RIGHT TO STRIKE UNDER INTERNATIONAL LABOUR ORGANIZATION CONVENTION NO. 87

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN COMMENTS OF THE PEOPLE'S REPUBLIC OF BANGLADESH SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE

16 September 2024

I. INTRODUCTION

1. The Republic of Bangladesh ("**Bangladesh**") respectfully submits, pursuant to paragraph 3 of the Order of the International Court of Justice (the "**Court**" or the "**ICJ**") dated 16 November 2023 and Article 66(4) of the Statute of the Court, its comments on the written statements filed by States and organisations in the advisory proceedings concerning the *Right to Strike under ILO Convention No. 87*.

2. Bangladesh's written comments are organised as follows. **Part II** provides some general remarks on the proper approach to treaty interpretation. **Part III** reaffirms Bangladesh's position that the right to strike is not protected under the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) ("**Convention No. 87**" or "**Convention**"). **Part IV** addresses Bangladesh's view that even if the Court determines that the right to strike is protected under Convention No. 87, it should opine that the right to strike is not absolute.

II. GENERAL OBSERVATIONS ON TREATY INTERPRETATION

3. Having reviewed the written statements submitted to the Court in these proceedings, Bangladesh considers it important to offer a number of general remarks concerning the process of treaty interpretation which lies at the heart of this matter.

A. Applicable rules of interpretation

4. It is not disputed that the rules of treaty interpretation under customary international law which are codified in the Vienna Convention on the Law of Treaties 1969 ("**VCLT**") apply to the interpretation of Convention No. 87, notwithstanding the fact that it was adopted in 1948 before the VCLT's entry into force.[1]

5. The VCLT's interpretative framework comprises two basic rules. Article 31 provides the general rule, which requires consideration of the ordinary terms of the treaty in their context and in light of its object and purpose. Article 32 supplies an additional rule, which permits

[1] The ICJ has observed on a number of occasions that the rules of interpretation set out in the VCLT reflect customary international law and so apply to the interpretation of treaties, like Convention No. 87, which were concluded prior to its adoption: see, e.g., *Kasikili/Sedudu Island (Botswana/Namibia), I.C.J. Reports 1999*, p. 1045, para. 18*; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 43, para. 160.

recourse to 'supplementary means' only in specified circumstances: namely, either confirming the meaning resulting from the application of the general rule in Article 31, or else determining the meaning if the application of Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.

B. Primacy of authentic interpretation

6. Within the VCLT framework of treaty interpretation, primacy is afforded to 'authentic' means of interpretation – that is, the objective evidence of the understanding of the parties as to the meaning of the treaty.[2] As the ILC has explained, the terms of Article 31 reflect the fact that the intentions of States parties carry the greatest importance in treaty interpretation:

> "[T]*he Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, … making the ordinary meaning of the terms, the context of the treaty, its objects and purposes, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty*".[3]

7. The priority afforded by the VCLT to evidence of the common intention of the States parties in the process of treaty interpretation reflects the fact that treaties are negotiated by, express the consent of, and are binding upon States. Moreover, it is States parties to a treaty that bear international responsibility for any breaches of the obligations contained therein.

8. While some of the participants have emphasised in their written statements the distinctive tripartite structure of the International Labour Organization ("**ILO**"), with its allocation of roles to States, employers and workers, it should not be overlooked that Convention No. 87 remains an ordinary treaty, concluded by States and binding only upon the States parties. Accordingly, evidence of the intention of the States parties themselves as to the meaning of Convention No. 87 must be afforded the greatest significance.

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[2] International Law Commission, *Report of the International Law Commission on the work of its seventieth session* (30 April–1 June and 2 July–10 August 2018), A/73/10, pp. 23–4.
[3] *ILC Yearbook 1964*, vol. II, A/5809, pp. 204–205, para. 15. See also *ILC Yearbook 1966*, vol. II, A/6309/Rev.1, p. 221, para. 15.

C. Temporal aspects

9. The correct meaning of a treaty is generally that which existed at the time the treaty was concluded. As one of the leading commentaries concludes, "*international judicial practice… on the whole, seems to follow the static approach* [to interpretation] *as a basic rule and as a particular application of the doctrine of intertemporal law*".[4] The ICJ has generally applied this approach, which seeks to ascertain the meaning of a treaty in accordance with the common understanding of the States parties, at the time when the treaty was concluded,[5] though it has considered the contemporaneous meaning of a treaty at the time of its interpretation on occasions where it is established that the States parties intended that the meaning of the treaty could change or evolve over time.

III. THE RIGHT TO STRIKE IS NOT PROTECTED UNDER ILO CONVENTION NO. 87

10. Recalling these important elements of the process of treaty interpretation, Bangladesh reaffirms its position that Convention No. 87, on its correct interpretation, does not provide protection for the right to strike.

11. This interpretation is the inevitable result when the authentic means of interpretation are considered together as a whole, as required by Article 31 of the VCLT, as the primary method of treaty interpretation.

A. Authentic means of interpretation in Article 31

a. Text of the treaty

12. The most important element in the interpretation of a treaty is the text of the treaty itself. The ICJ has confirmed this central point when it noted that "[i]*nterpretation must be based above all upon the text of the treaty*".[6]

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[4] Dörr and Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, 2018), p. 572.
[5] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C. J. Reports 1952, p. 176*, para. 189; *Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, paras. 55–56.
[6] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021,* p. 71, para. 81; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, para. 41. See also, Written Statement of the United Kingdom of Great Britain and Northern Ireland dated 16 May 2024, ¶17; Written Statement of Japan dated 16 May 2024, ¶7.

13. As Bangladesh emphasised in its written statement dated 16 May 2024,[7] and as most other States and organisations have noted in their written statements, the Convention makes no express reference to the 'right to strike'. The term is simply absent from the purportedly relevant provisions (Articles 3, 8 and 10 of the Convention), and there is nothing in the language of the Convention to suggest that the right to strike is incorporated as a necessary implication.[8]

14. While not conclusive in its own right, the fact that the treaty is entirely silent on a concept as significant as the right to strike lends considerable support to the conclusion that Convention No. 87 does not encompass such a right, since, quite simply, it says nothing whatsoever about it. It is reasonable to conclude that had the drafters of the Convention intended to include such a right, they would have done so expressly.

15. The ICJ has previously dealt with disputes where the absence of a purported term played a role in the analysis of the treaty text.[9] In *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, for example, the omission of any reference to rules on immunities was taken into account by the Court as it identified the correct interpretation of the Palermo Convention.[10] The Court considered the lack of explicit reference to immunity as a significant factor as it concluded that the treaty in question does not incorporate the customary rules on immunities of States and State officials.[11] Hence, as Japan's written statement in this proceeding aptly observes, "[t]*he absence of express reference to the right to strike either in Article 3 or in any other provisions is thus by itself indicative that the Convention does not cover the said right*".[12]

b. Treaty context

16. While the preamble of Convention No. 87 refers to the Constitution of the ILO and to the Declaration of Philadelphia, such that those instruments might properly be characterised as

[7] ¶3.1.
[8] See also, e.g., Written Statement of Japan dated 16 May 2024, ¶¶7-19; Written Statement of Costa Rica dated 14 May 2024, pp. 5, 7. *Cf*, Written Statement of the Organisation of African Caribbean and Pacific States dated 15 May 2024, ¶¶38-43; Written Statement of the International Trade Union Confederation dated 15 May 2024, ¶¶4.13-4.26.
[9] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018,* p. 292, para. 93; *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019,* p. 418, para. 73.
[10] United Nations Convention Against Transnational Organized Crime 2000, UNTS vol. 2225, p. 209.
[11] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018,* p. 292, paras. 93-94.
[12] Written Statement of Japan dated 16 May 2024, ¶9.

part of the context which must be considered when interpreting the treaty, there is nothing in the Constitution or the Declaration which indicates that Convention No. 87 is intended by the States parties to include a right to strike. The preambular statements in the Convention and these two instruments go no further than acknowledging the importance of the principle of freedom of association. Such an affirmation of significance provides no basis for incorporating an implicit protection for the right to strike.

17. It should also be recalled that the provisions of Convention No. 87 are applicable to protect equally the rights *both* of workers *and employers*. It strains the bounds of 'ordinary meaning' to suggest that a provision like Article 3, which protects rights for both "*workers' and employers' organisations*", and which sits alongside an array of other provisions applicable equally to both workers and employers (with a single exception),[13] includes implicit protection for the right to strike when that right – unlike all of the other rights recognised in Convention No. 87 – would redound to the benefit of only one of these two groups: workers, but not employers.[14]

c. Object and purpose

18. The title and preamble of Convention No. 87 indicate that the object and purpose of Convention No. 87 is confined to freedom of association and the right to organise. There is nothing in the Convention's object and purpose which justifies interpolating the right to strike into provisions which remain entirely silent on this concept.[15]

d. Subsequent agreement

19. There is no evidence that the States parties to Convention No. 87 have entered into any subsequent agreement within the meaning of Article 31(3)(a) of the VCLT. While this subparagraph admits the possibility that the States parties may formally agree upon an authentic interpretation of the treaty text at some point after the conclusion of the treaty, it is

[13] As noted in the Written Statement of Japan dated 16 May 2024 at ¶24, Article 9 of Convention No. 87 is specifically dedicated to the application of the Convention's guarantees to the armed forces and the police, which shall be determined by national laws or regulations.
[14] See, Written Statement of Japan dated 16 May 2024, ¶¶20–26.
[15] As Bangladesh emphasised in its Written Statement dated 16 May 2024, ¶3.2. See also, e.g., Written Statement of Costa Rica dated 14 May 2024, pp. 5, 7. *Cf* Written Statement of the Organisation of African Caribbean and Pacific States dated 15 May 2024, ¶¶44-49; Written Statement of the International Trade Union Confederation dated 15 May 2024, ¶¶4.51-4.58; Written Statement of Mexico dated 16 May 2024, ¶¶46-48.

necessary to demonstrate that this understanding enjoys the universal support of all States parties to the treaty. This requirement of universal acceptance for Article 31(3)(a) to apply has been affirmed by the Court.[16] There is no evidence of such agreement in the present case.

e. Subsequent practice evidencing agreement

20. Article 31(3)(b) acknowledges that the common intention of all States parties as to the meaning of a treaty need not be expressed in a formal agreement, but may become apparent through the consistent practice of the States parties in their application of the treaty. However, the requirement of demonstrating that the interpretation commands the universal acceptance of all States parties to the treaty applies for Article 31(3)(b), just as it does for Article 31(3)(a).

21. This requirement clearly excludes the application of any subsequent practice where there is disagreement.[17] The evidence of such disagreement among States parties as to the correct meaning of Convention No. 87 is well known: in fact, the events which led to the submission of this request for an advisory opinion demonstrate that there is no consensus view among States parties on this issue,[18] as most recently confirmed by the written statements documenting the enduring divergence in the States parties' understanding of this aspect of the Convention.

f. Other relevant rules of international law

22. While Article 31(3)(c) of the VCLT requires consideration of 'any relevant rules applicable in the relations between the parties', it has been acknowledged by leading authorities that, in order to qualify for mandatory consideration under this provision, the related rules must be binding upon all of the States parties to the treaty being interpreted.[19] This requirement holds particular importance in the present proceedings since the authoritative interpretation of Convention No.

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[16] *Whaling in the Antarctic (Australia* v. *Japan; New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, para. 83. See also *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, pp. 1045, para. 49; *ILC Yearbook 1966*, vol. II, p. 222, para. 15.

[17] The Written Statement of Japan dated 16 May 2024 similarly recognises that the opinions of the supervisory bodies do not constitute subsequent practice within the meaning of Article 31(3)(b) as it is apparent that not all parties to the Convention have agreed with the interpretation of these bodies (at ¶¶70–74).

[18] In the Resolution adopted by the Governing Body at its 349th *bis* (Special Session) on 10 November 2023 referring this matter to the Court, the ILO Governing Body noted the "*serious and persistent disagreement*" within the tripartite constituency of the ILO on the interpretation of Convention No. 87 with respect to the right to strike: see, Written Statement of the ILO dated 14 May 2024, p. 2.

[19] Dörr and Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, 2018), p. 610: "*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*".

87 which the ICJ has been requested to provide will necessarily affect all of the States parties to the Convention.[20] For this reason, the Court should abide by the accepted practice of considering, for the purposes of Article 31(3)(c), only those other relevant international rules which are binding upon *all* of the States parties of Convention No. 87.

23. For this reason, no other relevant international rules fall within the scope of Article 31(3)(c). On this basis, the various human rights instruments – both regional and global – which make provision for the right to strike and/or the rights to associate freely and to organise may not be considered under Article 31 since none of them apply to all of the parties of Convention No. 87. Even the International Covenant on Economic, Social and Cultural Rights 1966 ("**ICESCR**"), which is the most widely ratified of those treaties which expressly guarantee the right to strike, is ineligible for consideration under Article 31(3)(c) on account of the fact that seven of the parties to Convention No. 87 are not parties to the ICESCR.[21]

24. Additionally, the International Covenant on Civil and Political Rights 1966 ("**ICCPR**"), which is the most widely ratified of those instruments guaranteeing the freedom of association, does not make any reference to the right to strike in Article 22. Even if such a right is arguably protected under that provision, it too is ineligible for consideration under Article 31(3)(c) because four of the parties to Convention No. 87 are not parties to the ICCPR.[22]

25. Moreover, any other relevant rules of international law applicable between the parties can do no more than assist in ascertaining the meaning of Convention No. 87. Reference to extraneous rules certainly cannot justify the creation or interpolation of new rights or duties which depart from the explicit text of the Convention and the intention of its drafters.[23] This is especially relevant because, as discussed below, the *travaux préparatoires* demonstrate that the exclusion of the right to strike was deliberate.

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[20] McLachlan, *The Principle of Systemic Integration in International Law* (2024), pp.138–140.
[21] Botswana, Kiribati, Mozambique, Saint Kitts & Nevis, Saint Lucia, Samoa and Vanuatu are parties to Convention No. 87 but are not parties to the ICESCR.
[22] Kiribati, Myanmar, Saint Kitts & Nevis, and the Solomon Islands are parties to Convention No. 87 but are not parties to the ICCPR.
[23] Gardiner, *Treaty Interpretation* (2nd end, 2015), pp. 218–219. *Cf* Written Statement of the International Trade Union Confederation dated 15 May 2024, ¶¶4.154-4.188.

B. Supplementary means of interpretation

26. While careful evaluation of the evidence which qualifies under Article 31 of the VCLT as authentic means of interpretation points overwhelmingly to the conclusion that the States parties did not intend to protect the right to strike under Convention No. 87, confirmation of this interpretation is supplied by supplementary means of interpretation.

27. It has been argued by a number of participants in these proceedings that no recourse should be had to supplementary means.[24] This claim is raised by proponents of the right to strike who might appreciate that the *travaux préparatoires* provide contrary evidence supporting the fact that States parties did not intend to protect the right to strike in Convention No. 87. The attempt to exclude the supplementary means is coupled with the erroneous qualification of state practice and the activity of ILO supervisory bodies as subsequent practice within the meaning of Article 31. This practice falls outside the scope of Article 31 because it does not reflect the agreement of all States parties to the Convention, as set out above. At best, these sources are supplementary means (as discussed below), and in any event, the *travaux préparatoires* are far more relevant to demonstrating the intention of the parties in concluding the Convention than this contested practice. In this regard, the narrow interpretation of Article 32 in some written statements with a view to excluding its application is inconsistent with the liberal recourse to supplementary means in jurisprudence. As one of the leading commentaries has noted, "*it is difficult to imagine situations where the means of Article 32 may not be employed*".[25] Another commentary explains the role of supplementary means in the following terms:

> "*Art 32 allows reference to supplementary means of interpretation … in a much more liberal manner than it is usually perceived. Nothing in the rules on interpretation precludes a treaty interpreter from looking at the preparatory work in the process of interpretation. What is restricted by the Vienna rules, however, is to actually base a finding on such material at the outset of the process of interpretation, and they do so in order to prevent the agreement of the parties from*

[24] Written Statement of Germany dated 6 May 2024, ¶42; Written Statement of the Kingdom of the Netherlands dated 16 May 2024, ¶¶2.29–2.31; Written Statement of Vanuatu dated 15 May 2024, ¶42; Written Statement of Mexico dated 16 May 2024, ¶57.

[25] Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 447. See also, Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties', in Rest *et al* (eds), *Liber Amicorum Seidl-Hohenveldern* (1998), p.721, 739; and Dörr and Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, 2018), p.628.

being replaced by the content of unconsummated exchanges of proposals and arguments that preceded the finalisation of the treaty."[26]

a. Travaux préparatoires

28. Of the supplementary means of interpretation, the "*preparatory work of the treaty is the most important*".[27]

29. Most significantly, and as has been noted by other participants in these proceedings,[28] the *travaux préparatoires* clearly attest to the fact that the States parties, in negotiations prior to the conclusion of Convention No. 87, did not intend that the Convention should include provision for the right to strike. Indeed, the States parties advisedly decided *against* including any provision for the right to strike in this treaty. Silence regarding this matter was no mere omission or oversight on the part of the negotiating States. Rather, it was an intentional exclusion. When consulted by the ILO Office during the negotiations leading to the Convention's conclusion, many States expressed the view that the right to strike was entirely separate from the principle of freedom of association and the right to organise, and that no reference should be made to the right since it lay outside the focused scope of this particular treaty. Many States considered that provision for the right to strike was more appropriately considered in connection with the ILO Conference's work on conciliation and arbitration.[29]

30. This fact was documented by the ILO Office in its report to the Conference after it surveyed the views of the States parties concerning the inclusion of a reference to the right to strike in Convention No. 87:

> "*It may be observed … that the Governments were also consulted on the question whether it would be desirable to provide in the international regulations that the recognition of the right of association of public officials should in no way prejudge the question of the right of such officials to strike. Several Governments, while giving their approval to the formula, have nevertheless emphasised, justifiably it would appear, that the proposed Convention relates only to the freedom of*

[26] Dörr and Schmalenbach (eds), *ibid* (emphasis in the original). See also *ILC Yearbook 1966*, vol. II, p. 218, para. 4.
[27] Villiger, *op. cit.*, p. 445.
[28] See, Written Statement of Japan dated 16 May 2024, ¶¶38–54; Written Statement of the United Kingdom of Great Britain and Northern Ireland dated 16 May 2024, ¶¶62–76. See also, Written Statement of Australia dated 16 May 2024, ¶¶85–90.
[29] Written statement of BUSINESSAfrica – Employers' Confederation dated 16 May 2024, ¶27. For a thorough review of these communications, see, Written Statement of the United Kingdom of Great Britain and Northern Ireland dated 16 May 2024, ¶¶67–74.

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."[30]

31. These materials provide clear confirmation that the States parties did not share a common intention to include the right to strike within the text of Convention No. 87. Moreover, they show that many States parties considered that the right to strike fell entirely outside the limited scope of this particular treaty.

b. Supplementary subsequent practice of supervisory bodies

32. Those who favour the inclusion of the right to strike in Convention No. 87 invariably attach great significance to the subsequent practice of the ILO supervisory bodies, the Committee of Experts on the Application of Conventions and Recommendations ("**CEACR**") and the Committee on Freedom of Association ("**CFA**"),[31] which have expressed repeatedly the view that the right to strike is an intrinsic corollary of the freedom of association and the right to organise, and is therefore protected implicitly by Convention No. 87.[32]

33. While reference can be made to the subsequent practice of the CEACR and CFA as supplementary means of interpretation, this practice, and the 'intrinsic corollary' interpretation which it supports, carries relatively little value for the purposes of interpreting Convention No. 87 and is not determinative of its correct meaning. A number of factors support this conclusion.

i. The interpretation of supervisory bodies is not authoritative

34. Within the ILO's constitutive legal framework, neither the CEACR nor the CFA are entrusted with the competence to pronounce authoritative interpretations of the ILO treaties.

[30] International Labour Conference, 31st session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise (ICJ Dossier, Document No. 158), p. 87.

[31] Particular significance is attached to the practice of the ILO's supervisory bodies in the Written Statement of Colombia dated 16 May 2024, ¶3.33–3.45; Written Statement of the International Trade Union Confederation dated 15 May 2024, ¶¶4.74–4.89; Written Statement of the Organisation of African Caribbean and Pacific States dated 15 May 2024, ¶¶50–55; Written Statement of Somalia dated 13 May 2024, p. 2; Written Statement of the United States of America dated 16 May 2024, ¶¶2.13–2.14.

[32] The analysis of the right to strike as an intrinsic corollary of the right to organise and/or freedom of association is noted in the Written Statement of Colombia dated 16 May 2024, ¶¶3.1–3.45; Written Statement of the International Trade Union Confederation dated 15 May 2024, ¶4.59; Written Statement of Mexico dated 16 May 2024, ¶60; Written Statement of Somalia dated 13 May 2024, p. 1; Written Statement of the United States of America dated 16 May 2024, ¶2.9. The notion is referred to also in the Written Statement of the Republic of South Africa dated 15 May 2024, ¶60; Written Statement of Italy, ¶¶15, 18.

35. The CEACR is a standing supervisory body composed of 20 independent experts who are selected by the ILO Governing Body to serve in a personal capacity. No provision is made in the ILO Constitution for the creation of this body; rather, it was established under a resolution of the International Labour Conference in 1926.[33] At the outset, the CEACR's main task was to undertake reviews of the regular reports submitted by ILO Member States, in accordance with Article 22 of the ILO Constitution, and to assess the compatibility of ILO Member States' domestic legislation with the requirements of the ILO Conventions.

36. However, there has been controversy within the tripartite structure of the ILO in recent decades over the precise scope of the CEACR's role on account of the fact that the constitutive documents lack precision.[34] In 2014, the CEACR (or "Committee of Experts") sought to define the scope of its own authority as it set out its understanding of the scope of its role. It noted:

> "[The CEACR] *is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise.*"[35]

37. The CFA was established by the ILO Governing body in 1951. It consists of an independent chairperson and three representatives each of governments, employers and workers. The CFA may examine complaints of violations of the principle of freedom of association by a Member State of the ILO, irrespective of whether that State has ratified Convention No. 87. Although the CFA examines allegations of treaty violations, the CFA is not a judicial entity, and its conclusions and recommendations are non-binding. If the CFA considers that there has been a

[33] International Labour Conference, 8th Session, 1926, Record of Proceedings, Appendix VII: Resolution concerning the methods by which the Conference can make use of the reports submitted under Article 408 of the Treaty of Versailles, p. 429 (ICJ Dossier, Document No. 73).
[34] Written Statement of the ILO dated 14 May 2024, ¶65; Written Statement of the Republic of South Africa dated 15 May 2024, ¶¶7–14; Written statement of BUSINESSAfrica – Employers' Confederation dated 16 May 2024, ¶28. See also, Written Statement of the United Kingdom of Great Britain and Northern Ireland dated 16 May 2024, ¶11.
[35] International Labour Conference, 103rd Session, 2014, Report III (Part 1A), Report of the Committee of Experts on the Application of Conventions and Recommendations (ICJ Dossier, Document No. 85), para. 31.

violation of freedom of association standards or principles, it issues a report via the ILO Governing Body and offers recommendations which might usefully guide the actions of national authorities so that the situation could be remedied.

38. Although the ILO Governing Body decided against referring to this Court a question concerning the authority or competence of these two bodies to interpret Convention No. 87, for the purposes of completing its analysis of the assistance to be gained by this subsequent supervisory practice as supplementary means of interpretation, Bangladesh observes that neither of these bodies has been entrusted by the States parties to provide authoritative or binding interpretations of the Convention. Neither of these bodies has judicial or quasi-judicial functions; neither is empowered to provide binding settlements of disputes concerning the meaning of the ILO Conventions; and neither body's pronouncements possess any formal effect or binding force within the ILO's legal framework. Their statements merely represent recommendations on the part of independent technical experts, and States retain the capacity to consider and respond to those recommendations as they consider appropriate.[36] They are under no obligation to accept such recommendations.

ii. ILO bodies' practice does not attract additional weight

39. Since the pronouncements of these supervisory bodies are not afforded binding force or special authority within the legal structure of the ILO, they do not qualify for special evaluation under the general rules of treaty interpretation.

40. In its decision in the *Diallo case*, the ICJ acknowledged the weight which the practice of independent treaty bodies with judicial or quasi-judicial functions carries with regard to the interpretation of the treaties under which they are established. The Court stated:

> "*Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.*"[37]

[36] See also, Written Statement of the United Kingdom of Great Britain and Northern Ireland dated 16 May 2024, ¶¶11, 37; Written Statement of Japan dated 16 May 2024, ¶¶55–75.
[37] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, para. 66.

41. The ILO bodies, however, appear to fall outside the scope of this dictum. In these remarks, the Court was referring to the interpretations adopted by the Human Rights Committee and the African Commission on Human and Peoples' Rights. These bodies differ from both the CEACR and CFA in so far as they were both established directly by the States parties through explicit provision in the treaties which they are competent to interpret. The CEACR and CFA, by contrast, were created by indirect means, by operation of the various organs of the ILO, and as a result of the interaction of the ILO's unique tripartite structure.

42. In any case, the Court has shown its readiness to depart from the interpretation supplied by a treaty body when it finds firm support in the evidence before it for identifying, by application of the rules on treaty interpretation, a different interpretation of the treaty in question.[38]

~~43.~~ Furthermore, the pronouncements of these expert bodies do not prevail over the intentions of State parties as reflected in authentic interpretations of the treaty in question. While the ILC has described the CEACR as an example of the "*independent expert bodies that are organs of international organizations*",[39] it has also observed that the pronouncements of expert bodies cannot be considered as authentic means of interpretation since their views are not attributable to the States parties to that treaty.[40] That conclusion seems especially apt within the context of the ILO, with its tripartite structure of States, employers and workers. It remains the case that the pronouncements of the CEACR and CFA are not binding. In this light, it is useful to recall the fundamental principle articulated by the Permanent Court of International Justice in its *Jaworzina* opinion of 1923: "*it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body which has the power to modify or suppress it*".[41]

44. Whatever weight is afforded to the practice of the CEACR and CFA, it may not displace the weight accorded to the States' own authentic interpretations, as evident in the treaty text and confirmed by the preparatory work, expressing their intentions as to the scope of obligations they have assumed.

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[38] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71, paras. 81–88, 92–97, 101.
[39] International Law Commission, *Report of the International Law Commission on the work of its seventieth session* (30 April–1 June and 2 July–10 August 2018), A/73/10, p. 107.
[40] Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, 2018), p. 600
[41] *Question of Jaworzina (Polish–Czechoslovakian Frontier)*, PCIJ Ser B, No 8, 37 (1923).

iii. The 'intrinsic corollary' interpretation is unsound

45. Although stated repeatedly by the CEACR and CFA over many years, there is ample justification to reject the claim that the 'intrinsic corollary' interpretation represents the correct interpretation of Convention No. 87. As the *travaux préparatoires* demonstrate definitively, it was certainly not the understanding of the concluding parties that the right to strike was necessarily integral to the principle of free association and the right to organise. The right to strike is clearly related to the right of free association, and the two may be mutually supportive in certain circumstances, but this does not compel the conclusion that the two concepts are indivisible, or that freedom of association necessarily entails the right to strike.

c. Supplementary subsequent practice of States

46. Numerous participants in these proceedings have presented information concerning the protection afforded to the right to strike in their national legal system. This practice is far from uniform. While some States indicate that their domestic protection of the right to strike, both in legislation and official practice, is informed and controlled by the acknowledged need to comply with the obligations binding upon States under Convention No. 87, other States indicate that their officials remain uncertain as to whether they are required under the Convention to ensure protection for the right to strike,[42] and yet others reject the notion that Convention No. 87 entails the right to strike,[43] while others still suggest that their domestic efforts to protect the right to strike are not motivated by the need to fulfil their treaty obligations[44] but are implemented for other reasons.[45]

47. Given that this supplementary subsequent practice by States is inconsistent, this means of interpretation warrants relatively little weight in the application of the VCLT's rules of interpretation.

[42] See, e.g., Written Statement of the Swiss Confederation dated 6 May 2024, ¶¶85–89, 136–139; Written Statement of Indonesia dated May 2024, p. 1, 4, 7; Written Statement of Belize dated 21 May 2024, p.1. See also, Written Statement of the Republic of South Africa dated 15 May 2024, ¶¶15–22.
[43] See, e.g., Written Statement of Costa Rica dated 14 May 2024, pp.1, 6–7; Written Statement of the United Kingdom of Great Britain and Northern Ireland dated 16 May 2024, pp. 37–45.
[44] ILC Draft Conclusion 6 of the Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, in *ILC Yearbook* 2018, vol. II, Part Two, A/73/10, p. 43. See also Dörr and Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, 2018), p. 598.
[45] For example, the United States of America's practice in respect of the right to strike cannot be considered to be subsequent practice as that term is understood within the VCLT.

48. Ultimately, the value of this supplementary material is substantially outweighed by the combined value of the authentic means of interpretation mandated by Article 31, taken together with the clear corroboration provided by the *travaux préparatoires*. As a result, the supplementary subsequent practice of the ILO supervisory bodies is inadequate to controvert the conclusion that the right to strike falls outside the scope of Convention No. 87.

C. Stability of meaning

49. As noted above, and as confirmed by the prior practice of the Court, the task of treaty interpretation is to ascertain the intended meaning of the States parties at the time that the treaty was concluded. The preceding analysis of the authentic means of interpretation, as confirmed by the *travaux préparatoires*, shows that the States parties did not intend to provide protection for the right to strike in Convention No. 87 when adopting the treaty text.

50. The Court has accepted in its prior practice that the interpretation of certain treaty provisions may be 'evolutive' or 'dynamic', but the conditions specified by the Court for the adoption of such an evolutive approach are not present here. In particular, the Court has only considered it appropriate to employ evolutive interpretation when there is clear evidence, usually in the form of 'generic terms', that the States' parties intended that the meaning of a treaty may evolve over time.[46] Since there is no evidence to suggest that the States parties shared such a common intention, there is no justification for considering that the correct interpretation of Convention No. 87 might have departed from the meaning which applied when the treaty entered into force, and expanded so as to encompass the right to strike as an addition to the Convention's original scope. Indeed, the *travaux préparatoires* confirm that the States parties understood that legal provision for the right to strike would be made in an entirely separate instrument, and not within the scope of Convention No. 87.

D. Correct interpretation of Convention No. 87

51. Considering these various interpretative means – both authentic and supplementary – altogether in a "*single combined operation*",[47] in accordance with the VCLT's rules of interpretation in Articles 31 and 32, Bangladesh reaffirms that Convention No. 87 was not intended by the States parties at the time of its conclusion to encompass protection of the right

[46] *Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009,* p. 213, paras 63–71.
[47] *ILC Yearbook 1966*, vol. II, part 1, pp. 219–220, para. 8.

to strike. The most significant factor in support of this conclusion is the complete absence of any reference to the right to strike in the carefully negotiated text of the treaty. None of the articles of the Convention make provision for it; the title of the Convention does not name it; nor does it appear in any of the preambular recitals. Further support for this interpretation is furnished by the *travaux préparatoires*, which provide firm evidence that the States parties, having directly addressed the possibility, did not consider the right to strike to be an inseparable or integral element of the right to free association. While States and ILO supervisory bodies have produced a certain amount of subsequent practice in support of the proposition that Convention No. 87 necessarily includes protection for the right to strike, the value of this practice is discounted within the VCLT's carefully calibrated interpretative process, as it amounts to no more than supplementary means of interpretation. It remains the case that the process of treaty interpretation seeks to identify and articulate the shared understanding of the States which negotiated international agreements and consented to be bound by their terms. Divergent supplementary subsequent practice cannot subvert the common intention of the States parties concluding a treaty.

IV. IF THE RIGHT TO STRIKE IS PROTECTED UNDER ILO CONVENTION NO. 87, THE RIGHT IS NOT ABSOLUTE

52. For the reasons explained above, the right to strike is not protected under Convention No. 87. In any event, even if the Court were to opine to the contrary, Bangladesh submits that the right to strike is not absolute.

53. This should not be a controversial proposition, and is accepted by the CEACR: "*the Committee emphasizes that the right to strike cannot be considered as an absolute right*".[48] It is also not

[48] International Labour Conference, 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 (ICJ Dossier, Document No. 235), p. 66, para. 151. See also, ILC, 58th Session, 1973, Report III (Part 4B), Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations (ICJ Dossier, Document No. 233), para. 107 (*"The right to strike is subject to restrictions in many countries, but the scope and severity of these restrictions may vary to a considerable extent, ranging from temporary prohibition and prohibition for only certain categories of workers, to prohibition of a general character applicable to all workers*").

disputed by any participant in these proceedings. To the contrary, most participants expressly endorse restrictions and limitations on any such right.[49]

54. If the right to strike is protected under Convention No. 87, the Convention plainly indicates that this right may be subject to regulation and restriction under domestic law. In particular, article 8(1) of Convention No. 87, read with the qualifier in article 8(2),[50] provides that it is

[49] Written Statement of the United Kingdom of Great Britain and Northern Ireland dated 16 May 2024, ¶79 ("*The right to strike is not absolute because of the diverse range of limitations on the right. The limited scope of the right to strike is widely recognized, even if the nature and extent of the limits are contested*"; Written Statement of the International Trade Union Confederation dated 15 May 2024, ¶4.92 ("*those States often contend that the right to strike is not absolute – a fact that is not disputed*"); Written Statement of Germany dated 6 May 2024, ¶41 ("*Germany's assessment regarding the interpretation of Convention No. 87 also points to the limits of the right to strike under the Convention*"); Written Statement of the International Organisation of Employers dated 16 May 2024, ¶7 ("*the right to strike, by definition, cannot be absolute*"); Written Statement of Canada dated 10 May 2024, ¶9 ("*The right to strike, however, is not an absolute right in Canada*"); Written Statement of Japan dated 16 May 2024, ¶2 ("*the right to strike is not an absolute right but is restricted for certain categories of workers and in certain situations under Japanese law as well as in many jurisdictions*"); Written Statement of Tunisia, p. 3 ("*Il est clair donc et certain que le droit de grève était expressément subordonné à la législation du chaque pays et les autorités nationales doivent faire face à la difficulté intrinsèque de savoir comment réglementer les grèves tout en réconciliant les intérêts contradictoires des grévistes et des autres parties et en préservant l'intérêt public et les États membres de l'OIT doivent trouver des solutions adéquates conformes à leurs situations respectives*"); Written Statement of Mexico dated 16 May 2024, ¶27 ("*In Mexico's domestic law, for a strike to exist in legal terms, it must satisfy the requisites and pursue the objectives pointed out in Article 450 of the* [Federal Labor Law (FLL)]. … *the strike aims to balance the rights and obligations of both workers and employers, and the dispositions of the FLL provide a framework*"); Written Statement of Australia dated 16 May 2024, ¶19 ("*in State practice the right to strike is not unlimited and has been subjected to restrictions. Those restrictions are diverse and cover a range of distinct matters*"), ¶97 ("*In practice, State Parties to Convention 87 … protect and regulate the right to strike in accordance with their domestic laws in diverse and varied ways*"); Written Statement of the Kingdom of Norway dated 16 May 2024 ("*Such right* [to strike] *is not unfettered*."); Written Statement of Poland dated May 2024, ¶2.7 ("*The right to strike is not unconditional and can be restricted*"); Written Statement of BUSINESSAfrica – Employers' Confederation dated 16 May 2024, ¶55 ("*Decisions of* [some of the higher courts within Africa] *have confirmed that the 'right to strike' is by its nature a qualified right which may (and must) justifiably be limited in certain situations. Further, these judgments show that the different nations of Africa have taken divergent approaches to both the conditions on the lawful exercise of the 'right to strike' and the limits on any 'right to strike'. Indeed, many African nations take the view that, in light of their socio, political, geographical and economic contexts, strike action should only be utilised as a matter of last resort*."); Written Statement of the Republic of South Africa dated 15 May 2024, ¶60 ("*a limited and lawful right to strike*"), ¶65 ("*lawful but limited right to strike*"); Written Statement of the Swiss Confederation dated 6 May 2024, ¶¶92-93 ("*Chaque État membre règle, à sa propre manière, la protection juridique, la portée, les restrictions, les modalités et le déroulement de l'action de grève. … Il existe donc autant de manières de réguler le droit de grève qu'il existe d'États. De la seule protection du droit de grève dans de nombreux États, il ne saurait donc être déduit qu'il s'agit d'un droit absolu*"), ¶98 ("*La réglementation du droit de grève est une prérogative étatique. Il revient aux législateurs nationaux de fixer les règles détaillées de son application, de ses limites et de ses modalités en function du contexte national*"); Written Statement of the Kingdom of the Netherlands dated 16 May 2024, ¶¶4.1-4.43, ¶5.20; Written Statement of Colombia dated 16 May 2024, ¶3.45 ("*considerable legal uncertainty persists regarding the precise content and limitations of the right to strike under ILO law*"), ¶3.114 ("*Although the existence of the right to strike within the framework of human rights can be observed, there is still a lack of international consensus on the nature and scope of this right*").

[50] Article 8 provides: "*1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land. 2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention*". See also, article 3(2) (which is relevant if the Court determines that the right to strike is protected under

permissible to make the exercise of the right subject to prescribed conditions, provided those conditions are not of such a character as to interfere unduly with the right to strike itself.[51]

55. State practice also indicates that most States impose restrictions on the right to strike and that the restrictions vary *significantly*.[52] The ILO conducted a comprehensive study of the practice of all 158 States parties to Convention No. 87 prior to a tripartite meeting with Governments, employers and workers in February 2015. The ILO drew not only on information provided by its constituents, but also on authoritative secondary sources to examine national law and practices on the modalities of strike action.[53] Its clear conclusion was that, in most ILO member States, "*the right to strike may be restricted in certain circumstances, or even prohibited*".[54]

56. By way of example, there are divergent approaches to the following aspects of the right to strike amongst States: (i) the definition of a strike and the form of action that constitutes a strike;[55] (ii) prohibitions and limitations on political strikes;[56] (iii) the legality of secondary strikes;[57] (iv) restrictions for public servants and essential workers;[58] (v) restrictions during the term of collective agreement;[59] (vi) the ability to suspend or postpone strikes;[60] (vii) prior notification to administrative authorities and cooling-off periods;[61] (viii) exhaustion of prior procedures (e.g., conciliation, mediation and voluntary arbitration);[62] (ix) strike ballot

article 3(1)), and article 9 (which provides that the Convention shall apply to the armed forces and police to the extent determined by national law or regulations).

[51] See also, Written Statement of Australia dated 16 May 2024, ¶97; Creighton *et al*, *Strike Ballots, Democracy, and Law* (2020), p. 51. See also similar provisions in article 8(1)(d) and (3) of the ICESCR and article 22 of the ICCPR.

[52] See also, Written Statement of Germany dated 6 May 2024, ¶41 ("*a broad interpretation* [of the right to strike] *would contradict the practice of State parties*").

[53] GB.323/INS/5/Appendix III, The Standards Initiative, Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised) (Geneva, 23–25 February 2015), March 2015 (ICJ Dossier, Document No. 108), pp. 21-48, Appendix I.

[54] GB.323/INS/5/Appendix III, The Standards Initiative, Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised) (Geneva, 23–25 February 2015), March 2015 (ICJ Dossier, Document No. 108), p. 28, ¶89.

[55] *Ibid*, pp. 24-26, ¶¶68-77; p. 142-146, ¶¶142-146.

[56] *Ibid*, pp. 26-27, ¶¶79-83.

[57] *Ibid*, pp. 27-28, ¶¶85-88.

[58] *Ibid*, pp. 28-34, ¶¶89-111.

[59] *Ibid*, pp. 34-35, ¶¶112-116.

[60] *Ibid*, pp. 35-36, ¶¶117-118.

[61] *Ibid*, p. 36, ¶120; p. 37, ¶¶126-130.

[62] *Ibid*, pp. 36-37, ¶¶121-125.

requirements;[63] (x) minimum service requirements;[64] (xi) requisitioning of strikers and hiring of external replacement workers;[65] (xii) the cessation of strike action (e.g., by binding compulsory arbitration);[66] and (xiii) the permitted consequences of strike action (e.g., breach or suspension of contract, wage deductions, sanctions).[67] In light of such divergent approaches, the Governments that participated in the subsequent ILO tripartite meeting in February 2015 unanimously agreed that the right to strike "*is not an absolute right*" and emphasised that the "*scope and conditions of this right are regulated at the national level*".[68]

57. In light of the disparity in practice and complexity of the issue, Bangladesh is of the view that even if the Court finds that the right to strike is protected under Convention No. 87, it should not attempt to opine on its precise scope, particularly as this is not a question before the Court.[69] In this respect, Bangladesh agrees with the Swiss Confederation: there are as many ways of regulating the right to strike as there are States.[70] The Court should, instead, affirm that the right to strike is not absolute and that States must be given a broad discretion to determine the scope of that right under domestic law, in accordance with the terms of Convention No. 87 and the practice of States parties to the Convention. As the United Kingdom aptly observes, an opinion to the contrary will in practice adversely affect the operation of restrictions on the right to strike that are set by States at the national level.[71]

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[63] *Ibid*, pp. 38-39, ¶¶131-135.
[64] *Ibid*, pp. 39-41, ¶¶136-141.
[65] *Ibid*, pp. 42-43, ¶¶147-152.
[66] *Ibid*, pp. 43-44, ¶¶153-156.
[67] *Ibid*, pp. 44-47, ¶¶157-169.
[68] GB.323/INS/5/Appendix I, The Standards Initiative, Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, March 2015 (ICJ Dossier, Document No. 106), Appendix I, para. 5. See also, Written Statement of Australia dated 16 May 2024, ¶53; Written Statement of the United Kingdom of Great Britain and Northern Ireland dated 16 May 2024, ¶¶82-83 which discuss State practice.
[69] As noted by many participants, the referral request as initially proposed by the Workers' Group in the ILO in July 2023 included a second question regarding (*inter alia*) the competence of CEACR to "*specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise*". This question was, however, omitted in the text of the resolution that was adopted by the ILO Governing Body at its 349th *bis* (Special) Session held on 10 November 2023. As a result, the legal question put to the Court relates only to whether the right to strike is protected under Convention No. 87.
[70] Written Statement of the Swiss Confederation dated 6 May 2024, ¶93 ("*Il existe donc autant de manières de réguler le droit de grève qu'il existe d'États. De la seule protection du droit de grève dans de nombreux États, il ne saurait donc être déduit qu'il s'agit d'un droit absolu*").
[71] Written Statement of the United Kingdom of Great Britain and Northern Ireland dated 16 May 2024, ¶83.

V. CONCLUSION

For the reasons set out above, and for the reasons given in Bangladesh's written statement dated 16 May 2024, Bangladesh's position remains that the right to strike is not protected under Convention No. 87. Even if the Court does not accept that position and concludes that the right to strike is protected by Convention No. 87, Bangladesh submits that the right to strike is not absolute and urges the Court to affirm that States must be given broad discretion to determine its scope under domestic law.

Tareque Muhammad

Ambassador of Bangladesh to The Netherlands

16 September 2024