

Corrigé
Corrected

CR 2025/16

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2025

Public sitting

held on Monday 6 October 2025, at 10 a.m., at the Peace Palace,

President Iwasawa presiding,

*on the Right to Strike under ILO Convention No. 87
(Request for advisory opinion submitted by the Governing Body of the International
Labour Office (ILO))*

VERBATIM RECORD

ANNÉE 2025

Audience publique

tenue le lundi 6 octobre 2025, à 10 heures, au Palais de la Paix,

sous la présidence de M. Iwasawa, président,

*sur le Droit de grève au regard de la convention n° 87 de l'OIT
(Demande d'avis consultatif soumise par le Conseil d'administration du Bureau
international du Travail (BIT))*

COMPTE RENDU

Present: President Iwasawa
 Vice-President Sebutinde
 Judges Tomka
 Abraham
 Xue
 Bhandari
 Nolte
 Charlesworth
 Brant
 Gómez Robledo
 Cleveland
 Aurescu
 Tladi
 Hmoud

 Registrar Gautier

Présents : M. Iwasawa, président
M^{me} Sebutinde, vice-présidente
MM. Tomka
Abraham
M^{me} Xue
MM. Bhandari
Nolte
M^{me} Charlesworth
MM. Brant
Gómez Robledo
M^{me} Cleveland
MM. Aurescu
Tladi
Hmoud, juges

M. Gautier, greffier

The International Labour Office is represented by:

Ms Tomi Kohiyama, Legal Adviser.

The International Trade Union Confederation is represented by:

Mr Luc Triangle, General Secretary, International Trade Union Confederation,

Mr Paapa Kwasi Danquah, Director of Legal and Human and Trade Union Rights, Trade Union Confederation,

Mr Pierre Klein, Professor of International Law, Université Libre de Bruxelles,

Ms Phoebe Okowa, Professor of Public International Law, Queen Mary University of London, member of the International Law Commission, associate member of the Institut de droit international, Advocate, High Court of Kenya,

Mr Harold Hongju Koh, Sterling Professor of International Law, Yale Law School, member of the Bars of the State of New York and of the District of Columbia,

Mr Philippe Sands, KC, Professor of Law, University College London, Barrister, 11 King's Bench Walk Chambers,

Mr Icarus Chan, member of the Bar of the State of New York,

Ms Odile Dua, Teaching Assistant and PhD candidate, Université Libre de Bruxelles,

Ms Aliya Al-Yassin, Barrister, 11 King's Bench Walk Chambers,

Mr Jeffrey Vogt, Rule of Law Director, Solidarity Center,

Mr Ruwan Subasinghe, Legal Director, International Transport Workers' Federation,

Ms Tonia Novitz, Professor of Labour Law, University of Bristol Centre for Law at Work,

Mr John Hendy, KC, Old Square Chambers,

Mr Klaus Lörcher, Former Legal Secretary, Civil Service Tribunal of the European Union,

Mr Valerio De Stefano, Professor of Law, Canada Research Chair in Innovation, Law and Society, Osgoode Hall Law School, York University (Toronto),

Ms Catelene Passchier, Chairperson of the Workers' Group, International Labour Organization,

Ms Maité Llanos, Secretary of the Workers' Group, International Labour Organization,

Mr Jeroen Beirnaert, Political Director, International Trade Union Confederation,

Ms Mónica Tepfer, Legal Adviser, International Trade Union Confederation,

Ms Zuzanna Muskat-Gorska, Legal Adviser, International Trade Union Confederation,

Le Bureau international du Travail est représenté par :

M^{me} Tomi Kohiyama, conseillère juridique.

La Confédération syndicale internationale est représentée par :

M. Luc Triangle, secrétaire général, Confédération syndicale internationale,

M. Paapa Kwasi Danquah, directeur juridique aux droits humains et syndicaux, Confédération syndicale internationale

M. Pierre Klein, professeur de droit international à l'Université libre de Bruxelles,

M^{me} Phoebe Okowa, professeure de droit international public à l'Université Queen Mary de Londres, membre de la Commission du droit international, membre associée de l'Institut de droit international, avocate, Haute Cour du Kenya,

M. Harold Hongju Koh, professeur de droit international, titulaire de la chaire Sterling, faculté de droit de l'Université Yale, membre des barreaux de l'État de New York et du district de Columbia,

M. Philippe Sands, KC, professeur de droit à la University College de Londres, avocat au cabinet 11 King's Bench Walk,

M. Icarus Chan, membre du barreau de l'État de New York,

M^{me} Odile Dua, attachée d'enseignement et doctorante à l'Université libre de Bruxelles,

M^{me} Aliya Al-Yassin, avocate, cabinet 11 King's Bench Walk,

M. Jeffrey Vogt, directeur de l'État de droit, Solidarity Center,

M. Ruwan Subasinghe, directeur juridique, Fédération internationale des ouvriers du transport,

M^{me} Tonia Novitz, professeure de droit du travail au Centre for Law at Work de l'Université de Bristol,

M. John Hendy, KC, Old Square Chambers,

M. Klaus Lörcher, ancien secrétaire juridique, Tribunal de la fonction publique de l'Union européenne,

M. Valerio De Stefano, professeur de droit, chaire de recherche du Canada en innovation, droit et société, faculté de droit Osgoode Hall de l'Université York de Toronto,

M^{me} Catelene Passchier, présidente du groupe des travailleurs, Organisation internationale du Travail,

M^{me} Maité Llanos, secrétaire du groupe des travailleurs, Organisation internationale du Travail,

M. Jeroen Beirnaert, directeur politique, Confédération syndicale internationale,

M^{me} Mónica Tepfer, conseillère juridique, Confédération syndicale internationale,

M^{me} Zuzanna Muskat-Gorska, conseillère juridique, Confédération syndicale internationale,

Ms Loredana Carta, Legal Adviser, International Trade Union Confederation,

Mr Marcelo Di Stefano, Secretary of Trade Union Strengthening and Organization, Trade Union Confederation of the Americas (TUCA).

The International Organisation of Employers is represented by:

Mr Roberto Suárez Santos, Secretary-General, International Organisation of Employers,

Ms Michelle Butler, member of the Bar of England and Wales, Matrix Chambers,

Ms Rita Yip, member of the Bar of New Zealand, Senior Adviser, International Organisation of Employers,

Mr Anirudh Mathur, member of the Bar of England and Wales, Matrix Chambers.

The Government of the Republic of South Africa is represented by:

HE Ms Nomakhosazana Meth, Minister of Employment and Labour,

HE Mr Vusimuzi Madonsela, Ambassador of the Republic of South Africa to the Kingdom of the Netherlands,

Mr Thembinkosi Mkalipi, Acting Deputy Director-General, Department of Employment and Labour,

Mr Siyabonga Hadebe, Minister, Permanent Mission of the Republic of South Africa to the United Nations Office in Geneva,

Ms Sinesipho Mdutshane, Adviser to the Minister,

Ms Siphokazi Ndudane, Private Secretary to the Minister,

Mr Cornelius Scholtz, Legal Counsellor, Embassy of the Republic of South Africa in the Kingdom of the Netherlands,

Mr Halton Cheadle, Counsel and Advocate,

Mr John Dugard, Counsel and Advocate,

Ms Ietje Barbas-Dugard, Assistant to the Delegation.

The Government of the Federal Republic of Germany is represented by:

Ms Tania von Uslar-Gleichen, Legal Adviser and Director-General for Legal Affairs, Federal Foreign Office,

HE Mr Nikolaus Meyer-Landrut, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

M^{me} Loredana Carta, conseillère juridique, Confédération syndicale internationale,

M. Marcelo Di Stefano, secrétaire pour le renforcement et l'organisation des syndicats, Trade Union Confederation of the Americas (TUCA),

L'Organisation internationale des employeurs est représentée par :

M. Roberto Suárez Santos, secrétaire général, Organisation internationale des employeurs,

M^{me} Michelle Butler, membre du barreau d'Angleterre et du pays de Galles, Matrix Chambers,

M^{me} Rita Yip, membre du barreau de Nouvelle-Zélande, conseillère principale, Organisation internationale des employeurs,

M. Anirudh Mathur, membre du barreau d'Angleterre et du pays de Galles, Matrix Chambers.

Le Gouvernement de la République sud-africaine est représenté par :

S. Exc. M^{me} Nomakhosazana Meth, ministre de l'emploi et du travail,

S. Exc. M. Vusimuzi Madonsela, ambassadeur de la République sud-africaine auprès du Royaume des Pays-Bas,

M. Thembinkosi Mkalipi, directeur général adjoint, ministère de l'emploi et du travail,

M. Siyabonga Hadebe, ministre, mission permanente de la République sud-africaine auprès de l'Office des Nations Unies à Genève,

M^{me} Sinesipho Mdutshane, conseillère du ministre,

M^{me} Siphokazi Ndudane, secrétaire particulière du ministre,

M. Cornelius Scholtz, conseiller juridique, ambassade de la République sud-africaine au Royaume des Pays-Bas,

M. Halton Cheadle, conseil et avocat,

M. John Dugard, conseil et avocat,

M^{me} Ietje Barbas-Dugard, assistante auprès de la délégation.

Le Gouvernement de la République fédérale d'Allemagne est représenté par :

M^{me} Tania von Uslar-Gleichen, conseillère juridique et directrice générale des affaires juridiques, ministère fédéral des affaires étrangères,

S. Exc. M. Nikolaus Meyer-Landrut, ambassadeur de la République fédérale d'Allemagne auprès du Royaume des Pays-Bas,

Ms Laura Ahrens, Minister and Deputy Head of Mission, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

Mr Maximilian Klobe, Legal Officer in the Division for Public International Law,

Ms Silke Schneemann, Assistant Desk Officer, International Law Team, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

Ms Eva-Maria Manigk, Attaché, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands.

The Government of Australia is represented by:

Mr Stephen Donaghue, KC, Solicitor-General of Australia,

Mr Jesse Clarke, General Counsel (International Law), Office of International Law, Attorney-General's Department,

Mr Bill Cambell, AO, KC, Counsel,

Ms Kate Parlett, member of the Bar of England and Wales, Twenty Essex Chambers, London,

Mr Christopher McDermott, Senior Government Lawyer, Workplace Relations Legal Division, Department of Employment and Workplace Relations,

Mr Nathan Burke, Director, Bargaining Policy, Department of Employment and Workplace Relations.

The Government of the People's Republic of Bangladesh is represented by:

HE Mr Tareque Muhammad, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands,

Mr Fabián Raimondo, Associate Professor of Public International Law, Maastricht University, member of the Bar of the City of La Plata (Argentina),

Ms Nabila Nowshin, First Secretary, Embassy of the People's Republic of Bangladesh in the Kingdom of the Netherlands,

Mr Hasan Abdullah Towhid, Counsellor, Embassy of the People's Republic of Bangladesh in the Kingdom of the Netherlands.

The Government of the Republic of Colombia is represented by:

HE Mr Mauricio Jaramillo Jassir, Vice-Minister for Multilateral Affairs,

HE Ms Carolina Olarte Bácares, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands,

Mr Marco Alberto Velásquez Ruiz, Counsellor, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Mr Raúl Alfonso Simancas Gómez, Second Secretary of Foreign Affairs, Embassy of the Republic of Colombia in the Kingdom of the Netherlands.

M^{me} Laura Ahrens, ministre et cheffe de mission adjointe, ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas,

M. Maximilian Klobe, juriste à la division du droit international public,

M^{me} Silke Schneemann, administratrice adjointe, équipe du droit international, ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas,

M^{me} Eva-Maria Manigk, attachée, ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas.

Le Gouvernement de l'Australie est représenté par :

M. Stephen Donaghue, KC, *Solicitor General* d'Australie,

M. Jesse Clarke, General Counsel (droit international), bureau du droit international, services de l'*Attorney General*,

M. Bill Cambell, AO, KC, Counsel,

M^{me} Kate Parlett, membre du barreau d'Angleterre et du pays de Galles, Twenty Essex Chambers (Londres),

M. Christopher McDermott, juriste principal du gouvernement, service juridique des relations professionnelles, ministère de l'emploi et des relations professionnelles,

M. Nathan Burke, directeur, politique de négociations, ministère de l'emploi et des relations professionnelles.

Le Gouvernement de la République populaire du Bangladesh est représenté par :

S. Exc. M. Tareque Muhammad, ambassadeur de la République populaire du Bangladesh auprès du Royaume des Pays-Bas,

M. Fabián Raimondo, professeur associé de droit international public à l'Université de Maastricht, membre du barreau de La Plata (Argentine),

M^{me} Nabila Nowshin, première secrétaire, ambassade de la République populaire du Bangladesh au Royaume des Pays-Bas,

M. Hasan Abdullah Towhid, conseiller, ambassade de la République populaire du Bangladesh au Royaume des Pays-Bas.

Le Gouvernement de la République de Colombie est représenté par :

S. Exc. M. Mauricio Jaramillo Jassir, vice-ministre des affaires multilatérales,

S. Exc. M^{me} Carolina Olarte Bácares, ambassadrice de la République de Colombie auprès du Royaume des Pays-Bas,

M. Marco Alberto Velásquez Ruiz, conseiller, ambassade de la République de Colombie au Royaume des Pays-Bas,

M. Raúl Alfonso Simancas Gómez, deuxième secrétaire chargé des affaires étrangères, ambassade de la République de Colombie au Royaume des Pays-Bas.

The Government of the Federative Republic of Brazil is represented by:

HE Mr Fernando Simas Magalhães, Ambassador of the Federative Republic of Brazil to the Kingdom of the Netherlands,

Mr Marcelo Marotta Viegas, Director, Department of International Organizations, Ministry of Foreign Affairs,

Mr Henrique Choer Moraes, Deputy Head of Mission, Embassy of the Federative Republic of Brazil in the Kingdom of the Netherlands,

Mr Frederico Bauer, Counsellor, Embassy of the Federative Republic of Brazil in the Kingdom of the Netherlands,

Mr Victor Thives dos Santos, Secretary, Embassy of the Federative Republic of Brazil in the Kingdom of the Netherlands.

The Government of the Arab Republic of Egypt is represented by:

HE Mr Emad Magdy Hanna, Ambassador of the Arab Republic of Egypt to the Kingdom of the Netherlands,

Ms Jasmine Moussa, PhD, Minister Plenipotentiary, Cabinet of the Minister for Foreign Affairs, Emigration and Egyptian Expatriates, Ministry of Foreign Affairs, Emigration and Egyptian Expatriates,

Mr Mohamed Samir Salem, First Secretary, Embassy of the Arab Republic of Egypt in the Kingdom of the Netherlands,

Mr Kareem Mohamed Hassan, Second Secretary, Embassy of the Arab Republic of Egypt in the Kingdom of the Netherlands.

The Government of the Kingdom of Spain is represented by:

HE Ms Consuelo Femenía Guardiola, Ambassador of the Kingdom of Spain to the Kingdom of the Netherlands,

Mr Santiago Ripol Carulla, Professor of International Public Law, Universitat Pompeu Fabra, Head of the International Legal Advisory Service, Ministry of Foreign Affairs, European Union and Cooperation,

Ms María José Ruiz Sánchez, State Attorney, Office of the Attorney General,

Ms María Dolores Casariego Artola, Deputy Director General of International Socio-Labor Relations, Ministry of Labor and Social Economy,

Mr Juan Almazán Fuentes, First Secretary and Legal Adviser, Embassy of the Kingdom of Spain in the Kingdom of the Netherlands.

Le Gouvernement de la République fédérative du Brésil est représenté par :

- S. Exc. M. Fernando Simas Magalhães, ambassadeur de la République fédérative du Brésil auprès du Royaume des Pays-Bas,
- M. Marcelo Marotta Viegas, directeur du département des organisations internationales, ministère des affaires étrangères,
- M. Henrique Choer Moraes, chef de mission adjoint, ambassade de la République fédérative du Brésil au Royaume des Pays-Bas,
- M. Frederico Bauer, conseiller, ambassade de la République fédérative du Brésil au Royaume des Pays-Bas,
- M. Victor Thives dos Santos, secrétaire, ambassade de la République fédérative du Brésil au Royaume des Pays-Bas.

Le Gouvernement de la République arabe d'Égypte est représenté par :

- S. Exc. M. Emad Magdy Hanna, ambassadeur de la République arabe d'Égypte auprès du Royaume des Pays-Bas,
- M^{me} Jasmine Moussa, PhD, ministre plénipotentiaire, cabinet du ministre des affaires étrangères, de l'émigration et des expatriés égyptiens, ministère des affaires étrangères, de l'émigration et des expatriés égyptiens,
- M. Mohamed Samir Salem, premier secrétaire, ambassade de la République arabe d'Égypte au Royaume des Pays-Bas,
- M. Kareem Mohamed Hassan, deuxième secrétaire, ambassade de la République arabe d'Égypte au Royaume des Pays-Bas.

Le Gouvernement du Royaume d'Espagne est représenté par :

- S. Exc. M^{me} Consuelo Femenía Guardiola, ambassadrice du Royaume d'Espagne auprès du Royaume des Pays-Bas,
- M. Santiago Ripol Carulla, professeur de droit international public à la Universitat Pompeu Fabra, chef du service juridique international, ministère des affaires étrangères, de l'Union européenne et de la coopération,
- M^{me} María José Ruiz Sánchez, avocate de l'État, bureau du procureur général,
- M^{me} María Dolores Casariego Artola, directrice générale adjointe aux relations internationales en matière sociale et professionnelle, ministère du travail et de l'économie sociale,
- M. Juan Almazán Fuentes, premier secrétaire et conseiller juridique, ambassade du Royaume d'Espagne au Royaume des Pays-Bas.

The Government of the Republic of Indonesia is represented by:

HE Mr Mayerfas, Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands,

Mr Laurentius Amrih Jinangkung, Director General of International Law and Treaties, Ministry of Foreign Affairs,

Ms Mariska Dwianti Dhanutirto, Deputy Chief of Mission, Embassy of the Republic of Indonesia in the Kingdom of the Netherlands,

Mr Haryo Budi Nugroho, Minister Counsellor, Embassy of the Republic of Indonesia in the Kingdom of the Netherlands,

Mr Andrea Albert Stefanus, Counsellor, Embassy of the Republic of Indonesia in the Kingdom of the Netherlands,

Ms I Gusti Agung Ayu Ratih Astarty, Counsellor, Embassy of the Republic of Indonesia in the Kingdom of the Netherlands,

Ms Puji Lestari, Counsellor, Embassy of the Republic of Indonesia in the Kingdom of the Netherlands,

Ms Aisyah Murtina Allamanda, First Secretary, Embassy of the Republic of Indonesia in the Kingdom of the Netherlands,

Ms Maulida Fitri Purliayu, Third Secretary, Embassy of the Republic of Indonesia in the Kingdom of the Netherlands,

Ms Yustisia Pratiwi Pramesti, Third Secretary, Directorate of Social and Cultural Law and Treaties, Ministry of Foreign Affairs.

The Government of the Republic of Mauritius is represented by:

HE Mr Muhammad Reza Cassam Uteem, Minister of Labour and Industrial Relations,

Ms Priya Veedu Ramjeeawon-Varma, Assistant Solicitor General, Office of the Attorney General,

Mr Yousouf Mohamed Ramjanally, Chargé d'affaires a.i., Embassy of the Republic of Mauritius in the Kingdom of Belgium.

The Government of the United Mexican States is represented by:

HE Ms Carmen Moreno Toscano, Ambassador of the United Mexican States to the Kingdom of the Netherlands,

Mr Pablo Arrocha Olabuenaga, Legal Adviser, Ministry of Foreign Affairs,

Ms Alicia Patricia Perez Galeana, Deputy Legal Adviser "B", Ministry of Foreign Affairs,

Mr Alfonso Ascencio Herrera, Deputy Head of Mission, Embassy of the United Mexican States in the Kingdom of the Netherlands,

Le Gouvernement de la République d'Indonésie est représenté par :

S. Exc. M. Mayerfas, ambassadeur de la République d'Indonésie auprès du Royaume des Pays-Bas,

M. Laurentius Amrih Jinangkung, directeur général au droit international et aux traités, ministère des affaires étrangères,

M^{me} Mariska Dwianti Dhanutirto, cheffe de mission adjointe, ambassade de la République d'Indonésie au Royaume des Pays-Bas,

M. Haryo Budi Nugroho, ministre conseiller, ambassade de la République d'Indonésie au Royaume des Pays-Bas,

M. Andrea Albert Stefanus, conseiller, ambassade de la République d'Indonésie au Royaume des Pays-Bas,

M^{me} I Gusti Agung Ayu Ratih Astary, conseillère, ambassade de la République d'Indonésie au Royaume des Pays-Bas,

M^{me} Puji Lestari, conseillère, ambassade de la République d'Indonésie au Royaume des Pays-Bas,

M^{me} Aisyah Murtina Allamanda, première secrétaire, ambassade de la République d'Indonésie au Royaume des Pays-Bas,

M^{me} Maulida Fitri Purliayu, troisième secrétaire, ambassade de la République d'Indonésie au Royaume des Pays-Bas,

M^{me} Yustisia Pratiwi Pramesti, troisième secrétaire, direction de la législation en matière sociale et culturelle et des traités, ministère des affaires étrangères.

Le Gouvernement de la République de Maurice est représenté par :

S. Exc. M. Muhammad Reza Cassam Uteem, ministre du travail et des relations industrielles,

M^{me} Priya Veedu Ramjeeawon-Varma, *Solicitor General* adjointe, bureau de l'*Attorney General*,

M. Yousouf Mohamed Ramjanally, chargé d'affaires par intérim, ambassade de la République de Maurice au Royaume de Belgique.

Le Gouvernement des États-Unis du Mexique est représenté par :

S. Exc. M^{me} Carmen Moreno Toscano, ambassadrice des États-Unis du Mexique auprès du Royaume des Pays-Bas,

M. Pablo Arrocha Olabuenaga, conseiller juridique, ministère des affaires étrangères,

M^{me} Alicia Patricia Perez Galeana, conseillère juridique adjointe « B », ministère des affaires étrangères,

M. Alfonso Ascencio Herrera, chef de mission adjoint, ambassade des États-Unis du Mexique au Royaume des Pays-Bas,

Mr Jorge Francisco Calderón Gamboa, Head of Multilateral Legal Affairs, Embassy of the United Mexican States in the Kingdom of the Netherlands,

Mr Leonardo David Lima Valdés, Chief of the Department of International Tribunals and Organizations, Ministry of Foreign Affairs.

The Government of the Kingdom of Norway is represented by:

Mr Kristian Jervell, Director-General, Legal Affairs Department, Ministry of Foreign Affairs,

Mr Jørgen Sørگرد Skjold, Associate Professor, University of Bergen, International Law Adviser, Legal Affairs Department, Ministry of Foreign Affairs,

Ms Tanya Marie Samuelsen, Head of Analysis and Evaluation, Working Environment and Safety Department, Ministry of Labour and Social Inclusion,

Ms Kristin Hefre, Minister Counsellor for Legal and Multilateral Affairs, Embassy of the Kingdom of Norway in the Kingdom of the Netherlands,

Ms Emilie Tønseth Haugo, Legal Intern, Embassy of the Kingdom of Norway in the Kingdom of the Netherlands.

The Government of the Republic of Panama is represented by:

HE Mr Javier Eduardo Martínez-Acha Vásquez, Minister of Foreign Affairs,

HE Ms Jackeline Muñoz, Minister of Labour and Labour Development,

HE Ms Sally Loo Hui, Ambassador of the Republic of Panama to the Kingdom of the Netherlands,

Ms Lizbeth Hernández Altafulla, Secretary General, Ministry of Foreign Affairs,

Mr Adolfo Ahumada, Adviser to the Minister of Foreign Affairs,

Mr Humberto Alcázar, Adviser to the Minister of Foreign Affairs,

Mr Darbin Saldaña, Deputy Director of Protocol and State Ceremonial,

Ms Carmen De Gracia, Head of the Europe Department, Ministry of Foreign Affairs,

Ms Jackelin Florez, Head of International Technical Cooperation, Ministry of Labour and Labour Development,

Mr Eduardo Antonio Carreño, Attaché, Embassy of the Republic of Panama in the Kingdom of the Netherlands,

Mr Renato Famiglietti, Deputy Head of Mission, Embassy of the Republic of Panama in the Kingdom of the Netherlands.

M. Jorge Francisco Calderón Gamboa, chef des affaires juridiques multilatérales, ambassade des États-Unis du Mexique au Royaume des Pays-Bas,

M. Leonardo David Lima Valdés, chef du département des organisations et tribunaux internationaux, ministère des affaires étrangères.

Le Gouvernement du Royaume de Norvège est représenté par :

M. Kristian Jervell, directeur général du département des affaires juridiques, ministère des affaires étrangères,

M. Jørgen Sørگرد Skjold, professeur associé à l'Université de Bergen, conseiller en droit international, département des affaires juridiques, ministère des affaires étrangères,

M^{me} Tanya Marie Samuelsen, responsable de l'analyse et de l'évaluation, département du milieu de travail et de la sécurité, ministère du travail et de l'insertion sociale,

M^{me} Kristin Hefre, ministre conseillère aux affaires juridiques et multilatérales, ambassade du Royaume de Norvège au Royaume des Pays-Bas,

M^{me} Emilie Tønseth Haugo, stagiaire juridique, ambassade du Royaume de Norvège au Royaume des Pays-Bas.

Le Gouvernement de la République du Panama est représenté par :

S. Exc. M. Javier Eduardo Martínez-Acha Vásquez, ministre des affaires étrangères,

S. Exc. M^{me} Jackeline Muñoz, ministre du travail et du développement professionnel,

S. Exc. M^{me} Sally Loo Hui, ambassadrice de la République du Panama auprès du Royaume des Pays-Bas,

M^{me} Lizbeth Hernández Altafulla, secrétaire générale, ministère des affaires étrangères,

M. Adolfo Ahumada, conseiller auprès du ministre des affaires étrangères,

M. Humberto Alcázar, conseiller auprès du ministre des affaires étrangères,

M. Darbin Saldaña, directeur adjoint du protocole et du cérémonial d'État,

M^{me} Carmen De Gracia, cheffe du département de l'Europe, ministère des affaires étrangères,

M^{me} Jackelin Florez, responsable de la coopération technique internationale, ministère du travail et du développement professionnel,

M. Eduardo Antonio Carreño, attaché, ambassade de la République du Panama au Royaume des Pays-Bas,

M. Renato Famiglietti, chef de mission adjoint, ambassade de la République du Panama auprès du Royaume des Pays-Bas.

The Government of the United Kingdom of Great Britain and Northern Ireland is represented by:

HE Mr Chris Rampling, Ambassador of the United Kingdom of Great Britain and Northern Ireland to the Kingdom of the Netherlands,

Mr Paul McKell, Legal Director, Foreign, Commonwealth & Development Office,

Mr Daniel Stilitz, KC, Barrister, member of the Bar of England and Wales, 11 King's Bench Walk Chambers,

Ms Philippa Webb, Professor of Public International Law, University of Oxford, member of the Bar of England and Wales, and the Bars of the State of New York and Belize, Twenty Essex Chambers,

Ms Kate Hamilton, Legal Counsellor, Embassy of the United Kingdom of Great Britain and Northern Ireland in the Kingdom of the Netherlands,

Ms Amanda Hennedy-Goble, Assistant Legal Adviser, Legal Directorate, Foreign, Commonwealth & Development Office,

Ms Dora Gudmundsdottir, Senior Lawyer, Department for Business and Trade,

Ms Ann-Marie Orridge, Trade Union International Lead, Department for Business and Trade,

Ms Palika Bhasin, Second Secretary, Embassy of the United Kingdom of Great Britain and Northern Ireland in the Kingdom of the Netherlands,

Ms Laura Grant, Policy Adviser, International Law, Embassy of the United Kingdom of Great Britain and Northern Ireland in the Kingdom of the Netherlands,

Ms Pauline Pfaff, Policy Adviser, International Law, Embassy of the United Kingdom of Great Britain and Northern Ireland in the Kingdom of the Netherlands,

Ms Ashleigh Bicker Caarten, International Law Support Officer, Embassy of the United Kingdom of Great Britain and Northern Ireland in the Kingdom of the Netherlands.

The Government of the Eastern Republic of Uruguay is represented by:

HE Ms Alejandra de Bellis, Ambassador, Permanent Representative of the Eastern Republic of Uruguay to the United Nations,

HE Mr Álvaro González Otero, Ambassador of the Eastern Republic of Uruguay to the Kingdom of the Netherlands,

Ms Rossina Álvarez González, Assistant, Embassy of the Eastern Republic of Uruguay in the Kingdom of the Netherlands.

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord est représenté par :

S. Exc. M. Chris Rampling, ambassadeur du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord auprès du Royaume des Pays-Bas,

M. Paul McKell, directeur juridique, ministère des affaires étrangères, du Commonwealth et du développement,

M. Daniel Stilitz, KC, avocat, membre du barreau d'Angleterre et du pays de Galles, cabinet 11 King's Bench Walk,

M^{me} Philippa Webb, professeure de droit international public à l'Université d'Oxford, membre du barreau d'Angleterre et du pays de Galles, et des barreaux de l'État de New York et du Belize, Twenty Essex Chambers,

M^{me} Kate Hamilton, conseillère juridique, ambassade du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord au Royaume des Pays-Bas,

M^{me} Amanda Hennedy-Goble, conseillère juridique adjointe, direction des affaires juridiques, ministère des affaires étrangères, du Commonwealth et du développement,

M^{me} Dora Gudmundsdottir, juriste principale, département des affaires et du commerce,

M^{me} Ann-Marie Orridge, responsable internationale des questions syndicales, département des affaires et du commerce,

M^{me} Palika Bhasin, deuxième secrétaire, ambassade du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord au Royaume des Pays-Bas,

M^{me} Laura Grant, conseillère politique, droit international, ambassade du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord au Royaume des Pays-Bas,

M^{me} Pauline Pfaff, conseillère politique, droit international, ambassade du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord au Royaume des Pays-Bas,

M^{me} Ashleigh Bicker Caarten, chargée d'appui en droit international, ambassade du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord au Royaume des Pays-Bas.

Le Gouvernement de la République orientale de l'Uruguay est représenté par :

S. Exc. M^{me} Alejandra de Bellis, ambassadrice, représentante permanente de la République orientale de l'Uruguay auprès de l'Organisation des Nations Unies,

S. Exc. M. Álvaro González Otero, ambassadeur de la République orientale de l'Uruguay auprès du Royaume des Pays-Bas,

M^{me} Rossina Álvarez González, assistante, ambassade de la République orientale de l'Uruguay au Royaume des Pays-Bas.

The Government of the Federal Republic of Somalia is represented by:

HE Ms Khadija Ossoble Ali, Ambassador of the Federal Republic of Somalia to the Kingdom of the Netherlands, the Kingdom of Belgium, the Grand Duchy of Luxembourg and the European Union,

Mr Guled Yusuf, Partner, A&O Shearman LLP,

Mr Pranay Lekhi, Associate, A&O Shearman LLP, member of the Bar of India and solicitor of the Senior Courts of England and Wales.

The Government of the Swiss Confederation is represented by:

Mr Franz Xaver Perrez, Head of the Directorate of International Law, Federal Department of Foreign Affairs of the Swiss Confederation,

Ms Valérie Berset Bircher, Ambassador and Head of International Labour Affairs, State Secretariat for Economic Affairs (SECO),

Ms Céline Brugger, Legal Officer, International Labour Affairs, State Secretariat for Economic Affairs (SECO),

HE Ms Corinne Cicéron Bühler, Ambassador of the Swiss Confederation to the Kingdom of the Netherlands,

Ms Sandra Caluori, Deputy Head of Mission, Multilateral Affairs, Embassy of the Swiss Confederation in the Kingdom of the Netherlands,

Mr Gian Clavadetscher, Legal Adviser, Embassy of the Swiss Confederation in the Kingdom of the Netherlands,

Ms Dorotea Avedisian, Intern, Embassy of the Swiss Confederation in the Kingdom of the Netherlands.

The Government of the Republic of Vanuatu is represented by:

Ms Angelyne Glenda Dovo Roy, Attorney-General,

Ms Murielle Metsan Meltenoven, Commissioner of Labour,

Ms Florence Williams Samuel, Solicitor General,

Mr Dreli Solomon, Chargé d'affaires, Mission of the Republic of Vanuatu to the European Union, the Kingdom of Belgium and the United Kingdom of Great Britain and Northern Ireland,

Ms Margaretha Wewerinke-Singh, Counsel.

Le Gouvernement de la République fédérale de Somalie est représenté par :

S. Exc. M^{me} Khadija Ossoble Ali, ambassadrice de la République fédérale de Somalie auprès du Royaume des Pays-Bas, du Royaume de Belgique, du Grand-Duché de Luxembourg et de l'Union européenne,

M. Guled Yusuf, associé, A&O Shearman LLP,

M. Pranay Lekhi, collaborateur, A&O Shearman LLP, membre du barreau d'Inde et *solicitor* près les juridictions supérieures d'Angleterre et du pays de Galles.

Le Gouvernement de la Confédération suisse est représenté par :

M. Franz Xaver Perrez, directeur de la direction du droit international public, département fédéral des affaires étrangères,

M^{me} Valérie Berset Bircher, ambassadrice, cheffe des affaires internationales du travail, secrétariat d'État à l'économie (SECO),

M^{me} Céline Brugger, juriste, affaires internationales du travail, secrétariat d'État à l'économie (SECO),

S. Exc. M^{me} Corinne Cicéron Bühler, ambassadrice de la Confédération suisse auprès du Royaume des Pays-Bas,

M^{me} Sandra Caluori, cheffe de mission adjointe aux affaires multilatérales, ambassade de la Confédération suisse au Royaume des Pays-Bas,

M. Gian Clavadetscher, conseiller juridique, ambassade de la Confédération suisse au Royaume des Pays-Bas,

M^{me} Dorotea Avedisian, stagiaire, ambassade de la Confédération suisse au Royaume des Pays-Bas.

Le Gouvernement de la République de Vanuatu est représenté par :

M^{me} Angelyne Glenda Dovo Roy, *Attorney General*,

M^{me} Murielle Metsan Meltenoven, commissaire au travail,

M^{me} Florence Williams Samuel, *Solicitor General*,

M. Dreli Solomon, chargé d'affaires, mission de la République de Vanuatu auprès de l'Union européenne, du Royaume de Belgique et du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord,

M^{me} Margaretha Wewerinke-Singh, conseil.

The International Cooperative Alliance is represented by:

Mr Hagen Henry, Chairperson, International Cooperative Alliance Cooperative Law Committee,

Mr Santosh Kumar Padmanabhan, Director of Legislation, International Cooperative Alliance.

Business Africa is represented by:

Mr Kaizer Moyane, Special Adviser, Business Africa,

Mr Paul Clark, member of the Bar of England and Wales, Garden Court Chambers.

L'Alliance coopérative internationale est représentée par :

M. Hagen Henry, président du comité sur le droit coopératif, Alliance coopérative internationale,

M. Santosh Kumar Padmanabhan, directeur de la législation, Alliance coopérative internationale.

Business Africa est représenté par :

M. Kaizer Moyane, conseiller spécial, Business Africa,

M. Paul Clark, membre du barreau d'Angleterre et du pays de Galles, Garden Court Chambers.

The PRESIDENT: Please be seated. The sitting is open.

With this morning's sitting, the Court begins two and a half days of hearings on the request for an advisory opinion submitted to it by the Governing Body of the International Labour Organization on the question of the *Right to Strike under ILO Convention No. 87*.

*

I shall now recall the principal steps in the present advisory proceedings.

On 10 November 2023, at its 349th *bis* (special) Session, the Governing Body of the International Labour Organization, to which I will refer as the ILO, adopted a resolution by which it decided, referring to Article 65 of the Statute of the Court and Article 103 of the Rules of Court, to request the International Court of Justice to render urgently an advisory opinion. The text of the resolution was transmitted to the Court by a letter from the Director-General of the ILO dated 13 November 2023 and received in the Registry on the same day. I shall ask the Registrar to read the question on which the Court is asked to render an advisory opinion.

The REGISTRAR:

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

The PRESIDENT: In accordance with Article 66, paragraph 1, of the Statute, the Registrar gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

By an Order dated 16 November 2023, the Court decided that the ILO and the States parties to ILO Convention No. 87 were considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion, and fixed 16 May 2024 as the time-limit within which written statements on this question may be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute. The Court further fixed 16 September 2024 as the time-limit within which States and organizations having presented written statements may submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute.

Moreover, in light of the particular tripartite structure of the ILO, which is comprised of representatives of governments, employers and workers, the Court decided that six organizations having been granted general consultative status at the ILO by the Governing Body, namely the International Organisation of Employers, the International Trade Union Confederation, the World Federation of Trade Unions, the International Cooperative Alliance, the Organisation of African Trade Union Unity and Business Africa, were also considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion, and invited those organizations to make written contributions to the Court within the time-limits fixed.

The Registrar informed the ILO and the States parties to ILO Convention No. 87, as well as the six organizations having general consultative status at the ILO, of the Court's decisions and transmitted a copy of the Order to them.

Pursuant to Article 65, paragraph 2, of the Statute, the International Labour Office communicated to the Court a dossier of documents likely to throw light upon the question formulated by the Governing Body of the ILO. This dossier has been published on the Court's website.

Ruling on requests from the United States of America and Brazil, which are not parties to ILO Convention No. 87, the Court decided, in accordance with Article 66, paragraph 3, of its Statute, that they were both, as Members of the ILO, likely to be able to furnish information on the question submitted to the Court, and that consequently they might do so within the time-limits fixed for that purpose by the Order of the Court dated 16 November 2023.

Ruling on a request from the Organisation of African, Caribbean and Pacific States (hereinafter "OACPS") dated 16 April 2024, the Court decided, in accordance with Article 66 of its Statute, that the OACPS was likely to be able to furnish information on the question submitted to the Court and that, consequently, it might do so within the time-limits fixed for that purpose by the Order of the Court dated 16 November 2023. States and organizations having been considered by the Court likely to be able to furnish information on the question were informed accordingly.

Within the time-limit of 16 May 2024, written statements were filed in the Registry by 31 States and organizations; within the time-limit of 16 September 2024, written comments on those statements were filed in the Registry by 15 States and organizations. States and organizations authorized to participate were duly informed of the list of participants having filed written statements

and written comments, and were provided with a link to a web portal managed by the Registry from where those documents could be downloaded.

Subsequently, the United Kingdom informed the Court of the formal withdrawal of its written statement and the United States of America notified the Court of the formal withdrawal of its written statement and written comments. States and organizations authorized to participate were informed accordingly.

The schedule of the oral proceedings was communicated to the States and organizations taking part in them, along with details of certain practical arrangements relating to the organization of the oral proceedings.

The schedule for the hearings was also transmitted to the States parties to ILO Convention No. 87, the United States of America and organizations authorized to participate which were not taking part in the hearings. The schedule was subsequently posted on the Court's website.

This morning, the Court will hear a 30-minute oral statement by the International Labour Office. This will be followed by the oral statement of the International Trade Union Confederation and that of the International Organisation of Employers, each of which has been allocated a speaking time of one hour.

All other participants will speak for a maximum of 30 minutes each.

Before inviting the first delegation to address the Court, I would add that, in accordance with Article 106 of the Rules of Court, the Court has decided to make the written statements and comments submitted to it accessible to the public after the opening of the oral proceedings. The written statements and comments of States not taking part in the oral proceedings will be made accessible to the public today, the first day of the oral proceedings. The written statements and comments of States and organizations taking part in the oral proceedings will be made accessible at the end of the day on which they present their oral statements. They will be posted on the Court's website.

Let me also take this opportunity to explain the procedure that will be followed in the event of questions being put by Members of the Court to participants in these oral proceedings. Such questions will be asked at the close of the hearings, on Wednesday 8 October 2025, after the last delegation has completed its presentation. The written text of such questions will be transmitted to the

participants by the Registrar. Written replies should be provided by Wednesday 15 October 2025 at 6 p.m. No written comments on these replies are envisaged.

I now give the floor to the delegation of the International Labour Office and I invite Ms Tomi Kohiyama, Legal Adviser and Director of the Office of Legal Services of the ILO, to the podium. Madam, you have the floor.

M^{me} KOHIYAMA :

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un très grand honneur de présenter à la Cour internationale de Justice cet exposé oral au nom du directeur général du Bureau international du Travail, dans le cadre de la phase orale de la présente procédure consultative.

2. La dernière participation de l'OIT à une procédure consultative devant la Cour remonte à 93 ans presque jour pour jour : un représentant du Bureau international du Travail avait alors comparu le 14 octobre 1932 devant la Cour permanente de Justice internationale, dans le cadre d'une procédure portant sur l'interprétation de la convention internationale du travail relative au travail de nuit des femmes. On mesure au temps écoulé combien sont rares les questions d'interprétation que l'OIT estime être d'une importance telle qu'elles justifient de demander un avis à la Cour selon la procédure inscrite dans sa Constitution.

3. Ainsi qu'il l'a fait il y a 93 ans, le Bureau intervient dans le cadre de la présente procédure en vertu de la responsabilité institutionnelle qui lui incombe : celle de fournir à la Cour les informations et explications qu'il estime être à même d'assister la Cour dans sa tâche. Ce faisant, il remplit son mandat constitutionnel de secrétariat de l'OIT dont le personnel est assujetti à des normes élevées d'objectivité, d'indépendance et d'intégrité applicables à la fonction publique internationale. Cet exposé oral, à l'instar de l'exposé écrit, ne prendra donc pas position sur la réponse à donner à la question posée à la Cour par le Conseil d'administration du Bureau international du Travail, à savoir : « Le droit de grève des travailleurs et de leurs organisations est-il protégé par la convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948 ? »

4. Cette question est une question classique de droit international, à savoir une question d'interprétation d'un traité qui, logiquement, en comprend une autre, celle de l'application de la règle

générale et des moyens complémentaires d'interprétation codifiés dans la convention de Vienne sur le droit des traités de 1969 et de toute autre règle pertinente de l'OIT.

5. De fait, le contexte institutionnel dans lequel s'inscrit la question posée à la Cour est unique. Le traité dont l'interprétation est demandée est une convention internationale du travail, relevant d'un corpus normatif faisant l'objet d'un ensemble de procédures distinctes et complémentaires. Ces normes et procédures sont ancrées dans la structure et le fonctionnement tripartites de l'OIT. La structure tripartite et le système normatif représentent l'avantage unique de l'OIT comme institution spécialisée du système des Nations Unies. La participation d'organisations d'employeurs et de travailleurs à la présente procédure consultative est sans précédent dans l'histoire de votre auguste institution, du moins depuis qu'elle a succédé à la Cour permanente de Justice internationale. Elle atteste de l'ancrage du système normatif dans la structure tripartite de l'OIT.

6. En outre, l'objet du traité dont l'interprétation est demandée donne aussi une dimension particulière à la présente procédure. En effet, la liberté syndicale est un des objectifs figurant dans le préambule de la Constitution de l'OIT et, partant, un principe et droit fondamental au travail que les États membres sont tenus de respecter, promouvoir et réaliser en vertu de leur acceptation de la Constitution de l'OIT.

7. Mon exposé a donc en quelque sorte pour objet d'introduire les débats qui vont suivre en mettant en exergue certains des aspects les plus pertinents de ce contexte institutionnel unique. Bien que ce dernier soit décrit dans l'exposé écrit, je garde à l'esprit les mots prononcés en 1926 devant la Cour permanente de Justice internationale par Albert Thomas, le premier Directeur général, qui fit alors référence au « fonctionnement un peu compliqué, mais bien calculé » de l'OIT¹. Afin de compléter l'exposé écrit du Bureau, je me propose donc de donner une perspective d'ensemble sur le système normatif de l'OIT. Je poserai ensuite la question des règles d'interprétation applicables aux conventions internationales du travail et, enfin, je procéderai à quelques remarques finales.

I. LE CONTEXTE INSTITUTIONNEL : LE SYSTÈME NORMATIF DE L'OIT

8. En ce qui concerne le contexte institutionnel, l'OIT a été créée pour réaliser un programme de travail énoncé dans le préambule de sa Constitution et, depuis 1944, dans la déclaration de

¹ *Compétence de l'OIT pour régler accessoirement le travail personnel du patron, avis consultatif, 1926, C.P.J.I. série B n° 13, séance publique du 29 juin 1926, discours prononcé par M. Albert Thomas, p. 55.*

Philadelphie concernant les buts et objectifs de l'Organisation, qui a valeur constitutionnelle. La vision moderne de ce programme de travail est articulée plus avant dans des déclarations solennelles de l'Organisation. Il en est ainsi de la déclaration de l'OIT relative aux principes et droits fondamentaux au travail, adoptée en 1998 et amendée en 2022. Cette déclaration rappelle « qu'en adhérant librement à l'OIT, l'ensemble de ses Membres ont accepté les principes et droits énoncés dans sa Constitution et dans la Déclaration de Philadelphie »². Elle déclare cinq principes et droits fondamentaux au travail, dont, « la liberté d'association et la reconnaissance effective du droit de négociation collective »³. Comme le constate la déclaration, « ces principes et droits ont été exprimés et développés sous forme de droits et d'obligations spécifiques dans des conventions reconnues comme fondamentales »⁴, dont la convention n° 87.

9. Ce programme de travail se réalise par la voie de procédures constitutionnelles essentiellement à visées normatives auxquelles sont consacrés près de la moitié des 40 articles de la Constitution. Toute une panoplie de fonctions normatives, distinctes mais complémentaires, sont inscrites dans la Constitution, chacune relevant d'organes spécifiques : l'adoption des conventions et recommandations sont les prérogatives de la Conférence internationale du Travail ; il en va de même pour l'abrogation des conventions ; le contrôle de l'application des normes relève d'organes de contrôle tripartites ou composés d'experts indépendants ; enfin, l'interprétation des conventions internationales du travail est confiée à la Cour internationale de Justice. Ce programme de travail à vocation universelle, qui est inscrit au frontispice, si je puis dire, de l'Organisation, et la mise en œuvre de procédures constitutionnelles forment un tout orchestré par des organes rassemblant gouvernements, employeurs et travailleurs. Les normes internationales du travail sont donc des instruments au service du programme de travail et du mandat de l'Organisation.

10. Dans le cadre de cet exposé, j'aborderai plus spécifiquement les fonctions de contrôle et d'interprétation.

11. La fonction de contrôle a, dès l'origine, été associée à celle de l'adoption des normes. En effet, étant donné la participation des acteurs du monde du travail, l'accent a toujours été mis sur la

² Déclaration de l'OIT relative aux principes et droits fondamentaux au travail (1998), telle qu'amendée en 2022, par. 1 a).

³ *Ibid.*, par. 2 a).

⁴ *Ibid.*, par. 1 b).

mise en œuvre pratique de ce programme de travail. Lors de la genèse de la Constitution de l'OIT, le postulat était que les membres de l'OIT seraient tous liés par les conventions qu'ils auraient communément ratifiées. Partant, chacun des membres aurait un intérêt bien compris à l'application par les autres membres des conventions ratifiées par tous.

12. Ainsi, dans le cadre constitutionnel d'origine, la présentation de rapports annuels sur l'application des conventions ratifiées offrait les moyens nécessaires à un contrôle réciproque entre les membres, par l'intermédiaire de résumés de ces rapports présentés par le directeur général à la Conférence. Les procédures constitutionnelles de réclamation et de plainte pouvaient toujours être mises en œuvre contre des membres qui n'auraient pas mis à exécution des conventions ratifiées par eux. Toutes ces procédures avaient été soigneusement élaborées pour fonctionner selon un certain ordre pouvant, en dernier ressort, aboutir à l'application de sanctions d'ordre économique qui ont, aujourd'hui, laissé la place à des mesures plus larges que le Conseil d'administration peut recommander en dernier recours à la Conférence.

13. Cette architecture constitutionnelle a peu changé dans sa lettre, mais a connu de grandes évolutions en pratique. De fait, le contrôle de l'application des normes internationales du travail en est venu très vite à être opéré principalement par deux organes : d'une part, la Commission d'experts pour l'application des conventions et recommandations, composée — comme son nom l'indique — d'experts indépendants et, d'autre part, la Commission pour l'application des normes, organe tripartite de la Conférence internationale du Travail. Ces deux commissions, créées en 1926 par une seule et même résolution de la Conférence, examinent, successivement, l'application par les États membres des conventions ratifiées, sur la base des rapports annuels et des informations reçues des organisations d'employeurs et de travailleurs. Ces deux commissions ont progressivement assumé l'essentiel du contrôle régulier de l'application des conventions ratifiées, contrôle complété plus récemment dans l'histoire de l'OIT par le déclenchement des autres procédures de contrôle constitutionnelles de réclamations ou plaintes.

14. Si les fondateurs de l'OIT envisagèrent à l'origine un système normatif applicable d'office à tous les membres de l'Organisation, ils optèrent finalement pour un système plus classique reposant sur la ratification volontaire des conventions internationales du travail. Cependant, l'OIT n'a eu de cesse de se doter de procédures lui permettant de donner effet à son programme de travail à vocation

universelle en se fondant sur les obligations constitutionnelles, intrinsèques à la qualité de membre. Ainsi, la seule adoption des normes crée des obligations juridiques directes pour les membres, puisque ceux-ci sont tenus, d'une part, de soumettre aux autorités nationales compétentes les conventions ou recommandations adoptées par la Conférence et, d'autre part, de faire rapport à la demande du Conseil d'administration sur l'état de leurs législations et pratiques concernant les questions faisant l'objet de conventions non ratifiées ou recommandations.

15. La mise en œuvre des principes constitutionnels, en dehors de la ratification de conventions, trouve son expression la plus aboutie dans les procédures d'examen des plaintes pour violation de la liberté syndicale, procédant d'un accord entre le Conseil d'administration et le Conseil économique et social des Nations Unies en 1950. Ces procédures très spécifiques consistent principalement aujourd'hui dans les travaux du Comité de la liberté syndicale, organe tripartite du Conseil d'administration qui examine les plaintes en question. La ratification de la convention n° 87 et/ou la convention n° 98 sur le droit d'organisation et de négociation collective n'est pas une précondition à la compétence de ce Comité, pas plus que ne l'est le consentement de l'État membre concerné. Enfin, le Conseil d'administration peut recevoir aussi les plaintes en violation de la liberté syndicale adressées aux Nations Unies, y compris, sous certaines conditions, contre les États non membres de l'OIT.

16. Pour ce qui est de la fonction normative d'interprétation des conventions, les premiers projets de la Constitution de l'OIT de 1919 n'abordaient pas cette fonction, la priorité ayant été donnée au rôle des organes tripartites dans l'adoption des normes internationales du travail et à l'application pratique de celles-ci. Quand cette question fut enfin soulevée en 1919, d'aucuns estimèrent que le pouvoir d'interprétation des conventions devait relever de la Conférence. Finalement, la possibilité d'avoir recours à la Cour permanente de Justice internationale fut inscrite dans le traité de Versailles.

17. En 1946, le recours à votre Cour fut inscrit dans l'article 37, paragraphe 1, de la Constitution. En même temps, l'OIT ajouta un deuxième paragraphe à cet article, afin de prévoir la possibilité d'un recours à un tribunal interne pour le règlement rapide des questions d'interprétation des conventions insuffisamment importantes pour justifier un renvoi à la Cour. Ce tribunal ne fut

cependant pas établi, l'OIT ayant obtenu, via les Nations Unies, l'accès direct à la Cour internationale de Justice.

18. En l'absence d'un tribunal interne, la Cour internationale de Justice reste donc, à l'heure actuelle, l'unique institution judiciaire habilitée en vertu de la Constitution à se prononcer sur des questions relatives à l'interprétation des conventions internationales du travail.

19. En pratique, d'autres organes se livrent à un examen du sens et de la portée des dispositions des conventions, notamment la Commission d'experts. L'adoption des conventions internationales du travail par des organes tripartites, pour répondre aux besoins de pays de conditions socio-économiques très différentes, et le contrôle de leur application ont rendu l'interprétation de ces textes inévitablement nécessaire.

II. RULES OF INTERPRETATION OF INTERNATIONAL LABOUR CONVENTIONS

20. Mr President, Members of the Court, I shall now turn to the question of the rules of the interpretation of international labour conventions, which is at the heart of the current proceedings.

21. In this context, the following observations may be useful.

22. At the outset, it is relevant to note that the Permanent Court's 1932 Advisory Opinion remains the only judicial pronouncement concerning the rules applicable to the interpretation of an international labour convention. In that context, having expressed the view that "[t]he wording of Article 3 [of the Night Work (Women) Convention], considered by itself, gives rise to no difficulty", the Court assessed whether there were any valid grounds that justified interpreting that provision differently from "the natural sense of the words"⁵. First, it considered whether such grounds arose from the fact that the convention in question was "a Labour convention, i.e. one prepared within the framework of [the ILO's Constitution], and in accordance with the procedure provided for therein"⁶. In addition, the Court examined the convention's preparatory work while indicating that, "[i]n doing so, [it did] not intend to derogate in any way from the rule . . . that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself"⁷. Lastly, the Court

⁵ *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 50, p. 373.*

⁶ *Ibid.*, p. 374.

⁷ *Ibid.*, p. 378.

examined, for the purpose of interpreting the Night Work (Women) Convention, the Eight Hour Day Convention, noting “[t]he similarity both in structure and in expression between the various draft conventions adopted by the Labour Conference at Washington in 1919”⁸.

23. I wish to respectfully draw the Court’s attention to three important developments since those earlier proceedings.

24. First, the general rule and supplementary means of interpretation of treaties have since been codified in the Vienna Convention. As recalled in the Office’s Written Statement, the ILO has acknowledged that the Vienna Convention applies to international labour conventions. Yet, it has always taken the view that pursuant to Article 5 thereof, such application is without prejudice to the relevant rules of the Organization, which constitute *lex specialis*.

25. Second, to date, 192 conventions, 6 protocols and 209 recommendations covering a wide range of topics have been adopted by the ILO. These form a rich body of international labour standards whose coherence must be maintained to ensure their effective implementation in law and practice.

26. Third, the ILO supervisory bodies have expressed views on the scope and meaning of provisions and concepts under international labour conventions.

27. More generally, in comparison to other multilateral treaties whose preparatory work may be incomplete or difficult to access, the preparatory work of the international labour conventions is clearly identified in Articles 45 and 46 of the Standing Orders of the International Labour Conference. It has been consistently published and can thus be easily consulted.

28. Finally, I must underscore once again that the ILO is the only specialized agency whose normative action is rooted in its tripartite structure. It is precisely this specific structure that is traditionally invoked in support of the importance given to the preparatory work in the interpretation of international labour conventions and the inadmissibility of reservations to international labour conventions.

29. The opinion of the Court concerning the rules of interpretation applicable to Convention No. 87 would contribute significantly to the legal certainty the ILO seeks from the Court. This would

⁸ *Ibid.*, pp. 380-381.

particularly involve the impact of the ILO's tripartite structure on the weight to be attributed to the different elements set out in Articles 31 and 32 of the Vienna Convention.

30. Mr President, honourable judges, I now come to the end of my oral statement. The Peace Palace, which houses your institution, was built to embody the ideal of universal peace. This same ideal is found in the first sentence of the ILO Constitution, which reads: "Whereas universal and lasting peace can be established only if it is based upon social justice".

31. The links between the Court and the ILO are deep seated.

32. The Permanent Court of International Justice laid the foundation for the future of our Organization. Three years following its establishment, the ILO sought the opinion of the Court on a matter intrinsic to its functioning and normative action: the designation of employers and workers as members of the national tripartite delegations to the International Labour Conference. That first advisory opinion remains to this day key to understanding tripartism and is still regularly cited by the Credentials Committee of the International Labour Conference.

33. Today, the Organization turns to the Court on a matter of equal significance: the interpretation of one of the ILO's fundamental conventions that gives effect to the constitutional principle of freedom of association, which is quintessential to the ILO in its role in bringing together governments, employers and workers, on an equal footing, I quote the Constitution, "in free discussion and democratic decision with a view to the promotion of the common welfare".

34. Recourse to the Court for the interpretation of international labour conventions is a central component of the standards system set out in the ILO Constitution. Article 37, paragraph 1, of the Constitution establishes that any referral to the International Court of Justice is for decision on the question or the dispute referred.

35. The advisory opinion will benefit from the Court's distance from the dispute underlying the question submitted to the Court as much as from its authority and the rigour of its long-standing jurisprudence on the interpretation of treaties. Importantly, the advisory opinion will be rendered based on public proceedings in which governments, employers' and workers' organizations presented their views, on an equal footing, on the interpretation of Convention No. 87, and the application of the Vienna Convention in the unique context of the International Labour Organization.

36. Mr President, Members of the Court, I thank you for your attention.

The PRESIDENT: I thank Ms Kohiyama for her presentation on behalf of the International Labour Office. I now invite the delegation of the International Trade Union Confederation to address the Court and I call Mr Paapa Danquah to the podium. Sir, you have the floor.

Mr DANQUAH:

I. INTRODUCTION

1. Mr President, Members of the Court, a century ago, a predecessor in our lineage, the International Federation of Christian Trades Unions, was the first to address the Permanent Court in its very first advisory proceedings in this Great Hall⁹. Today, it is a privilege for the International Trade Union Confederation (ITUC), and an honour for me, to address this Court.

2. The ITUC is the world's most representative international workers' organization. We address you on behalf of 191 million workers across 169 countries and territories, many of whom suffer intimidation and coercion on a daily basis for reason only of the fact that they are members of a trade union.

3. Today, Mr President, these millions of workers invite the Court to confirm the well-established view that the right to strike is protected by the ILO Convention on Freedom of Association and Protection of the Right to Organise of 1948 ("Convention No. 87"). We address you with the fullest respect for the Court and a deep commitment to the international rule of law. As representatives of the Workers' Group in the ILO's unique tripartite system, we voted in favour of bringing what has proved to be an intractable dispute among ILO constituents before you for a decision.

4. Mr President, let us begin with what *is not* in dispute.

5. First, there is no question what the word "strike" means — it is the *collective withdrawal of labour by workers to promote and defend their interests and rights*. From the first documented strike by tomb-workers in ancient Egypt¹⁰ to the collective actions taken around the world today, strikes are a quintessential expression of industrial action, as old as labour itself. Strike action has been our

⁹ See *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, P.C.I.J., Series C*, Public Sitings, pp. 11, 13-14, first ordinary session, fourth public sitting, 26 June 1922, at 11 a.m. (International Federation of Christian Trades Unions).

¹⁰ See e.g. J. J. Mark, "The First Labor Strike in History", *World History Encyclopedia*, 4 July 2017.

vital tool, to improve labour conditions and to defend our human dignities against exploitation and commodification.

6. Not everyone has gone on strike, but we *all* are beneficiaries of those who have. Many of the improvements in labour conditions today were simply unimaginable a century ago, when the ILO was created. These were hard-won rights realized through widespread strikes led by workers and their trade unions, be it the eight-hour workday, minimum wages, holidays with pay, parental leave or social protection, among others¹¹.

7. What is also not in dispute, Mr President, is the broad agreement about “the right to strike” *itself*. In particular, no participants in these proceedings challenge, either¹²:

(a) *One*: that the right to strike is part of the broader right of workers and their organizations to take industrial action to further and defend their interests. The International Organisation of Employers (IOE) itself admits, without qualification, that the right to strike per se is not contentious and is linked to the right to take industrial action¹³. Or,

(b) *Two*: that the right to strike exists as “part of the fundamental principles and rights at work of the ILO”, specifically “freedom of association”¹⁴ — which is one of ILO’s foundational principles enshrined in the 1919 Treaty of Versailles and reaffirmed in the Declaration of Philadelphia.

8. Mr President, another issue also not disputed — until recently — is that the right to strike, though not explicitly articulated, is fully protected by Convention No. 87 as part of freedom of association. Indeed, that was the basis for the consistent and coherent application and supervision of the right to strike under the Convention. For decades, nobody challenged this understanding. For

¹¹ See e.g. F. Hordern, « Genèse et vote de la loi du 20 juin 1936 sur les congés payés », *Mouvement social*, n° 150, 1990, pp. 19-34, p. 29; H. Velge, “Le mouvement social en 1936”, *Bulletin de l’Institut des sciences économiques*, vol. 2, n° 8, 1937, pp. 83-98; G. Cross, “Les Trois Huits: Labor Movements, International Reform, and the Origins of the Eight Hour Day, 1919-1924”, *French Historical Studies*, vol. 14, n° 2, 1985, pp. 240-268; “Railroads Avert Strike; Eight-Hour Day Granted in View of Nation’s Crisis”, *The Evening World*, New York, NY, 19 March 1917, p. 1, image 1, col. 1; “No Strike; 8 Hour Law is Upheld”, *El Paso Herald*, El Paso, TX, 19 March 1917, p. 1, image 1, col. 2.

¹² 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 [Document No. 106].

¹³ Written Statement of the IOE, para. 3; Written Comments of the IOE, para. 58, both citing GB.323/INS/5/Appendix I, The Standards Initiative, Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, March 2015, Annex I [Document No. 106].

¹⁴ GB.323/INS/5/Appendix I, The Standards Initiative, Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, March 2015, Annex II, Government Group Statement (23 February 2015), paras. 4-5 [Document No. 106].

example, commenting upon Convention No. 87 at the Committee on the Application of Standards in 1989, the Employers' Group stated: "Far from challenging the right to strike . . . , [the Employers] merely wanted the exercise of that right submitted to reasonable restrictions"¹⁵. Even as late as 2010, the Employers' Group conceded that Convention No. 87 contained a general right to strike¹⁶. So it was, until the Employers departed from the consensus and brought the ILO supervisory system into a complete standstill in 2012. It did so by adopting the very opposite — and extreme — position that the right to strike *did not exist at all* — not even as an inherent corollary of freedom of association under Convention No. 87¹⁷.

9. Mr President, the ITUC and the great majority of participants hold the view that the right to strike is embodied in the principle of freedom of association and protected as an inherent and central part of the right of workers and their trade unions to organize under Convention No. 87¹⁸. A minority of the participants in these proceedings deny that Convention No. 87 protects the right to strike¹⁹. We will explain in our submissions today that these participants have either wholly misunderstood or misrepresented the central issue that falls to be determined.

10. *First*, the minority argue that the right to strike is *only* a corollary of freedom of association in ILO law in general and in national laws, but not reflected in Convention No. 87²⁰. However, as a threshold matter and as Professor Klein will explain, this position is not logical. In fact, apart from

¹⁵ ILC, 76th Session, 1989, Report of the Committee on the Application of Standards, p. 26/43.

¹⁶ ILC, 99th Session, 2010, Report of the Committee on the Application of Standards, Part I/18, para. 57.

¹⁷ Written Statement of the IOE, para. 6.

¹⁸ Written Statement of Australia, para. 96; Written Statement of Brazil, para. 22; Written Statement of Colombia, para. 1.2; Written Statement of France, para. 39; Written Statement of Germany, para. 47; Written Statement of the International Cooperative Alliance, para. 3; Written Statement of Italy, para. 18; Written Statement of Mexico, paras. 58-60; Written Statement of the Netherlands, para. 2.24; Written Statement of Norway, para. 12; Written Statement of the OACPS, para. 11 (*b*); Written Statement of Poland, para. 4.1; Written Statement of Somalia, p. 2; Written Statement of Spain; Written Statement of Tunisia, p. 1; Written Statement of the United States of America, para. 2.8; Written Statement of Vanuatu, para. 74 (*b*); Written Statement of the WFTU, para. 20; Written Comments of Australia, paras. 3, 58; Written Comments of Mexico, para. 6; Written Comments of the Netherlands, para. 2.4; Written Comments of the Republic of Vanuatu, para. 2; Written Comments of South Africa, para. 7; Written Comments of the United States of America, para. 1.3.

¹⁹ IOE, Written Statement, para. 6; Written Statement of Bangladesh, para. 2.0; Written Statement of Business Africa, para. 8; Written Statement of Costa Rica; Written Statement of Japan, para. 4; Written Statement of Switzerland, para. 83; Written Comments of Bangladesh, para. 10; Written Comments of Business Africa, para. 2; IOE, Written Comments, paras. 58, 163; Written Comments of Japan, para. 3; Written Comments of Switzerland, para. 4.

²⁰ IOE, Written Statement, para. 215; Written Statement of Switzerland, para. 103; Written Statement of Costa Rica; IOE, Written Comments, para. 58; Written Comments of Switzerland, para. 62; Written Comments of Japan, paras. 36-37.

the IOE's extreme position, the other minority participants — rather than challenging the right to strike under the Convention — raise questions about its limitations and who sets them.

11. Nevertheless, neither of these issues is within the scope of the question put before you. This question only concerns the existence of the right under Convention No. 87, and it turns on the proper interpretation of the Convention.

12. *Second*, the minority make their case on the basis that Convention No. 87 does not detail or codify a standalone right to strike, or they overly rely on the absence of the exact word “strike” in the Convention²¹. To be clear, the issue before you is whether the right to strike falls within the meaning of Article 3 (1), read together with Article 10, under the Convention. As Professor Okowa will demonstrate by applying the rules of treaty interpretation, the answer to that question is plainly: yes. Thus, when we say that the “right to strike of workers and their organisations is protected under Convention No. 87”, what we mean is that there is no reason to exclude strikes from the activities that workers and their organizations are entitled to organize to further and defend their interests.

13. Finally, this case certainly has wider implications. But these are not the ones that the IOE identified in their written submissions.

(a) The first wider implication of the Court's determination will be whether the ILO can continue to maintain a coherent and consistent body of law on freedom of association and the right to organize, as a constitutional imperative. As the ILO stated in its written statement, freedom of association “not only permeates the entire fabric of international labour standards but is also a primal aspect of a multitude of international human rights instruments”²².

(b) The other implication is raised by the Government Group, in their statement at the 2015 Tripartite Meeting. They say “without protecting a right to strike, Freedom of Association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot

²¹ Written Statement of the IOE, para. 141; Written Statement of Japan, para. 9; Written Statement of Bangladesh, para. 3.1; Written Comments of the IOE, para. 10; Written Comments of Bangladesh, paras. 13-14; Written Comments of Business Africa, para. 2.

²² Written Statement of the ILO, para. 13.

be fully realized”²³. Simply put, the seismic implication is that workers would no longer be able to promote and protect workers’ interests using all available means under the ILO Convention.

14. As Professor Koh will explain, to conclude that the right to strike is excluded from Convention No. 87 would have far-reaching consequences for national laws around the world, for the established practice of the ILO system, and for international law more generally.

15. Mr President, Members of the Court, when a legally protected right, which has been accepted and acted upon for decades, is questioned and its support thrown in doubt, social dialogue and the rule of law, themselves, are undermined. This is why we stand before you to defend the existence of this quintessential right.

16. Mr President, that concludes our opening statement. I now invite you to call Professor Klein to address the Court. Thank you.

The PRESIDENT: I thank Mr Danquah. Je donne maintenant la parole à M. Pierre Klein. Monsieur, vous avez la parole.

M. KLEIN :

II. LA COMPÉTENCE DE LA COUR, L’OBJET DE LA REQUÊTE ET LE LIEN ENTRE LA LIBERTÉ SYNDICALE ET LE DROIT DE GRÈVE

1. Merci, Monsieur le président. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, c’est un honneur pour moi de prendre la parole aujourd’hui devant vous au nom de la Confédération syndicale internationale (ci-après, la « CSI »). Je voudrais, avant que vous soit présentée l’argumentation de la CSI sur le fond, m’attarder un instant avec vous sur trois questions préliminaires : celle de la compétence de la Cour pour rendre l’avis qui lui est demandé et de l’opportunité de le faire, celle de la portée de la question qui vous est soumise et, enfin, celle du lien de principe entre la liberté syndicale et le droit de grève.

²³ GB.323/INS/5/Appendix I, The Standards Initiative, Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, March 2015, Annex II, Government Group Statement (23 February 2015), para. 4 [Document No. 106].

2. Pour ce qui est du premier de ces points, tous les participants, à une exception près²⁴, s'accordent à reconnaître que la Cour est compétente pour donner l'avis qui lui est demandé et qu'il n'existe aucune raison décisive pour refuser de rendre cet avis. Les objections à l'exercice par la Cour de son pouvoir discrétionnaire ont été réfutées en détail dans les observations écrites de la CSI et il n'est pas nécessaire d'y revenir maintenant²⁵. Rien ne s'oppose à ce que la Cour donne suite à la demande d'avis dont elle est saisie.

3. Pour ce qui est du deuxième point que j'évoquais à l'instant, celui de la portée de la question qui est soumise à la Cour, il existe manifestement à ce sujet des divergences de vues entre les participants à l'instance. Cette question est pourtant formulée de façon particulièrement claire et concise, ne laissant place à aucune ambiguïté, et elle se suffit manifestement à elle-même. Je la cite une nouvelle fois : « Le droit de grève des travailleurs et de leurs organisations est-il protégé par la convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948 ? » Cela n'a pas empêché certains participants d'affirmer que la Cour devrait faire usage de son pouvoir de reformuler cette question, afin de refléter ce qu'ils appellent « l'intention véritable » du Conseil d'administration de l'OIT²⁶. Comment ? En y incluant la détermination de l'autorité — nationale ou internationale — compétente pour réglementer le droit de grève²⁷, ou en l'étendant à l'identification des limites qui doivent encadrer le droit de grève et son exercice²⁸. Ces propositions vont pourtant totalement à l'encontre du choix délibéré opéré par le Conseil d'administration de l'OIT. Pour rappel, les premières versions de la question proposées au Conseil d'administration couvraient deux sujets différents. D'une part, celui de la protection du droit de grève par la convention n° 87. D'autre part, celui des pouvoirs de la Commission d'experts de l'OIT pour l'application des conventions et recommandations de préciser les limites et conditions d'exercice du droit de grève²⁹. Le Conseil a

²⁴ Exposé écrit de l'Indonésie, par. 4 et suiv.

²⁵ Observations écrites de la CSI, par. 2.2-2.6.

²⁶ Exposé écrit de la Suisse, par. 43 ; observations écrites de la Suisse, par. 5.

²⁷ Exposé écrit de la Suisse, par. 42.

²⁸ Exposé écrit de l'OIE, par. 7.

²⁹ 349^{bis} session (spéciale) du Conseil d'administration, « Suite à donner à la demande du groupe des travailleurs et de 36 gouvernements visant à ce que la difficulté d'interprétation de la convention n° 87 concernant le droit de grève soit soumise d'urgence à l'appréciation de la Cour internationale de Justice en vertu de l'article 37, paragraphe 1, de la Constitution de l'OIT — Rapport d'information du Bureau », doc. GB.349^{bis}/INS/1/1, octobre 2023, annexe 1, « Projet de résolution du Conseil d'administration », p. 45-46 [Document n° 29].

ensuite décidé de ne retenir que le premier volet de la question, et d'opter pour la formulation qui apparaît dans la requête. Celle-ci a été considérée par les membres du Conseil comme « suffi[sante afin de] régler le différend »³⁰. Selon le procès-verbal de la réunion, « [a]ucun gouvernement ne s'est dit favorable à la deuxième question énoncée » initialement³¹. Il convient également de noter ici que la résolution adoptée par le Conseil d'administration pour renvoyer la question devant la Cour comprenait une déclaration conjointe sur le mandat de la Commission d'experts³², de sorte que la Cour n'avait pas à se prononcer sur ce point. Il semble donc pour le moins paradoxal d'invoquer maintenant « l'intention véritable » du Conseil d'administration pour inviter la Cour à reformuler la question, alors qu'une telle reformulation irait manifestement à l'encontre du choix opéré en toute connaissance de cause par le Conseil.

4. Il ne serait d'ailleurs pas plus justifié d'étendre la portée de la question à l'identification des limites et conditions d'exercice du droit de grève. L'Organisation internationale des employeurs affirme à ce sujet que la Cour ne devrait pas se prononcer sur l'existence d'un droit de grève en vertu de la convention n° 87 « de manière abstraite », puisque ce droit ne peut être absolu³³. Mais, Monsieur le président, Mesdames et Messieurs les juges, des exemples abondent de traités internationaux qui énoncent des droits sans en définir précisément les contours. Pour ce qui est des droits protégés par les conventions internationales du travail, c'est aux organes de contrôle de l'OIT qu'incombe cette tâche. Il est donc parfaitement possible pour la Cour de reconnaître que le droit de grève est protégé par la convention n° 87 sans en faire pour autant un droit absolu. Sa reconnaissance dans le cadre de la convention a *ipso facto* pour conséquence de le soumettre aux limitations qui découlent de cet instrument lui-même, et en premier lieu du fait que ce droit doit être exercé dans le respect de la légalité³⁴. C'est d'ailleurs en application même du cadre défini par la convention n° 87

³⁰ Procès-verbaux de la session 349^ebis (spéciale) du Conseil d'administration, novembre 2023, p. 21 [Document n° 31].

³¹ *Ibid.*, p. 22.

³² 349^ebis session (spéciale) du Conseil d'administration, « Décision concernant la suite à donner à la demande du groupe des travailleurs et de 36 gouvernements visant à ce que la difficulté d'interprétation de la convention n° 87 concernant le droit de grève soit soumise d'urgence à l'appréciation de la Cour internationale de Justice en vertu de l'article 37, paragraphe 1, de la Constitution de l'OIT », doc. GB.349bis/INS/1/1/Décision, 10 novembre 2023.

³³ Exposé écrit de l'OIE, par. 7.

³⁴ Convention n° 87, article 8, par. 1.

que les organes de contrôle de l'OIT ont reconnu au fil des ans certaines restrictions à l'exercice du droit de grève.

5. Il n'existe donc pour la Cour aucune raison de reformuler la question qui lui est soumise. Celle-ci s'avère parfaitement claire et précise. Elle reflète sans ambiguïté quelconque l'intention réelle de l'organe qui vous l'adresse. La seule demande qui est faite à la Cour aujourd'hui est de se prononcer sur la question de savoir si le droit de grève *en tant que tel* est protégé par la convention n° 87, et non de déterminer si son étendue et ses modalités sont définies dans cet instrument.

6. J'en viens maintenant au troisième des points que j'évoquais tout à l'heure, celui du lien entre le principe de la liberté syndicale et le droit de grève. Il s'agit ici d'une question de principe centrale, que je vous invite à garder à l'esprit durant les jours d'audience qui vont suivre. Je voudrais tout spécialement attirer votre attention, à cet égard, sur le très large consensus qui se dégage quant au fait que — et je cite ici les observations écrites de la Suisse — « les États membres reconnaissent le droit de grève comme un corollaire du principe et droit fondamental de la liberté syndicale »³⁵. C'est évidemment là un constat d'une importance fondamentale : la reconnaissance par tous d'un lien intrinsèque entre la liberté syndicale, principe central du droit de l'OIT, et le droit de grève.

7. Pour autant, les quelques participants qui prétendent que le droit de grève n'est pas protégé par la convention n° 87 tentent aussitôt de minimiser ce lien en affirmant qu'il n'existe qu'au regard de la Constitution de l'OIT ou des législations nationales applicables, et pas dans le cadre de la convention³⁶. Monsieur le président, Mesdames et Messieurs les juges, cette position est profondément illogique. Si l'on admet par exemple que le fait d'être mouillé est un corollaire d'une immersion dans l'eau, vous serez mouillé en tout état de cause, que vous alliez vous baigner dans la mer à Scheveningen ou que vous entriez dans votre baignoire. Le contexte importe peu. Il en va de même pour les principes juridiques. Si l'intégrité territoriale est un corollaire de la souveraineté de l'État, le lien entre les deux principes est avéré, quel(s) que soi(en)t le ou les instrument(s) où ils sont énoncés. Il est de ce fait logiquement impossible de reconnaître que le droit de grève est un corollaire de la liberté syndicale dans le contexte de la Constitution de l'OIT ou de législations nationales, mais

³⁵ Observations écrites de la Suisse, par. 62.

³⁶ Voir entre autres, exposé écrit de l'OIE, par. 215, et exposé écrit de la Suisse, par. 103-104.

pas dans celui de la convention n° 87. C'est d'ailleurs ce qu'ont admis de manière on ne peut plus claire les États membres de l'OIT lorsqu'ils ont proclamé en des termes tout à fait généraux, en 2015, que « le droit de grève est lié à la liberté syndicale, qui est un principe et droit fondamental au travail de l'OIT »³⁷, et ce juste après avoir fait référence à « la relation entre la convention n° 87 sur la liberté syndicale et le droit de grève »³⁸. Ce constat entraîne évidemment des conséquences majeures en termes d'interprétation de la convention n° 87, comme la professeure Okowa vous le montrera maintenant.

8. Je vous prie donc, Monsieur le président, de bien vouloir passer la parole à ma collègue Phoebe Okowa pour poursuivre les exposés de la CSI. Je vous remercie, Monsieur le président, Mesdames et Messieurs les juges, pour votre aimable attention.

The PRESIDENT: Je remercie M. Klein. I now give the floor to Professor Phoebe Okowa. Madam, you have the floor.

Ms OKOWA:

III. INTERPRETATION OF CONVENTION NO. 87

1. Mr President, Members of the Court, it is a great honour for me to appear before you today on behalf of the ITUC in a case that raises issues of profound significance and interest to the workers of the world.

2. Allow me to reiterate, at the outset, that the issue before you is a narrow one — albeit important — concerning the proper interpretation of Convention No. 87. It is not in dispute that the starting-point is the general rule of treaty interpretation embodied in Article 31 of the Vienna Convention. This means that Convention No. 87 shall, in the first place, be interpreted in good faith, according to the meaning of its terms, in their context, in light of the Convention's object and purpose (A) and taking into account the Parties' subsequent practice (B), as well as other relevant rules applicable to them (C).

³⁷, « L'initiative sur les normes — Appendice I — Résultat de la Réunion tripartite sur la convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948, pour ce qui est du droit de grève ainsi que les modalités et pratiques de l'action de grève au niveau national », doc. GB.323/INS/5/Appendice I, mars 2015, annexe II, par. 4 [Document n° 106].

³⁸ *Ibid.*, par. 3.

3. The meaning of the terms under this “general rule of interpretation”, properly applied, leaves little room for any supplementary means under Article 32, including the *travaux* of Convention No. 87 (D).

Meaning of the terms of Convention No. 87

4. Indeed, as the Court has recalled on many occasions, “[i]nterpretation must be based above all upon the text of the treaty”³⁹. The minority do not dispute that but argue that the “right to strike” cannot be read into Convention No. 87 because it is not expressly mentioned.

5. As a preliminary point, Convention No. 87 is not an anomaly in not explicitly mentioning in the text that strikes are within its scope. Other early human rights instruments have been interpreted to protect the right to strike notwithstanding the absence of the word “strike” in the text. I will explain this in more detail when I consider other relevant rules of international law.

6. Here, the central issue for your determination is whether the right to strike falls within the meaning of the key terms of Convention No. 87. It is not in dispute that Article 3 (1), when read together with Article 10, provides that

“[w]orkers’ and employers’ organisations [for furthering and defending the interests of workers or of employers] shall have the right to . . . organise their . . . activities and to formulate their programmes”⁴⁰.

7. In our submission, the words speak for themselves: strike action — as an “industrial action by workers . . . in support of their legitimate industrial interests”⁴¹ — is plainly one of the activities organized by a workers’ organization for furthering and defending workers’ interests.

8. I make three points.

9. First, none of the participants in the proceedings have demonstrated why strike action is *excluded* from the broad and unambiguous meaning of the terms “activities” and “programmes”.

³⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 98, para. 81; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 41.

⁴⁰ Written Statement of the IOE, para. 152.

⁴¹ 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 [Document No. 106], cited in Written Statement of the IOE, para. 3; Written Comments of the IOE, para. 58.

10. It is significant that there is no qualifier to the term “their . . . activities”. Moreover, the organizations are entitled to formulate not just their “programmes” but “*programme d’action*”, as explicitly stated in the equally authoritative⁴² French text. Both terms are wide enough to cover not just action “internal” to an organization — as the IOE contended⁴³ — but also industrial action, including strikes.

11. The minority argue that those terms in Article 3 (1) are vague because they are *too* broad. For instance, the IOE has resorted to the “contextual” argument that “the unqualified breadth of those rights is precisely a fact that means it is unlikely that ‘activities’ encompasses strike”⁴⁴.

12. The IOE is wrong on the law and the facts. The Permanent Court addressed this point with characteristic clarity when it interpreted another international labour convention. It held that, where “the terms of the Convention in their ordinary meaning are wide enough to cover” a certain fact or situation, unless some special intent is evident in the convention to the contrary, there is no reason to interpret “those of its provisions which are general in scope otherwise than in accordance with their terms”⁴⁵. That is the case here.

13. The IOE’s argument also contradicts their own acknowledgment that Convention No. 87 is a general statement of principles on freedom of association and the right to organize, not their detailed regulation⁴⁶.

14. Moreover, the premise of the IOE’s argument is simply inaccurate. As Professor Klein mentioned a little while ago, the rights under Article 3 (1) are both qualified and restricted. Most immediately, Article 3 (2) requires the exercise of the right in Article 3 (1) to be “lawful”. More broadly, Article 8 also requires workers and their organizations to “respect the law of the land” in exercising their rights, provided that this does not “impair . . . the guarantees provided for in this Convention”. Finally, Article 9 expressly allows States to exclude police and the armed forces from

⁴² Convention No. 87, Art. 21.

⁴³ Written Statement of the IOE, para. 147; Written Comments of the IOE, para. 39.

⁴⁴ Written Comments of the IOE, para. 40.

⁴⁵ *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 50*, p. 377; see H. Lauterpacht, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties” (1949) 26 B.Y.I.L. 48, 79. See also *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion, 1922, P.C.I.J., Series B, No. 2*, p. 23; ITUC WS para. 4.32.

⁴⁶ Written Statement of the IOE, para. 164, quoting ILC, Record of Proceedings, 1948, Appendix X, p. 477 [Document No. 164].

the scope of the Convention's application altogether. Indeed, apart from these restrictions and exceptions, the Convention contains no indication that strikes are generally excluded from the usual activities and programmes of action of workers' organizations. Instead, these restrictions make sense on the assumption that strikes fall within the remit of the Convention.

*

15. Mr President, coming to my *second* point: far from being excluded from the broad meaning of the terms, strike action must be *included* since it is a key trade union activity to further and defend workers' interests.

16. By referring to "*their . . . activities*" and "*programmes [of action]*", Article 3 (1) refers not to the *individual* actions of workers and employers, but to the *collective* action of their "*organisations*"⁴⁷. Moreover, this does not mean *any* organization. Instead, that term is specifically defined under Article 10 as an organization "*for furthering and defending the interests of workers or of employers*". So, a trade union would be an "*organisation*" protected by the Convention, but not, say, a staff poker club.

17. It is this defined objective that must animate the interpretation of Convention No. 87 generally, and the terms in Article 3 (1) specifically. To be clear, contrary to the IOE's assertion, I am not referring to the *object and purpose of Convention No. 87*, but simply the bare *text of the Convention's terms*⁴⁸. Article 10 establishes the States parties' unambiguous intent to give special meaning⁴⁹ to the term "*organisation*", which informs the ordinary meaning⁵⁰ of the terms "*their . . . activities*" and "*their programmes*".

18. Moreover, this is closely related to the meaning of the terms "*freedom of association*" and "*the right to organise*" in the very title of Convention No. 87, its preamble, and Part I, where Articles 3 (1) and 10 are found. Those terms also demonstrate the *trade-union* context in which the terms in Article 3 (1) must be understood.

⁴⁷ Written Comments of the IOE, para. 36 (ii).

⁴⁸ Written Comments of the IOE, para. 34.

⁴⁹ VCLT, Art. 31, para. 4.

⁵⁰ VCLT, Art. 31, para. 1.

- (a) In the French version, “freedom of association” is not “*liberté d’association*” but specifically “*liberté syndicale*”. And the “right to organise”, too, is referred to as the “*droit syndical*”. By its very definition, a “*syndicat*” is a group of *workers* organized to defend their rights and interests⁵¹.
- (b) The English version has the same meaning⁵². According to the Oxford Dictionary, to “organize” means — *specifically in the case of a political body, especially a trade union* — not just to form and put in place an administrative structure, but to *plan organized action*⁵³.

19. In fact, crucially, no participants dispute that strike action is one of the key activities organized by workers’ organizations for furthering and defending workers’ interests⁵⁴. To arbitrarily *exclude* strikes from the meaning of such “activities” and “programmes [of action]” of workers’ organizations would significantly deprive Articles 3 (1) and 10 of their practical effect and would defeat the parties’ intent.

20. Mr President, this brings me to my *third* point: that Article 3 (1) cannot properly or reasonably be interpreted to exclude strike action, if effect is to be given to the Convention’s undisputed object and purpose, namely “freedom of association and protection of the right to organise”.

21. Importantly, the States parties did not seek this freedom and protection as a mere abstract ideal. Rather, the Convention’s preamble expressly explains that freedom of association is, in turn, “a means of improving conditions of labour and” — more broadly — “of establishing peace”⁵⁵.

22. This is a reference to the preamble to the ILO Constitution in the 1919 Treaty of Versailles, which provides that “conditions of labour exist involving such injustice, hardship and privation . . . that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required”⁵⁶.

⁵¹ Multidictionnaire de la langue française, available on www.multidictionnaire.com.

⁵² Contrast VCLT Art. 33, para. 4.

⁵³ Oxford English Dictionary, “organize (v.)”, sense 2.c, available on www.oed.com; see Written Statement of the ITUC, para. 4.19; Written Comments of the ITUC, para. 3.22.

⁵⁴ See e.g. Written Comments of Business Africa, para. 17.

⁵⁵ Preamble, para. 4.

⁵⁶ Preamble of the Constitution of the ILO [Document No. 1].

23. However, the conditions of labour cannot be improved unless workers and their trade unions can effectively negotiate with their employers. Given the inherent asymmetry in industrial relations, withdrawal of labour, from time to time, may be necessary to exert economic pressure.

24. As the Supreme Court of Canada recognized, “suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining”⁵⁷. Without that right, employees lose the leverage needed to overcome the power asymmetry at the bargaining table, so employers no longer need to negotiate in good faith. As the German Federal Labour Court memorably put it: “collective bargaining without the right to strike . . . would be nothing more than collective begging”⁵⁸.

25. In short, excluding the right to strike from the meaning of the terms in Article 3 (1) would significantly undermine the Convention’s object and purpose.

Subsequent practice of the parties

26. Mr President, I now turn to address the factors to be taken into account under Article 31 (3) of the Vienna Convention, starting with the subsequent agreement of the parties on the interpretation of Convention No. 87, as established by their practice in applying the Convention.

27. As the International Law Commission (ILC) commented, “[s]ubsequent practice in the application of a treaty . . . is authoritative evidence as to its interpretation when the practice is consistent, and establishes [the parties’] understanding regarding the meaning of the provisions of the treaty”⁵⁹. As an eminent publicist has more recently explained, this means that subsequent practice thus “possess[es] the same importance for the process of interpretation” as other primary elements that I have just addressed⁶⁰. In particular, the International Law Commission was explicit

⁵⁷ Supreme Court of Canada, *Saskatchewan Federation of Labour v. Saskatchewan*, Case No. 2015 CSC 4, para. 75 [Document No. 342].

⁵⁸ German Federal Labour Court (Bundesarbeitsgericht), Case 1 AZR 822/79, Judgment, 10 June 1980.

⁵⁹ Draft Articles on the Law of Treaties with commentaries, Commentary to Article 38, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 236. See also *Yearbook of the International Law Commission*, 1964, Vol. II, doc. A/5809, pp. 204-205, para. 15.

⁶⁰ G. Nolte, “Treaties and their Practice” (2018), Vol. 392, *Recueil des Cours*, p. 336; ILC Report (2018) *International Law Commission, Report of the Seventieth Session (2018), Official Records of the General Assembly, Seventieth Session, Supplement No. 10 (A/73/10)*, “Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties”, draft conclusion 2, commentary para. 14.

that it was not necessary to show that all parties to a treaty have engaged in a practice for it to qualify as subsequent practice; they only need to have accepted it⁶¹.

28. The minority again misunderstand the legal issue to be determined when they argue that the parties never unanimously agreed that Convention No. 87 protects the right to strike. The central issue is whether the parties agreed to *specifically exclude* strike action from the otherwise unambiguously broad meaning of the terms of Convention No. 87. The parties have never done so. Rather, their practice clearly establishes the opposite.

29. Mr President, I do not propose to take you through the myriad examples of individual practices of the States parties. All these were fully developed in our written submissions. Today, I shall focus on two collective practices establishing their agreement, in substance⁶², that the right to strike is protected by Convention No. 87.

2015 tripartite meeting outcome

30. I begin with the parties' substantive agreement as clearly established in the 2015 "Outcome of the Tripartite Meeting on [Convention No. 87] in relation to the right to strike". The Government Group expressly stated that it "had the opportunity to thoroughly ponder on the question that is posed to us all, namely *the relation between Convention 87 on Freedom of Association and the right to strike*" and, in the same breath,

"recognizes that the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO. The Government Group specifically recognizes that without protecting a right to strike, Freedom of Association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized"⁶³.

31. This is exactly the meaning of the Convention's terms — in their context and in light of its object and purpose — which we have demonstrated. The outcome of the 2015 tripartite meeting,

⁶¹ Draft Articles on the Law of Treaties with commentaries, Commentary to Article 38, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 236.

⁶² *Obligations of States in respect of Climate Change, Advisory Opinion of 23 July 2025*, paras. 184, 224.

⁶³ GB.323/INS/5/Appendix I, The Standards Initiative, Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, March 2015, Annex II, Government Group Statement (23 February 2015), para. 4 [Document No. 106] (emphasis added).

therefore, is clearly practice that establishes the “agreement *in substance* between the parties regarding the interpretation”⁶⁴ of Convention No. 87 — that it protects the right to strike.

Interpretive practice of the ILO supervisory system

32. The parties’ subsequent practice is also derived from their agreement with the long-established interpretation developed by the ILO supervisory bodies that the right to strike falls within the ambit of Convention No. 87 generally, and Articles 3 (1) and 10 specifically.

(a) *First*, as the ILC expressly recognized, the pronouncements of the Committee of Experts on the Application of Conventions and Recommendations “may give rise to” the parties’ subsequent practice⁶⁵. As long ago as 1959, when interpreting the “Right of Organisations to Organise Their Activities and to Formulate Their Programmes” under Article 3 (1) of Convention No. 87, the Committee confirmed that “in every case in which certain workers are prohibited from striking, adequate guarantees should be accorded to such workers in order fully to safeguard their interests”⁶⁶. The Committee clearly understood that strike actions fall within the meaning of those terms in Article 3 (1).

(b) *Second*, and of relevance, is the practice of the tripartite Committee on Freedom of Association (CFA), established in 1951 to “determin[e] whether any given . . . practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions”⁶⁷. It has consistently and expressly affirmed that the right to strike is both a trade union right generally⁶⁸, and an inherent corollary of freedom of association and the right to organize under Convention No. 87 specifically⁶⁹.

⁶⁴ *Obligations of States in respect of Climate Change, Advisory Opinion of 23 July 2025*, para. 184 (emphasis added); see also *ibid.*, para. 224.

⁶⁵ Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, Conclusion 13 (3); commentary, para. 4, and footnote 602.

⁶⁶ ILC, 43rd Session, 1959, Report III (Part IV), Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 101-129, para. 68 [Document No. 232].

⁶⁷ Compendium of rules applicable to the Governing Body of the International Labour Office, Annex II, Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, para. 14 [Document No. 90].

⁶⁸ CFA Case No. 28 (1952), para. 68.

⁶⁹ See e.g. CFA Case No. 454 (1966), para. 188.

(c) *Finally*, all the Commissions of Inquiry set up under Article 26 of the ILO Constitution⁷⁰ for the most serious complaints have uniformly confirmed that the right to strike falls within the ambit of Convention No. 87, and specifically Articles 3 (1) and 10⁷¹.

33. It was *after* the interpretation by these supervisory bodies had been firmly established that the overwhelming majority of States parties ratified Convention No. 87. They properly understood and accepted the parties' existing agreement and practice in the interpretation of Convention No. 87.

34. Curiously, Japan has maintained that the "opinions and recommendations of ILO supervisory bodies could not constitute 'subsequent practices'", because "numerous States parties . . . consistently object to" them⁷². But tellingly, apart from its own practice, the only other State practice that it is able to cite is that of Switzerland⁷³.

35. Japan understood that Convention No. 87 protects the right to strike generally. The debates in the Japanese Diet it cited, in fact, contradicts its assertion that "it ratified the Convention on 14 June 1965 on the understanding that neither the Convention nor the Committee of Experts deals with the right to strike"⁷⁴. Not only was the Japanese Government referring to strikes by *public workers*, it also explicitly referred to and relied on the views of the Committee of Experts in 1959 that I just referred to — namely the need for compensation and "adequate guarantees" when strikes are prohibited⁷⁵. On that basis, it believed its prohibition of strikes by public workers would be compliant with the Convention.

⁷⁰ ILO Constitution, Articles 26 *et seq.* See Written Statement of the ITUC, paras. 3.21, 4.105-108.

⁷¹ Report of the Commission of Inquiry appointed under article 26 of the Constitution to examine the complaints concerning the observance by Greece of Conventions Nos. 87 and 98 made by a number of delegates to the 52nd Session of the International Labour Conference, *Official Bulletin*, Vol. LIV, 1971, para. 261 [Document No. 276]; Report of the Commission instituted under article 26 of the Constitution to examine the complaint on the observance by Poland of Conventions Nos. 87 and 98 presented by delegates at the 68th Session of the International Labour Conference, *Official Bulletin*, Vol. LXVII, 1984, para. 517 [Document No. 277]; Report of the Commission of Inquiry appointed under article 26 of the Constitution to examine the observance by Nicaragua of Conventions Nos. 87, 98 and 144, *Official Bulletin*, Vol. LXXIV, 1991, paras. 500-509 [Document No. 278]; Trade Union Rights in Belarus, Report of the Commission of Inquiry appointed under article 26 of the Constitution to examine the observance by the Government of the Republic of Belarus of Conventions Nos. 87 and 98, *Official Bulletin*, Vol. LXXXVII, 2004, paras. 622-627 [Document No. 279]; Truth, reconciliation and justice in Zimbabwe, Report of the Commission of Inquiry appointed under article 26 of the Constitution to examine the observance by the Government of Zimbabwe of Conventions Nos. 87 and 98, *Official Bulletin*, Vol. XCIII, 2010, paras. 572-575 [Document No. 280].

⁷² Written Comments of Japan, para. 32.

⁷³ *Ibid.*, n. 39.

⁷⁴ Written Comments of Japan, para. 32, fn. 39, citing House of Representatives, Special Committee on ILO Convention No. 87, 25 June 1963; and House of Councillors, Plenary Session, 29 January 1965.

⁷⁵ Records of the House of Representatives, Special Committee on ILO Convention No. 87, 25 June 1963, p. 4 (HORI); Records of the House of Councillors, Plenary Session, 29 January 1965, p. 63 (ISHIDA).

36. Similarly, Switzerland's alleged objection when it ratified the Convention in 1973 did not concern the right to strike *in general*, but that of *public servants*⁷⁶. In any case, as the International Law Commission emphasized, a State's subsequent disagreement could "not displace the prior subsequent agreement" in place between the parties⁷⁷. More importantly, Switzerland never denied that the right to strike is part of freedom of association under ILO law, and in fact relied on the 2015 Government Group Statement in their written submissions⁷⁸.

Relevant rules applicable to the parties

37. Mr President, this brings me to my submission on other relevant rules of international law applicable in the relations between the parties under Article 31 (3) (c) of the Vienna Convention.

38. The relevance of these rules to questions of treaty interpretation, including developments in them since the treaty was concluded, is well recognized⁷⁹. In the *Oil Platforms* case, you confirmed that "[t]he application of the relevant rules of international law . . . forms an integral part of the task of interpretation"⁸⁰, a point you elaborated further and confirmed in the recent *Climate Change* Advisory Opinion⁸¹.

39. For one, the entire body of ILO law is, of course, part of other "relevant rules" "applicable" to all the States parties of Convention No. 87. The Government Group's express recognition of the right to strike as "part of the fundamental principles and rights at work of the ILO"⁸² is also significant on this additional basis.

40. Besides ILO law and practice, international human rights law is also both "relevant" and "applicable" to the States parties, and confirms that the right to strike falls within the meaning of the terms of Convention No. 87.

⁷⁶ International Labour Conference, 58th Session, 1973, *Record of Proceedings*, p. 544, paras. 26-27. See Written Statement of Switzerland, para. 6; Written Comments of Switzerland, para. 35.

⁷⁷ Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, conclusion 10, commentary, para. 24 (emphasis added).

⁷⁸ Written Statement of Switzerland, para. 73; Written Comments of Switzerland, para. 62.

⁷⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, pp. 31-32, para. 53.

⁸⁰ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *I.C.J. Reports 2003*, p. 182, para. 41.

⁸¹ *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 311.

⁸² GB.323/INS/5/Appendix I, para. 5 [Document No. 106].

41. This is clearly evidenced in the international human rights treaties. Contrary to the minority's view⁸³, these instruments are "relevant" to the question of whether Convention No. 87 provides the basis for the right to strike, because they confirm the interpretative analyses I set out.

(a) *First*, the International Covenant on Economic, Social and Cultural Rights — which 149 of the 158 parties to Convention No. 87 have ratified — explicitly mentions both Convention No. 87 and the term "[t]he right to strike" in Article 8. This directly confirms the legal relationship between the two.

(b) *Second*, the Charter of the Organization of American States⁸⁴ and the Arab Charter on Human Rights⁸⁵ expressly recognize the "right to strike" as part of freedom of association.

(c) *Third*, the European Social Charter of the Council of Europe⁸⁶ and the Charter of Fundamental Rights of the European Union expressly clarify that the right to take collective action to defend workers' interests *includes* the right to strike⁸⁷. This confirms the textual meaning of Articles 3 (1) and 10 we advanced.

42. And as I alluded at the beginning, this is *even more so* for the human rights instruments that do *not* mention the "right to strike".

(a) Both the 1948 Universal Declaration of Human Rights, adopted the same year as Convention No. 87, and later the International Covenant on Civil and Political Rights, to which nearly all States parties to Convention No. 87 are parties, are silent on the right to strike. However, the Human Rights Committee has repeatedly recognized that the right to strike forms part of freedom of association under Article 22 of the Covenant⁸⁸.

⁸³ Written Comments of the IOE, para. 131; Written Comments of Bangladesh, para. 23; Written Comments of Japan, para. 18; Written Comments of Switzerland, para. 65.

⁸⁴ Article 45 (c) of the Charter of the Organization of American States.

⁸⁵ Article 35 (1) and (3) of the Arab Charter on Human Rights.

⁸⁶ Article 6 (4) of the European Social Charter of the Council of Europe.

⁸⁷ Article 28 of the Charter of Fundamental Rights of the European Union.

⁸⁸ See e.g. HRC, CCPR/C/79/Add.104 (1999), Consideration of reports submitted by States parties under article 40 of the Covenant, para. 25; HRC, CCPR/CO/80/LTU (2004), Consideration of reports submitted by States parties under article 40 of the Covenant, para. 18; HRC, CCPR/C/EST/CO/3 (2010), Consideration of reports submitted by States parties under article 40 of the Covenant, para. 15; HRC, CCPR/C/DOM/CO/6 (2017), Concluding observations on the sixth periodic report of the Dominican Republic, paras. 31-32; HRC, CCPR/C/EST/CO/4 (2019), Concluding observations on the fourth periodic report of Estonia, paras. 31-32.

(b) Similarly, although the 1950 European Convention on Human Rights does not expressly mention the term “right to strike”, numerous decisions of the European Court of Human Rights have established that it falls within freedom of association and the right to form and join trade unions in Article 11⁸⁹.

43. The universal recognition of the right to strike in these international and regional human rights treaties, coupled with the widespread recognition of the right to strike in national systems, confirm that the right to strike is part of customary law that is applicable to the States parties.

Supplementary means

44. The meaning of the terms of Convention No. 87 by applying the “general rule of interpretation”— that the right to strike is covered— is neither ambiguous nor unreasonable. It follows that given the primacy of textual interpretation, there is little room for reliance on supplementary means of interpretation, including the preparatory works, on which the minority have tried to rely⁹⁰.

45. Some of those participants even refer to a purported special rule of interpretation under Article 5 of the Vienna Convention⁹¹. However, in the last— and only— advisory opinion interpreting another international labour convention, the Permanent Court confirmed “that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself”⁹². That remains the case a century later in respect of Convention No. 87.

46. In fact, it is all the more so given how few of the current States parties took part in the *travaux*. The limited relevance of the *travaux* for accession States was also emphasized by the Permanent Court in the *River Oder* case, where it noted that, because three of the parties concerned

⁸⁹ See e.g. ECtHR, *Ognevenko v. Russia* (2018), paras. 57 and 61; *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (2014), para. 84; *Enerji Yapi-Yol Sen v. Turkey* (2009), para. 24.

⁹⁰ Written Statement of the IOE, paras. 276-299; Written Statement of Japan; paras. 38-54; Written Statement of Switzerland, paras. 76-82; Written Statement of Bangladesh, para. 7.0; Written Statement of Business Africa, para. 38.

⁹¹ Written Comments of the IOE, para. 32.

⁹² *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 50, p. 378.*

in that case did not take part in the *travaux* of the Treaty of Versailles, “the record of this work cannot be used to determine, in so far as they are concerned, the import of the Treaty”⁹³.

47. In any case, nothing in the preparatory works amounts to an express rejection of the right to strike in Convention No. 87.

48. In conclusion, the ITUC submits that the right to strike is not an optional extra that applies only to virtuous States. It is a legal requirement under Article 3 (1) of Convention No. 87 and must be interpreted by reference to the Convention régime as it has developed.

49. With that, I respectfully ask that you call Professor Koh to address you on the wider implications of the Court’s decision. I thank you for your attention.

The PRESIDENT: I thank Professor Okowa. I now call Professor Harold Koh to the podium. Sir, you have the floor.

Mr KOH:

IV. WIDER IMPLICATIONS OF THE COURT’S DECISION

1. Mr President, Members of the Court. The ITUC represents millions of workers from six continents, who ask you to recognize a global reality: the right to strike is an indispensable part of their right of freedom of association, protected by the ILO Convention No. 87.

2. It is no accident that after nearly a century, this is the first request to this Court to give an advisory opinion regarding interpretation of an ILO convention. Under the ILO’s Constitution, such questions are generally intended to be — and so traditionally have been — dealt with *within the ILO system*. Indeed, until very recently, the Employers consistently recognized that Convention No. 87 protects the right to strike. But nearly a century after its adoption, the Employers sought to rewrite the ILO Constitution to upset the delicate balance of power long-established within the tripartite global legal system. Just 13 years ago, the Employers abruptly broke consensus and rejected that established right, claiming a late-discovered “legal error”.

⁹³ *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, Annex 3, Order of 20 August 1929, 1929, P.C.I.J. Series A, No. 23*, p. 42. See also *United Nations Educational, Scientific and Cultural Organization (Constitution) Case* (1949), Vol. 16, *ILR.*, pp. 336-337 (Rolin, President; du Costa and Lachs, Members).

3. But this case is about more than legal abstractions; it will affect the real rights of tens of millions of working people around the world. Witness, for example, this newspaper advertisement published by Cambodian employer groups warning garment workers not to strike, after several of their fellow workers had been shot and killed. The employers assert that the right to strike is not a fundamental right and “is not provided for in . . . [Convention No. 87] and was not intended to be”. After this advertisement ran, many more Cambodian workers were jailed in inhumane conditions for six months.

4. Should the Employers’ minority view prevail, we can expect to see similar media campaigns around the world. National employer groups would contest the right to strike country by country, focusing first on nations with compliant courts, weak civil societies and ineffective media. At a time of rising authoritarianism, governments and employers could use your opinion to launch lawsuits seeking to undermine the many high courts that have referred to both Convention No. 87 and the ILO supervisory bodies to guarantee protection of the right to strike under national laws.

5. Your ruling could be used to destabilize industrial relations, and to deny the very existence of worker rights in countries hostile to those rights. From Belarus to Brazil, from Cambodia to Hungary, from Lesotho to Poland and the United States of America, labour unions are invoking the right to strike to give workers a stronger voice and to help forge a path toward collective bargaining. Recognizing workers’ right to strike as an inherent part of the freedom of association ensured by Convention No. 87 would simply acknowledge that these millions of workers may collectively protest against illegal and unfair practices and assert their right to work, without intimidation or persecution.

6. As the United Nations Special Rapporteur explained:

“The concentration of power in one sector . . . inevitably leads to . . . an increase in inequalities and marginalization with all their attendant consequences. *The right to strike is a check on this concentration of power.*”

7. Our written statements enumerate the countless other legal instruments to which Convention No. 87’s right to strike has become integral. Industrial relations the world over — based on more than a century of tripartite negotiations — have rested on a settled jurisprudence regarding the interpretation and application of Convention No. 87 that universally recognize the right to strike.

These include human rights instruments, trade agreements, preference programmes and bilateral investment treaties that incorporate labour protections with reference to Convention No. 87.

8. To take just one example, the 2018 US-Mexico-Canada Agreement (USMCA) not only requires those States to respect freedom of association “as stated in the ILO Declaration on Rights at Work”, but also expressly declares that “the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike”. To suddenly decide that Convention No. 87 does not protect the right to strike would not only disrupt the fabric of the USMCA, but the ILO Declaration and so many other interconnected agreements as well.

9. Simply put, the choice before you is asymmetric. Should this Court answer the advisory question “yes”, you would simply reconfirm what was the settled legal understanding until 2012, when the Employers abruptly abandoned consensus. You would end this erroneous, belatedly offered legal interpretation, and confirm not just the correct scope of the right, but the proper relationship between this Court and the ILO in construing its own treaties. Once this Court reaffirms that the right to strike is part of Convention No. 87, future ILO referrals should be rare, because your ruling would again allow the ILO to resolve in the first instance future disputes regarding interpretation of these treaties. And you would strengthen industrial democracy and order by reaffirming a social compact based on peaceful bargaining between employers and workers.

10. But should you rule the other way, Employers will claim that the legality of the right to strike must be contested country to country, offering multiple positions on interpretive issues regarding other ILO treaties. While your Court’s docket strains under urgent global business, a negative answer to the question before you will likely trigger future employer advisory requests contesting other long-established ILO interpretations.

11. Mr President, Members of the Court: the right to strike does not threaten — it maintains — social order. In real life, the right to strike is a safety valve, a non-violent bulwark of social peace. Every day, we are served meals and drinks, we ride in cars and buses, we work in offices on equipment that is built, prepared and maintained by committed and conscientious workers. They do not want to strike; they want to *work*; to do their jobs for a fair and honest wage. But behind their toil is constant *awareness* that if their rights are abused, they have the fundamental right to withhold that work in fellowship with their co-workers.

12. Once you answer the narrow question before you in the affirmative and confirm the long-standing *existence* of the right to strike, you will restore the ILO and its members to the status quo *before* the Employers abandoned consensus just 13 years ago. The nuances can then be declared by the ILO, its Member States and supervisory system, according to that Organization's Constitution. But to decide otherwise would ignore reality, foster confusion and trigger a new stream of advisory requests.

13. At first blush, this case may not seem momentous. But your decision here will affect every worker in the world. However you rule, workers will still strike. Will you be the judges who tell them that, under Convention No. 87, they no longer have that right? Or will you reaffirm, once and for all, that Convention No. 87 protects their right to strike as an integral part of their freedom of association?

14. For all these reasons, we submit that you should confirm:

- first, that this Court has both jurisdiction and discretion to issue an advisory opinion under Article 37 (1) of the ILO Constitution that is authoritative and binding on the ILO and its constituents; and
- second, that the right to strike is protected under Convention No. 87 on Freedom of Association and Protection of the Right to Organise.

15. I thank you.

The PRESIDENT: I thank the representatives of the International Trade Union Confederation for their presentation. Before I invite the next delegation to take the floor, the Court will observe a coffee break of 15 minutes. The hearing is suspended.

The Court adjourned from 11.40 a.m. to 12 noon.

The PRESIDENT: Please be seated. The sitting is resumed. I now invite the delegation of the International Organisation of Employers to address the Court and I call Mr Roberto Suárez Santos to the podium. Sir, you have the floor.

Mr SUÁREZ SANTOS:

I. INTRODUCTION

1. Mr President, Madam Vice-President, Members of the Court, I have the honour to appear before you, opening the submissions on behalf of the International Organisation of Employers (IOE) representing more than 15 million companies — most of them are small and medium companies — through its employers' organizations in 142 countries.

2. This Court is regularly asked to opine on issues of fundamental importance to the international legal system. This responsibility is particularly great when, as here, your opinion will so fundamentally affect the proper working of one of the most important United Nations international organizations — the ILO.

3. The ILO is a unique organization, which operates according to a unique system: tripartism. Tripartism means that the International Labour Conference, the “parliament of labour”, is used to resolving *very sensitive* disputes of all different kinds and adopting international labour standards based on discussions and negotiations by employers, workers and governments, on an equal footing.

4. When a right is recognized through this process, its scope and limits are defined with much care, so that the right can operate in very different legal orders and diverse national contexts.

5. Let me state the IOE and Employers' position clearly. We do not oppose the right to strike or even a specific international convention recognizing this right developed through a proper tripartite process. This is the only legitimate way of solving the current issue because we are firmly convinced that Convention No. 87 neither explicitly nor implicitly covers the right to strike. There was even an explicit intention to exclude this right by those who drafted and adopted Convention No. 87.

6. The fact that the right to strike is not covered under Convention No. 87 — contrary to what we have heard — takes nothing away from the protection of this right at domestic and regional levels. The domestic regulations of many States carefully frame this right having taken into consideration national needs. Even certain regional instruments address the right to strike and its limits, with their own supervisory and remedial frameworks. In those sources, the right to strike has been discussed, has been negotiated among States, and has been framed with nuance, tailored with specific care to

the specific context of each State and region. That would not be the case if this distinguished Court were to adopt the brutal unilateralism of imposing a right to strike into Convention No. 87 or the non-agreed detailed and prescriptive guidance of the ILO Committee of Experts. This would risk distorting national and regional industrial systems around the world and the efficient functioning of labour markets and economies.

7. It is very unfortunate that the ILO has never attempted to discuss or negotiate an ILO instrument to cover the right to strike. The reason: the consistent opposition of the ILO Workers' Group, which constantly refused to engage in standard setting for an ILO instrument which would frame the scope and limits of the right to strike. Whenever a dialogue on this matter has been attempted, the Workers' Group alleges that Convention No. 87 is the only way to deal with this matter and the very detailed opinions of the Committee of Experts, the only valid way to interpret it. They fear to discuss the necessary limits to the right to strike which should be the last resort in industrial relations.

8. Even if anyone wrongly assumes that Convention No. 87 contains an abstract right to strike, it would be impractical to suggest that it contains a fully formed regulatory régime on the right to strike and its modalities. The ILO Committee of Experts has sought to import a complex regulatory architecture into Convention No. 87. There is no basis for the Court to now elevate this very prescriptive guidance to the status of international law. The practical consequences of doing so would undermine the entire good governance of the ILO and most ratifying Member States could be in breach of these provisions. Believe me, those are not minority governments, it is a vast majority.

9. It would also invert the ILO's constitutional order and marginalize the ILO tripartite process, which must live by the rules: if we rewrite a convention in this way, then every contentious topic would become susceptible to recodification.

10. Mr President, in national and regional systems, the modalities of strikes on crucial policy issues differ substantially. For example: strikes in essential services — which affect entire economies and the lives of the vulnerable; rules for dealing with political strikes; notification periods before a strike takes place; access of employers to the enterprise facilities during a strike period; the payment of salaries to workers on strike; just to quote some examples — cannot be resolved by simply reading

an abstract right to strike into Convention No. 87 and trying to impose it on employers, workers and governments.

11. It is notable that even the International Trade Union Confederation (ITUC) takes the view that the question related to the regulation of the modalities of a strike is not for this Court⁹⁴. There is little doubt that an ILO social dialogue procedure to develop an international labour standard would be the best way forward as it is well established, and an effective procedure. Once the ILO Governing Body decides to discuss this matter in the International Labour Conference, it is highly likely that a meaningful outcome, a convention, will be achieved. Almost 200 legal binding instruments have been adopted to date following this practice. It is also likely that this instrument created following this tripartite process will enjoy support and legitimacy among ILO constituents.

12. Mr President, Madam Vice-President, Members of the Court, I will be followed today by three speakers on behalf of the IOE.

13. First, counsel Ms Michelle Butler will deal with the core interpretative framework for Convention No. 87 using Article 31 of the Vienna Convention on the Law of Treaties and will make clear that Convention No. 87 does not protect the right to strike as we employers have *constantly* defended.

14. Second, Mr Anirudh Mathur will then address the supplementary means of interpretation under Article 32 of the Vienna Convention, and the significance of its Article 5, both of which would confirm that Convention No. 87 does not protect it.

15. Third, Ms Rita Yip will conclude the IOE's presentation by explaining the wider implications of the Court's advisory opinion for the international labour system.

16. I thank you for the honour of addressing you. I now, with your permission Mr President, request that the Court give the floor to Ms Butler.

The PRESIDENT: I thank Mr Suárez Santos. I now give the floor to Ms Michelle Butler. Madam, you have the floor.

⁹⁴ ITUC, Written Comments, para. 7.6.

Ms BUTLER:

II. APPLICATION OF THE VIENNA CONVENTION: ARTICLE 31

1. Mr President, Madam Vice-President, Members of the Court. It is a great honour to appear before you again today, and it is a real privilege to represent the International Organisation of Employers on a matter so important for the ILO.

2. Mr President, this request requires the Court to determine whether or not the right to strike is protected by Convention No. 87. Nothing more. Nothing less.

3. As the honourable Members of this Court will be well aware, that task is one of pure treaty interpretation. It is trite to say that interpretation must above all else be based upon the treaty text⁹⁵. I implore you not to replace treaty text with aspiration, but rather to painstakingly apply the interpretative framework of the Vienna Convention on the Law of Treaties. The mandate of this Court is not to adjudicate the wisdom of strikes per se, it is not to calibrate policies as to their modalities — these are nuanced matters, these require social dialogue through the ILO's tripartite parliament of labour, the International Labour Conference.

4. So, whilst some States parties⁹⁶ encourage the unilateral imposition of the Committee of Experts' detailed régime on the modalities of the right to strike, that is not what this advisory opinion question calls for, it is not what it suggests, it is not what it even permits. The Court's role is simply to answer the question, without more, as to whether Convention No. 87 protects the right to strike. In my submissions today, I will seek to evidence why the clear answer to the advisory opinion question is a simple "no".

5. In order to do that, I will take you through the treaty interpretation framework which is envisaged by Article 31 of the Vienna Convention.

Article 31 (1): ordinary meaning

6. Mr President, turning to the initial textual analysis under Article 31 (1), the foremost text to consider is Article 3 (1) of the Convention No. 87. When seeking to discern the *ordinary meaning*

⁹⁵ *Legality of the Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 318, para. 100; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41.

⁹⁶ Colombia, South Africa, Vanuatu, France, Spain and Somalia.

from the bare text, the key phrase to consider is that “workers’ and employers’ organisations . . . shall have the right . . . to organise their . . . activities”. On any sensible reading, the bare text of that phrase is ambiguous in respect of the right to strike. There is no express mention of conducting “strikes”, no mention of “industrial action” — or even a conceptually wider phrase, there is no mention of “collective bargaining”. The treaty text shows an obvious ambiguity about the scope of “activities”. Does it mean *all* activities? Does it mean internal activities, or external activities? Does it mean activities without limitations?

7. Some parties suggest that the bare text (without consideration of context, without consideration of object and purpose) grounds an *unambiguous* right to strike⁹⁷. With the greatest respect, that unrealistic suggestion betrays the extremity of their position. At least one participant purports to find an unambiguous meaning by the bare text, because strike is “the *raison d’être* of workers’ organisations”⁹⁸. But that is wrong; it is reductive on its own terms. That same participant also asserts that it is clear that Article 3 (1), when read with Articles 2 and 10, gives a right to workers’ organizations to organize and plan strikes, because of the reference within it to “furthering and defending workers’ interests”. But again, that is circular and unclear.

Article 31 (1): context

8. This is why, Mr President, here — as is so often true with respect to treaty interpretation — *context* is key.

9. It is part of the context, that there is no mention of the words “strike”, “collective bargaining” or “industrial action” anywhere in the text of Convention No. 87. The terms actually found in Article 3 are capacious; they are not specific. But just because a term is general, that does not mean that it includes everything. To the contrary, because capacious terms are unclear, when specific protections are sought, they are mentioned⁹⁹. So, the silence is part of the context, but this Court must not fall into the mischaracterization of the IOE’s arguments, which has been suggested

⁹⁷ ITUC, Written Statement, paras. 4.13-4.22; Written Statement of Australia, paras. 26-31.

⁹⁸ ITUC, Written Statement, para. 4.25.

⁹⁹ E.g. as in Article 28 of the Charter of Fundamental Rights of the European Union.

by some participants¹⁰⁰, that the IOE's reasoning may be reduced to just this. Mr President, there are three further points on context which must be considered in the round.

10. *First*, it is also crucial context that the syntax of Article 3 (1) is organization-centric: it uses the language of “constitutions”, “rules”, “representatives”, “administrations”, “activities” and “programmes”. The conceptual thread which runs through Article 3 concerns the ability of an organisation to organize per se, it concerns its existence, its internal arrangements and its internal governance. This is key to resolving what the general term “activities” is intended to and likely does mean. Just because “strikes” *in abstracto* can be consistent with “activities” that does not mean that the word “activities” entails “strikes”. To this extent, the ITUC has fallen into error by mischaracterizing the IOE's acceptance of an abstract link between “strikes” and “activities”, with the outcome that strikes therefore fall within “organising . . . activities”¹⁰¹. But strikes are not inherent to “organising activities”.

11. *Second*, it is also crucial context that there is no clear qualification or limitation in Convention No. 87 circumscribing the right to strike even though the right to strike is plainly not an absolute right. While the ITUC suggests that it is capable of being circumscribed by the requirement of compliance with the law of the land found in Article 8, respectfully, that does not move the dial. For a start, the Article 8 limit is explained by reference within that text to “other organised collectivities” (like NGOs or hobby organizations) in municipal law. Municipal law applying to “other organised collectivities” may shed light on the right of such organizations to exist, it may shed light on the right of such organizations to self-govern, it may shed light on the right of such organizations to conduct activities amongst their own members. But it does not shed light on the limitations of the right to strike¹⁰². Moreover, the assumption of a right to strike that it is effectively unqualified as a matter of international labour law, but at the same time can be freely limited according to national preferences, has no principled contour. It is unhelpful for the efficient functioning of labour markets and economies¹⁰³.

¹⁰⁰ ITUC, Written Comments, paras. 3.12, 3.24-3.25.

¹⁰¹ ITUC, Written Comments, para. 7.4.

¹⁰² IOE, Written Statement, para. 155 (vi).

¹⁰³ IOE, Written Comments, para. 42.

12. *Third*, the title of Convention No. 87 — that is, the “Freedom of Association and Protection of the Right to Organise Convention” — is also crucial context. Its focus is on the ability to associate, and the protection of the right to organize; whilst, at the same time, contains no right to strike.

Article 31 (1): object and purpose

13. Mr President, what is illustrated by context, is underscored by an analysis of the *object and purpose* of Convention No. 87.

14. It is trite law that consideration of object and purpose finds its limits in the ordinary meaning of the text of the treaty. This Court has never allowed teleology to create substantive rights which are not provided by the text. This reflects the orthodox position in international law: general references cannot be used to alter or enhance the meaning of treaty terms¹⁰⁴.

15. The object and purpose of Convention No. 87 was to create specific, basic and sequential rights for employers’ and workers’ organizations to form organizations and the autonomy to run them. It is a charter of associational autonomy for *both* workers and employers, protecting hard-won rights of association *per se*. This follows from the consideration of the provisions of Convention No. 87 when taken together.

16. But there is also an important further point of first principle. There is an axiomatic mistake made by many participants to these proceedings¹⁰⁵, in their assertion that the object and purpose must lead to the protection of strikes. It is repeatedly assumed that strike is (in effect) the sole method of improving conditions of labour; therefore, without the protection of strikes, Convention No. 87 cannot be effective.

17. Mr President, that is simply mistaken.

18. Strike is not the sole such means, let alone a definitive or unambiguous means of furthering workers’ interests. In fact, strikes should always be an instrument of last resort. Many workers’ organizations around the world do not strike. But they still have a purpose. They provide invaluable services defending the interests of individual members; representing workers in discussions and

¹⁰⁴ *Federal Reserve Bank of New York v. Bank Markazi* Case A 28 (2000), *Iran-US Claims Tribunal Reports*, Vol. 36, p. 5, para. 58.

¹⁰⁵ Written Statement of Australia, para. 34; ITUC, Written Comments, para. 3.65; Written Statement of Vanuatu para. 31.

negotiations with employers. They offer a means of co-ordination for members, by giving them a forum in which they can come together. This is important. Convention No. 87 therefore provides such opportunities for the provision of legal services, or the ability to enter into arbitration and conciliation.

19. The suggestion that Convention No. 87 is worthless without a right to strike is also historically myopic. It cheapens the hard-won and historic struggle it took for all organizations to achieve a right to association. In one breath, it is said that “organising . . . activities” has no value without strike. Yet, in the next breath, when setting out the history of labour movements, it is noted that even in the United Kingdom and other industrialized States, for decades after trade unions were legalized, strikes remained unlawful as a means of achieving trade union objectives¹⁰⁶. So was the legalization of trade unions and the protection of such organizations to exist in the first place — a cause that itself took centuries of sacrifice — really worthless? Mr President, it plainly was not.

Article 31 (1): good faith

20. For all these reasons, a *good-faith* interpretation points clearly in one direction: that a right to strike falls outside the scope of Convention No. 87. The contrary position adopted by certain participants to these proceedings is so extreme — that if Convention No. 87 does not contain a right to strike, this “would deprive the convention of *any* practical effect”¹⁰⁷ — that this honourable Court needs little hesitation in rejecting it.

21. What is more, even if there is a regulatory gap in ILO standards, an appropriate resolution exists to remedy this. As Mr Suárez Santos has previously explained, the ILO’s tripartite process could readily create a principled and nuanced right to strike, with clear qualifications — as any such right needs, and without which it would be absurd.

22. For this Court to read such a right into Convention No. 87 would run a coach and horses through the requirement for good-faith treaty interpretation.

¹⁰⁶ ITUC, Written Statement, paras. 4.197-4.198.

¹⁰⁷ ITUC, Written Statement, para. 4.59.

Article 31 (3) (a) and (b): subsequent agreement and practice

23. Mr President, I turn now to Article 31 (3) of the Vienna Convention, and consideration of *subsequent agreement and practice* between the parties. On these issues, the IOE's position can be stated very simply. The fact that there are State parties to Convention No. 87 that expressly insist that the right to strike is not protected by it shows that there is no "subsequent agreement" or "subsequent practice" capable of changing its interpretation to insert such a right within it.

24. What then is the *threshold* against which the emergence of subsequent agreement and practice is to be assessed?

25. I identify five key principles.

26. *First*, this honourable Court, in the *Botswana/Namibia*¹⁰⁸ proceedings, described the relevance of subsequent practice (and the same may be said for subsequent agreement) as constituting objective evidence of the understanding of the parties as to the meaning of the treaty. That is the touchstone. Where subsequent agreement or practice is unclear, or where there is doubt about it meeting the threshold, then this reduces the weight that is given to treaty interpretation.

27. *Second*, in *Whaling in the Antarctic*¹⁰⁹ no subsequent practice or agreement was found to have emerged, in circumstances where the support of *all parties* was not present, and in particular, where Japan expressly objected.

28. *Third*, looking elsewhere, the World Trade Organization Appellate Body has opined that "the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts and pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation"¹¹⁰.

29. *Fourth*, the International Law Commission's Draft Conclusion 10 (2)¹¹¹ explains that "the number of parties that must actively engage in subsequent practice . . . may vary". In other words, it is a contextual question that depends upon the circumstances. Further, the ILC makes clear that

¹⁰⁸ *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999 (II), pp. 1075-76, paras. 47-50, and p. 1087, para. 63.

¹⁰⁹ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, pp. 256-257, paras. 78 and 83.

¹¹⁰ Japan — Taxes on Alcoholic Beverages, *Japan v. United States*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report No AB-1996-2, Doc No 96-3951, ITL 106 (WTO 1996), DSR 1996:I, 97, 4 October 1996, World Trade Organization [WTO].

¹¹¹ Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission (YILC)*, 2018, Vol. II, Part Two, Conclusion 10.

“silence may constitute acquiescence”. In this regard, the ILC has explained that the reason the text of Article 31 (3) did not in terms say “all the parties” was because it was taken as given that this referred to the parties as a whole, and to avoid any misconception that every party must individually have *engaged* in the practice where it would suffice that it had *accepted* the practice.

30. *Fifth*, express objections are distinct from “silence”. Thus, in the *Panama/Guinea-Bissau*¹¹² proceedings, a case considering the practice of States in interpreting certain United Nations Convention on the Law of the Sea (UNCLOS) articles, the International Tribunal for the Law of the Sea’s (ITLOS’) essential reasoning included that there was no “manifest objection” to such legislation and that “it is, in general, complied with”. The obvious corollary of this is that a “manifest objection” by a party or parties, or general non-compliance, tells *against* the emergence of subsequent practice.

31. Mr President, you will have seen that a significant and cogent grouping of States participating in these proceedings has expressly objected in their written submissions to the suggestion that Convention No. 87 has ever come to include a right to strike. These States include Bangladesh, Belize, Costa Rica, Japan and Switzerland. While the United Kingdom previously took the same position, it withdrew its written submission following a change of government. However, that very fact shows the instability of any acceptance of a right to strike within Convention No. 87: the issue is subject to political vagaries.

32. Indeed, beyond the express objections made by Bangladesh, Belize, Costa Rica, Japan and Switzerland in these proceedings; and the express objection followed by equivocation by the United Kingdom; there may well be other States participating in these oral proceedings who have not previously filed written submissions who also object to a right to strike being protected by Convention No. 87.

33. It is notable that at least nine States, including Algeria, Belarus, Cyprus, Morocco, Nigeria, Sweden, Türkiye, Uruguay and Venezuela, which have not filed written submissions before this Court, have previously objected to the imposition of such a right at the ILO’s Governing Body or at the ILO’s International Labour Conference¹¹³. It would be wrong in principle, to infer from their

¹¹² *The M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 69, para. 218.

¹¹³ IOE, Written Statement, Annex F.

election not to file a written objection in these advisory opinion proceedings, that their previous express objections have turned into acceptance.

34. This explicit disagreement — by at least 15 States — not forgetting that these are a range of countries of varying stages of industrialization and varying economic weights — precludes the inference of any *subsequent agreement*.

35. This is the core but inescapable point.

36. As against that, various smaller points fall away.

First, the views of the Committee on Freedom of Association (CFA) cannot ground subsequent agreement by the parties, where it does not have the mandate to interpret Convention No. 87. The same goes for the Committee of Experts in circumstances where their role is not tripartite and is actually non-binding in nature¹¹⁴.

Second, it does not take matters any further to note that several countries ratified Convention No. 87 *after* the Committee of Experts made its first pronouncement as to the right to strike being included in its interpretation. It should also be observed that 34 parties had already ratified Convention No. 87 before that point¹¹⁵. But more importantly, several State parties manifestly objected and continue to manifestly object to the musings of the individual members of the Committee of Experts. And in any event, a State reaction is due only when the circumstances call for it¹¹⁶; it is highly doubtful that States believed there was to be a need for express objection in response to a non-binding opinion.

Third, the 2015 Government Group Statement is of little consequence. It amounts to nothing more than a recognition that the right to strike is “linked to freedom of association” and that its “scope and conditions are regulated at the national level” — that is not contentious. Nowhere in that statement is there an acceptance that the right to strike is protected by Convention No. 87. Indeed, it is no doubt due to the lack of an ILO instrument delimiting the right to strike that the statement gives

¹¹⁴ Written Statement of Switzerland, paras. 63-65; Written Comments of Bangladesh, paras. 34 and 39; Written Statement of Norway paras. 11 and 22; (now withdrawn) Written Statement of the United Kingdom, paras. 11 and 46.

¹¹⁵ Albania, Austria, Belarus, Belgium, Cuba, Denmark, Dominican Republic, Egypt, Finland, France, Germany, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Mexico, Myanmar, Netherlands, Norway, Pakistan, Panama, Philippines, Poland, Romania, Russian Federation, Sweden, Tunisia, Ukraine, United Kingdom, Uruguay.

¹¹⁶ *Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 23.

a commitment to “consider discussing, in the forms and framework that will be considered suitable, the exercise of the right to strike”. That document in no way evidences a subsequent agreement as to a right to strike emanating from Convention No. 87.

37. Mr President, *the core but inescapable point* already explained — that at least 15 States have explicitly disagreed with a right to strike being protected by Convention No. 87 — equally precludes the emergence of any *subsequent practice*. But it is instructive to consider two further submissions on this issue.

38. *First*, even assuming the Committee of Experts’ views were persuasive as to subsequent practice — which they are not — there remains a widespread lack of consensus and express objections to their musings on the right to strike. As a matter of fact, if the Committee of Experts’ views as to the scope and limits of a right to strike were to be read into Convention No. 87, most State parties to that convention would find themselves in breach. If a lack of consensus and express objection was enough for this Court in *Whaling in the Antarctic*, it should be here as well: there are at least 15 objectors here, not a lone one.

39. *Second*, no subsequent practice has emerged by way of national courts. Only the national courts of 12 State parties — out of the 158 that have ratified Convention No. 87 — have referred to the Committee of Experts’ interpretations on the right to strike in their judicial decisions. Nor can general reference to the case law of regional human rights courts, which contain no reference to Convention No. 87, constitute practice as to the interpretation of that Convention. Each regional decision that does address Convention No. 87, does not support the emergence of a right to strike within that treaty¹¹⁷.

40. Mr President, taking all this into account, it is the clear view of the IOE that no subsequent practice or subsequent agreement has emerged to show that Convention No. 87 protects the right to strike. Alternatively, there is no subsequent agreement or practice of sufficient clarity, consistency and uniformity, such as to offer a clear insight into the parties’ objective intentions.

¹¹⁷ IOE, Written Comments, paras. 99-120.

Article 31 (3) (c): relevant rules of international law

41. I will turn now to Article 31 (3) (c), *relevant rules of international law*. The threshold here is demanding: to be relevant, all parties have to be bound by the “rules” — or, at least, must not have manifestly objected to the purported rule. For a relevant rule to be “applicable” implies giving consent through another treaty or binding customary rules or general principles. But, as ever, such rules may not override or limit the treaty text of Convention No. 87. There are two short issues worth highlighting in this respect.

42. *First*, there is no further treaty that would introduce a right to strike into Convention No. 87. While the International Covenant on Economic, Social and Cultural Rights (ICESCR), and certain other treaties, contain a right to strike, none of these instruments cover all of the State parties to Convention No. 87. Indeed, a significant minority of Convention No. 87 signatories are not also parties to the ICESCR, namely, Botswana, Comoros, Cuba, Kiribati, Mozambique, Saint Kitts and Nevis, Saint Lucia, Samoa and Vanuatu. Further, regional instruments cannot take any matters further either, in circumstances where there is no regional instrument from the Asian region.

43. *Second*, the demanding test for the emergence of a norm of customary international law places a high burden on those seeking to prove it. That burden is not made out with respect to the right to strike. Here, the right to strike is largely regulated at the municipal or even the regional level, and many States act pursuant to municipal or regional law in protecting it, rather than by reference to a belief in a rule of customary international law¹¹⁸.

44. Indeed, there is not even a general or a settled practice that is sufficiently widespread or representative to form customary international law at the level of an abstract right to strike. But the point is stronger still when made by reference to the modalities of the right to strike. If a norm of customary international law existed, it would need to be reasonable; if it were not reasonable, the implication is that no norm would have formed. But there is no reasonable norm of customary international law that appears to emerge here, given that there is no consistent State practice on the qualifications and limits to the right to strike¹¹⁹.

¹¹⁸ Cf. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77.

¹¹⁹ See the United Kingdom’s (now withdrawn) Written Statement, paras. 88-125.

Conclusion

45. Mr President, I trust that this canter through the treaty interpretation framework of Article 31 of the Vienna Convention has made it abundantly clear that the right to strike falls outside the scope of Convention No. 87.

46. I thank you for the honour of addressing you and for your patient attention and I ask that you give the floor to my colleague, Mr Anirudh Mathur, who will address you on Articles 32 and 5 of the Vienna Convention.

The PRESIDENT: I thank Ms Butler. I now give the floor to Mr Anirudh Mathur. You have the floor, Sir.

Mr MATHUR:

III. APPLICATION OF THE VIENNA CONVENTION: ARTICLE 31 AND ARTICLE 5

The Article 32 VCLT confirmatory exercise

1. Mr President, Madam Vice-President, Members of the Court. It is an honour to appear before you on behalf of the IOE. I will be addressing the confirmatory exercise that is Article 32 VCLT. The supplementary means show that not only was there *no* intention to include a right to strike in Convention No. 87, but, to the contrary, the parties made an express choice to set aside the issue. Mr President, there are three key points.

2. *First*, even as far back as the 30th Session of the International Labour Conference, which “unanimously adopted . . . principles” that “should form the basis for the international regulation”, even then the International Labour Conference distinguished between freedom of association on the one hand and, on the other, the specification of more nuanced rights regarding how the right to organize would be applied, including by way of collective bargaining. Collective bargaining deserved its own instrument, Convention No. 98¹²⁰. And it is telling that the right to strike is outside the scope of even Convention No. 98.

3. *Second*, as is typical in ILO standard-setting procedures, the Office prepared and sent out to governments of Member States a report containing a questionnaire on the scope and nature of the

¹²⁰ IOE Written Statement, para. 154 (ii); see further ILC, 30th Session Record of Proceedings Record Vote on Resolution, 1947, p. 319 [ILO Dossier Document No. 150].

newly envisaged Convention No. 87. One question concerned whether the recognition of the right to association of public officials should prejudice the question of the right of such officials to strike¹²¹. As the Office stated in summarizing the responses, many countries — including the Netherlands, Sweden and the United States — pointed out that the right to strike was simply not relevant to Convention No. 87¹²². These comments were *not* restricted to the right to strike of public officials: responses, including Norway and Italy, made clear that the right to strike of all employees had no bearing on the question of freedom of association¹²³. The Office therefore, *unsurprisingly*, concluded that Convention No. 87

“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. In these circumstances, it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association.”¹²⁴

That is Convention No. 87. Mr President, these comments were a clear statement of fact that the right to strike would be dealt with separately.

4. *Third*, it is therefore unsurprising, Mr President, that the Record of Proceedings shows that the issue of the “right to strike” was not raised in the discussion of Convention No. 87 at the International Labour Conference in 1948¹²⁵. Now, if the right to strike really had remained on the agenda, controversial as it is, that silence is deafening; it would obviously have been the subject of discussion.

5. To the contrary, prior to the conclusion of the discussion on Convention No. 87, and the Convention’s vote to adopt Article 3, the Chairman stated “that the Convention was not intended to be a ‘code of regulations’ for the right to organise, but rather a concise statement of certain

¹²¹ IOE Written Statement, paras. 284-285; see further ILC, “Questionnaire, Freedom of Association and Protection of the Right to Organise”, 1948, pp. 15 *et seq.* [ILO Dossier Document No. 157].

¹²² IOE Written Statement, para. 286; see further ILC, 31st Session Report VII – Freedom of Association and Protection of the Right to Organise, 1948, p. 67 [ILO Dossier Document No. 158].

¹²³ IOE Written Statement, para. 287; see further ILC, 31st Session Report VII (Supplement) – Freedom of Association and Protection of the Right to Organise, 1948, pp. 11-12 [ILO Dossier Document No. 159].

¹²⁴ IOE Written Statement, para. 288; see further ILC, 31st Session Report VII – Freedom of Association and Protection of the Right to Organise, 1948, p. 87 [ILO Dossier Document No. 158].

¹²⁵ IOE Written Statement, para. 291; see further ILC, 31st Session Record of Proceedings Appendix X, pp. 477-480 [ILO Dossier Document No. 164].

fundamental principles”¹²⁶. As a result, when informed by the Chairman of Convention No. 87’s intention, States withdrew amendments to Article 3 that would have set out minimum conditions qualifying it. Article 3 was then adopted by near unanimity. This course of events is simply not consistent with Article 3 having been intended to protect a right to strike.

6. Against that background, Mr President, the arguments deployed by some participants to suggest that Article 32 supports a right to strike does not withstand scrutiny. I turn to address three such arguments. *First*, that references to a potential exclusion of the right to strike by public officials somehow presupposes a general right to strike by others¹²⁷. That is wrong. The broader *travaux* tell against that. In any event, the point is logically fallacious. Agreement that public officials should *not* strike simply reflects agreement that in a subset of all situations, strikes were deemed inappropriate; it does not presuppose that they were otherwise permitted. *Second*, some suggest that the right to strike was simply implied in the meaning of freedom of association, and no formal text was included due to time pressure¹²⁸. But that is pure supposition. *Finally*, some have argued that Convention No. 87 concerns the right to strike because four Western States which were party to the Treaty of Versailles — which established the ILO — recognized such a right¹²⁹. That is untenable. Convention No. 87 was a separate and distinct instrument *within* the ILO, 30 years later, agreed by a broader range of States with exponentially greater diversity. Mr President, it may be that some participants therefore seek to diminish the role of the supplementary means simply because that material is so clearly against them.

The significance of Article 5 VCLT for this advisory opinion

7. Mr President, Article 5 of the Vienna Convention matters here for its emphasis. The IOE’s case is that the consequence of Article 5 is methodological.

¹²⁶ IOE Written Statement, para. 291; see further ILC, 31st Session Record of Proceedings Appendix X, p. 477 [ILO Dossier Document No. 164].

¹²⁷ ITUC Written Statement, para. 4.203; ITUC Written Comment, para. 6.9.

¹²⁸ ITUC Written Statement, para. 4.216.

¹²⁹ ITUC Written Comment, para. 4.202.

8. It is not — or, at least, should not be — in dispute that Article 5 applies. The ITUC themselves have previously acknowledged this in 2014¹³⁰, despite just now seeking to diminish its relevance by reference to a Permanent Court judgment which predated the Vienna Convention by decades.

9. Mr President, it also cannot be in dispute that at the 1968-1969 Vienna Conference, Dr Wilfred Jenks, observing for the ILO, recorded that the ILO's institutional practice on interpretation had involved greater recourse to the preparatory work than the minimum envisaged in the eventual Article 32 of VCLT¹³¹. Thus, former legal adviser to the ILO, Anne Trebilock, notes that the ILO Office takes into account preparatory work *even when* the ordinary meaning of the text is clear, as a way to enhance “ownership” by ILO constituents¹³².

10. Mr President, it would *plainly* be prudent for this Court — when interpreting Convention No. 87 — to aim for harmony, rather than disharmony, between *its* interpretative *method* under the VCLT and the ILO's. The reason is obvious. This Court has as much interest in protecting the buy-in of those affected by the rules as the ILO Office does. It is that buy-in which supports stability within the ILO and the stability of the international labour system itself. Both are this Court's concern.

11. In turn, that is why where ambiguity arises: the Court should orient itself by the lights of tripartite co-operation and social dialogue, and the Court should recognize the particular importance here of Article 32 confirmation. That is why the Court must also be particularly careful to ensure that its analysis of subsequent practice — and of the competence of ILO actors in generating subsequent practice, including the CFA (the Committee on Freedom of Association) and the Committee of Experts is faithful to the ILO's rules, and the actual mandate of those entities.

12. Mr President, Members of the Court, I thank you for the honour of addressing you. And I now request, Mr President, that the Court give the floor to Ms Yip.

The PRESIDENT: I thank Mr Mathur. I now call Ms Rita Yip to the podium. Madam, you have the floor.

¹³⁰ See IOE Written Statement, fn. 172; ITUC, “The Right to Strike and the ILO: The Legal Foundations”, March 2014, p. 69.

¹³¹ IOE Written Statement, para. 129; see further UN Conference, Official Records – First Session, A/CONF.39/11, March-May 1968, p. 37, para 12.

¹³² ITUC Written Comment, para. 7.6.

Ms YIP:

IV. THE WIDER IMPLICATIONS

1. Mr President, it is an honour to appear before you to conclude the submissions of the IOE. I will address the wider implications of the Court's advisory opinion for the international labour system. But before doing so, I summarize what the analysis has shown so far.

2. It has shown that read in context, the text of Convention No. 87 does not protect the right to strike. Nor does its object and purpose suggest otherwise. Those who suggest otherwise, particularly the ITUC, have relied too heavily on circularity and question-begging, or on a mischaracterization of other parties' cases. By contrast, the IOE's argument gives the Court its reasonable outcome. Further, no subsequent agreement or practice has emerged capable of imposing such a right — given that at least 15 countries have previously objected to such an imposition. Nor do relevant rules of international law assist that imposition. Finally, what the supplementary means — and particularly the *travaux préparatoires* — confirms is unsurprising. Convention No. 87 was never intended to protect the right to strike.

3. There is therefore no “reversal” or “restriction” of rights to speak of, in finding as the Court must. The text is the text, and its proper interpretation is clear. The inescapable conclusion is for the Court to articulate that truth.

4. We suggest that the Court should keep in mind the following three points, which go to the heart of this matter.

5. *First*, contrary to the inflammatory and alarmist submissions of the ITUC counsel, the absence of a right to strike in Convention No. 87 does not erase its protection elsewhere. It will remain protected in the manner that States, collectively, intended: in domestic law, or regional law, with carefully calibrated limits. By contrast, imposing such a right into Convention No. 87 will not only unsettle the nuanced, regionally sensitive balance that currently exists — and risk undermining the international rule of law. It would also threaten one of the most pressing moral challenges of our time: lifting hundreds of millions of people out of poverty. Enterprise — particularly in developing countries — is the engine of this effort. There is a need for *nuanced* legal frameworks, which can support States' efforts to alleviate poverty, individual rights and the requirement of a just transition.

Not for boilerplate norms, imposed at the highest level, which unpredictably shrink the policy space available to developing economies to achieve that urgent moral goal.

6. *Second*, the absence of a right to strike in Convention No. 87 does not preclude the development of such a right within the ILO, in the proper manner, as should have occurred here from the outset: through tripartite social dialogue in the International Labour Conference. That option has not disappeared. In fact, it has been consistently called for by the Employers' Group, but opposed by the Workers' Group on a number of occasions. As Spain has emphasized in its written submissions — legal certainty requires the ability to obtain “unambiguous and decisive pronouncements” so that the “nature and extent of obligations” can be understood. That should not be done by the Court. To find now, contrary to the strength of argument, that Convention No. 87 protects a right to strike would cause confusion. The contours of such a right, not obviously qualified in Convention No. 87, and not suitable for determination by the Court here and now, would be unreasonable. That would unsettle the international rule-based order and erode the confidence of ILO Member States in ratifying future ILO instruments due to fears as to legal certainty.

7. *Third*, strikes vary immensely in terms of their modalities, and their effects. Such specificities, and the approaches taken to regulating them, are nuanced and varied across the diverse membership of the ILO. Key modalities should be determined through national processes that understand and respect local realities. At the level of the ILO, any consideration of such matters should occur through tripartite social dialogue at the International Labour Conference, the parliament of labour. The Court should not import the brutal unilateralism of the Committee of Experts' views and observations into Convention No. 87. To do so would invert the ILO's constitutional order. Even the ITUC suggests that specific matters — such as the question of whether or when modalities of strikes are lawful — are not for this Court. Even countries with liberal strike laws do not meet all the protections developed by the Committee of Experts. Even if the right to strike under Convention No. 87 were interpreted as broadly as the Committee of Experts suggests, most State parties would be found in perpetual violation, especially regarding essential services. The Committee of Experts defines essential services narrowly: “the interruption of which would endanger the life, personal safety or health of the whole or part of the population”. However, what counts as essential varies by national context, scale and duration.

8. Mr President, this case goes to the credibility of the entire international labour system. A principled opinion which focuses on the text, rather than aspiration, will reinforce legal certainty, uphold the ILO's constitutional order, and safeguard the essential space for the International Labour Conference to shape international labour standards through inclusive, tripartite dialogue. The integrity of global labour governance depends on this. For these reasons, the Court must answer "no" to the question before it.

9. Mr President, Madam Vice-President, I thank you for your kind attention to the IOE's case. Thank you so much.

The PRESIDENT: I thank the representatives of the International Organisation of Employers for their presentation. This concludes this morning's sitting. The oral proceedings will resume this afternoon, at 3 p.m., in order for South Africa, Germany, Australia, Bangladesh and Colombia to be heard on the question submitted to the Court.

The sitting is closed.

The Court rose at 1 p.m.
