conventions, legal certainty implies the ability to obtain unambiguous and decisive*

[217] Written Statement of Japan, para 3.

> *pronouncements on the scope and meaning of provisions of Conventions so that States parties, or States considering ratification, can fully appreciate the nature and extent of obligations arising from ratification, and can adopt national law and practice accordingly.*" (emphasis added)[218]

159. In this light, any evolutive and dynamic interpretations of ILO Conventions developed by bodies other than the ILO tripartite constituents creates legal uncertainty for Governments intending to ratify these Conventions. At the time of adoption of C87, Government were clear that a right to strike is not covered by C87, even though such a right already existed at that time in the national law of certain States. Indeed, Switzerland rightly stressed that any interpretation which changes the meaning, purpose or scope of C87 cannot be accepted.[219]

160. Second, it is misconceived to suggest, as is done in certain Written Statements, that not recognising the protection of the right to strike in C87 would: have a negative effect in terms of social justice,[220] be harmful to groups vulnerable to just transition and climate change;[221] or erode the international human rights framework entirely. [222] The WFTU even goes so far as to claim that "*challenging the right to strike can only be seen as an attack on democratic and trade union freedoms, aimed at silencing workers and limiting their ability to defend interests and put forward their demands*".[223] Such unsubstantiated and therefore unjustified statements are designed to override the intentions of the drafters of C87 and undermine the rule of law. Many governments and the ILO standards supervisory bodies agree that the right to strike is not an absolute right and there must be restrictions on its exercise. The IOE and many Governments agree that such restrictions are both permissible and necessary, and should be regulated by national law.

161. Third, several Written Statements point out that it was regrettable that the ILC did not have an opportunity to resolve the dispute itself.[224] The Court will have noted that there are existing fora available within the ILO to resolve questions of interpretation and to clarify the scope and limits of ILO instruments. These existing fora, designed as they are within the *sui generis* ILO structure, are based on tripartite cooperation and search for consensus. They include, for instance, tripartite meetings of experts, or discussions in the

[218] Written Statement of Spain, p. 11.
[219] Exposé écrit de la Confédération Suisse, para 6.
[220] Written Statement of International Co-operative Alliance, 26 April 2024, para 4.
[221] Written Statement of Vanuatu, para 63; Written Statement of OACPS, para 92.
[222] Written Statement of Vanuatu, para 72.
[223] Written Statement of The World Federation of Trade Unions (WFTU), 16 May 2024, para 22.
[224] *See for example,* Written Statement of Indonesia, para 32; Exposé écrit de la Confédération Suisse, paras. 39-41.

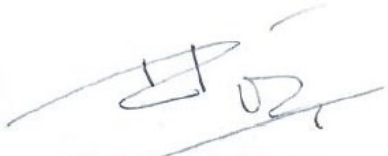
ILC, that can adopt conclusions, declarations or international labour standards. These alternative methods of dispute resolution are inclusive and aligned with the ILO's unique tripartite structure and governance.

162. The IOE would finally draw attention to the fact that IOE's suggested result, i.e. that the right to strike is not protected in C87, strengthens transparency, democracy and legal certainty in ILO standards matters. For more than 100 years, the ILO approach has been that binding standards and rules on labour and social matters can only be set by the tripartite ILC. There is no competence for ILO standards supervisory bodies to act as additional ILO legislators and to unilaterally introduce new standards and rules by way of interpretation.

VI. CONCLUSION

163. The Employers do not deny that the strike is an important right that is recognised by certain regional and international instruments.[225] However, the relevant question for the Court in these proceedings is whether or not C87, in particular, protects the right to strike for workers and their organisations. Having analysed the Written Statements of other parties, the IOE remains firmly of the view that the right to strike is not protected in C87, in accordance with the provisions of the VCLT. The IOE respectfully requests the Honourable Court to give due consideration to the facts and arguments put forward in these comments.

Respectfully,



Roberto Suarez Santos
IOE Secretary General

Geneva, 16 September 2024

[225] *See cf* Written Statement of South Africa, paras 7-14.