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CR 2025/17

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2025

Public sitting

held on Monday 6 October 2025, at 3 p.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 15 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 Government of the Republic of South Africa is represented by:

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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:

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

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,

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The Government of Australia is represented by:

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

Mr Bill Cambell, AO, KC, Counsel,

For the complete list of delegations of all participants, please refer to CR 2025/16.

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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,

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M. Bill Cambell, AO, KC, Counsel,

Pour consulter la liste complète de toutes les délégations, prière de se reporter au CR 2025/16.

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

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

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

The PRESIDENT: Please be seated. Good afternoon. The sitting is now open.

The Court meets this afternoon to hear South Africa, Germany, Australia, Bangladesh and Colombia on the question submitted to it by the Governing Body of the International Labour Organization. I recall that each of the delegations has been allocated 30 minutes for its presentation. The Court will observe a short coffee break after Australia's presentation.

I shall now give the floor to the delegation of South Africa. I call His Excellency Ambassador Vusimuzi Madonsela to the podium. You have the floor, Sir.

Mr MADONSELA:

I. INTRODUCTION: SOUTH AFRICA'S INTEREST IN THE MATTER

1. Mr President, distinguished Members of the Court, it is a great privilege for us to appear before you today on behalf of the Republic of South Africa. The outline of our oral submissions is as follows:

(1) I will briefly discuss the South African Government's interest in the matter;

(2) Professor John Dugard will address the principles of treaty interpretation; and

(3) Professor Halton Cheadle will apply those principles in respect of the wording, the context, object and purpose, subsequent practice and general principles of international law.

South Africa's interest

2. South Africa was a founding member of the ILO in 1919. Pursuant to the ILO's 1964 Declaration concerning the Policy of Apartheid, South Africa was expelled from the organization on account of its racial policies relating to suppression of human rights, particularly freedom of association.

3. On 11 May 1988, a complaint was submitted to the ILO concerning infringements of trade union rights by the apartheid government. Because South Africa was not a member of the ILO at the time, the complaint was forwarded to the Economic and Social Council of the United Nations (ECOSOC) in terms of an agreed procedure between the two international organizations.

4. An ILO fact-finding and conciliation commission was established for it to examine the alleged infringements. After hearing evidence, it issued a report that included a number of findings

on the right to strike, drawing on the jurisprudence established by the ILO's two supervisory bodies, namely the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts)

[1]. In summary, based on the jurisprudence of the CFA and the Committee of Experts, they addressed various impairments of the right to strike in the apartheid labour legislation.

5. After rejoining the ILO in 1994 and in response to the report, the first democratic South African Government:

(1) introduced labour rights in its Constitution that mirror the essential elements of Convention No. 87, and which specifically include the right to strike; and

(2) passed the 1995 Labour Relations Act, which was crafted to ensure that the lawful scope of the right to strike and the employers' right to lockout was in accordance with the jurisprudence of the two supervisory bodies.

6. This, we submit, is an example of a government's reliance on what was settled jurisprudence at the time and constitutes subsequent practice of the application of the Convention for the purposes of Article 31 (2) *(b)* of the Vienna Convention on the Law of Treaties.

7. Thank you, Mr President. I now request the Court to invite Professor John Dugard who will deal with the principles of treaty interpretation.

The PRESIDENT: I thank Ambassador Madonsela. I now give the floor to Professor John Dugard. Sir, you have the floor.

Mr DUGARD: Mr President, Members of the Court, it is a great privilege to appear before you today on behalf of the Republic of South Africa.

II. PRINCIPLES OF TREATY INTERPRETATION

Vienna Convention on the Law of Treaties

1. In the case before the Court today, advice is sought on whether, correctly interpreted, Convention No. 87 includes the right to strike.

[1] The relevant findings and recommendations in the report are attached in Appendix I to South Africa's Written Statement, submitted on 15 May 2024.

2. In order to make this determination, it will be necessary to decide whether the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties support this interpretation.

3. In approaching this task, the Court should be guided by the words of a distinguished member of the International Law Commission:

> "Treaties are not just dry parchments. They are instruments for providing stability to their parties and for fulfilling the purposes which they embody. They can therefore change over time, and must adapt to new situations, [and] evolve according to the social needs of the international community"[2].

Ordinary meaning, context and practice

4. Mr President, all the elements contained in Article 31 (1) support the inclusion of the right to strike in Convention No. 87. The express references in the Convention to the right of workers' organizations to organize their "activities"[3], and to "further[] and defend[]" the interests of workers[4], and to "improv[e] conditions of labour"[5] by necessary implication imply a right to strike. The right to strike is an essential activity in the exercise of the freedom of association — the primary object of the Convention.

5. The content of the Convention appears from the reports of the 1947 International Labour Conference and the UN resolution of the same year, referred to in the preamble of the Convention, which understood the right to strike as a trade union activity. And considerations of good faith demand that Convention No. 87 be interpreted "in a reasonable way and in such a manner that its purpose can be realized"[6] — that is freedom of association including the essential right to strike.

Subsequent practice

6. I now turn to the subject of subsequent practice. Article 31 (3) *(b)* of the Vienna Convention provides that any subsequent practice in the application of the treaty which establishes the agreement of parties regarding its interpretation must be taken into account.

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[2] See Georg Nolte in *Report of the International Law Commission on its Sixtieth session*, 2008, p. 635.

[3] Article 3 (1) of Convention No. 87.

[4] Article 10 of Convention No. 87.

[5] Preamble to Convention No. 87.

[6] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 79, para. 142.

7. In 2018, the International Law Commission adopted a set of Conclusions which constitutes the most authoritative statement on this subject[7]. South Africa submits that these Conclusions will assist the Court in the determination of the interpretation of the Convention. Conclusion 3 states that such practice is an authentic interpretation of the Convention as it provides "objective evidence of the understanding of the parties as to the meaning of the treaty"[8].

8. Subsequent practice establishing the understanding of the parties to the meaning of the Convention includes a wide range of acts and omissions. This practice contributes to the clarification of both the meaning of the Convention and its object and purpose[9].

9. Convention No. 87 is a living instrument to be applied in the light of present-day conditions. Subsequent practice assists in determining whether the treaty has evolved over time[10].

10. For subsequent practice to widen the understanding of the meaning of a treaty, it is necessary for all parties to concur in the practice[11]. This concurrence includes "not only acts, but also omissions, including relevant silence"[12].

11. Silence on the part of one or several States constitutes acceptance if the circumstances call for some reaction[13]. Failure on the part of a State to indicate its opposition to subsequent practice, including through recourse to the dispute resolution mechanism provided for in the ILO Constitution, may estop it from later objecting[14]. Also, the principle of good faith will prevent a State from "disavowing the legitimate expectations that have been created by a common interpretation"[15].

12. South Africa submits that the practice of the ILO and its expert bodies over many decades constitutes subsequent practice under Article 31 (3) *(b)* which provides objective evidence of parties as to the meaning of the Convention.

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[7] *Report on Subsequent Agreements and Subsequent Practice in relation to Interpretation of treaties, Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, A/CN.4.SER. A/2018/Add.1 (Part 2), p. 23.

[8] *Ibid.*, Conclusion 3.

[9] *Ibid.*, Conclusion 7, Commentary, para. 8.

[10] *Ibid.*, Conclusion 8.

[11] *Ibid.*, Conclusion 4, Commentary, paras. 4, 16.

[12] *Ibid.*, Conclusion 4, Commentary, paras. 17 and 18; Conclusion 5.

[13] *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 23; Report of the International Law Commission, above footnote 7, Conclusion 10, Commentary, para. 14.

[14] Report of the International Law Commission, Conclusion 10, Commentary, para. 22.

[15] *Ibid.*, Conclusion 10, para. 24.

Article 32 and supplementary means of interpretation

13. Finally, a word on Article 32. South Africa submits that the preparatory works in Convention No. 87 are of no assistance in the interpretation of the Convention.

14. Article 32 of the Vienna Convention does, however, contemplate recourse to subsequent practice that is not endorsed by all parties as a supplementary means of interpretation. This may be resorted to in respect of subsequent practice to which not all parties have not consented[16].

15. Mr President, Members of the Court, I now ask the Court to invite Professor Halton Cheadle to address you on the application of principles of treaty interpretation to Convention No. 87 in greater detail. I thank you.

The PRESIDENT: I thank Professor Dugard. I now invite Professor Halton Cheadle to the podium. You have the floor, Sir.

Mr CHEADLE: Mr President, Members of the Court, it is a great privilege to appear before you today on behalf of the Republic of South Africa.

III. APPLICATION OF PRINCIPLES OF TREATY INTERPRETATION TO THE CONVENTION

Principle of freedom of association

1. I want to begin firstly to deal with the principle of freedom of association. The preamble of the ILO Constitution recognizes the "principle of freedom of association", the importance of which was affirmed in the Declaration of Philadelphia. Conceptually, that principle is constituted at both individual and collective dimensions. The freedom is as much about the freedom *to* associate (the individual dimension) as it is about the freedom *of* the association (which is the collective dimension).

2. That principle forms the bedrock of the modern democratic State, ranging from the right to form political parties, religious institutions, schools, companies, trade unions and employer organizations — all of which, although regulated, in some way get a special dispensation from the State to pursue their legitimate activities, such as the immunity given to shareholders of a limited liability company or trade unions calling a strike. In other words, inherent in the principle of freedom

[16] Report of the International Law Commission, above footnote 7, Conclusion 3, Commentary, para. 12, Conclusion 4, Commentary, para. 16, pp. 23-35.

of association is that it is a *regulated freedom* of the association to pursue its legitimate and lawful activities without liability or penalty.

3. In this respect, the individual and collective rights and protections contained in the Convention accord with this conceptual elaboration of the "principle of freedom of association".

4. It is accordingly not correct to argue, as the IOE and some States do, that, at the level of principle, freedom of association does not include the right of associations to pursue their lawful activities.

Ordinary meaning of "activities" in Article 3 (1)

5. Let me start with the ordinary meaning of "activities" in Article 3 (1). Firstly, the meaning of the term "activities" draws its content from the context in which these words find themselves in the Convention itself because they

(1) are determined by their objects and purpose which are to "further[] and defend[] the interests of workers or of employers"[17];

(2) are *collective activities* because, in the exercise of the right to organize those activities, the organizations must respect the "law of the land" — and this is quite important — like other "organised collectivities"[18].

6. It was commonplace then, and remains so now, that the collective activities ordinarily associated with worker and employer organizations include:

(1) collective bargaining because of the 1947 International Labour Conference resolution[19] which specifically regards collective bargaining as a right of association[20] and concerted action on each other and government to "further and defend the interests of workers" or as a "*means* of improving conditions of labour and of establishing peace"[21]; and

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[17] Article 10.

[18] Article 8.

[19] The fifth recordal of the preamble of the Convention.

[20] Paragraphs 9 and 10 of 1947 ILC Resolution concerning Freedom of Association and Protection of the Right to Organise and Bargain Collectively at its 30th Session. Paragraphs 9 and 10 of the Resolution specifically regards collective bargaining as a right of association.

[21] The third recordal of the preamble; emphasis added.

(2) The very nature of those collective activities constitutes the reason for the obligation in Article 8 (1) that worker and employer organizations, like other "*organised collectivities*" must "respect the law of the land" — to ensure their legitimate and orderly pursuit.

7. If a workers' and an employers' organization's "activities" ordinarily understood include collective bargaining, as it must, then it follows that it must include concerted action by those organizations for the very reason, universally understood, that "collective bargaining without the right to strike is collective begging"[22].

8. The context also includes the circumstances of the time, namely the emergence from World War II, the history of trade union repression, and the criminalization of strikes during fascist rule giving rise to the need for an international instrument on freedom of association. It explains the inclusion of the phrase in Article 8 (2) that the "law of the land shall not be such as to impair . . . the guarantees provided for in this Convention". The reason for the specific attention to legal impairment arises from the prior and ongoing history of legislative and judicial prohibitions on trade union activity in both common law and civil law systems[23].

9. The IOE advances an interpretation to the effect that there is a "conceptual thread" running through Article 3 of the Convention to the effect that the right to engage in "activities" is limited to the organization's internal establishing and ordering of itself, and that the "activities" do not "relate to *all* activities of workers' organisations, but instead those concerning the ability of the organisation to come together as a coherent body, govern itself, and conduct activities amongst members"[24].

10. The reasons why the terms "activities" are not limited to the purely internal activities of organizations are:

(1) Firstly, the collective nature and purposes of these organizations addressed above.

(2) Secondly, the preamble specifically states that the principle of freedom of association is "a *means* of improving conditions of labour and of establishing peace". That purpose accordingly can only be realized if an organization's right to organize its activities includes the kind of *external*

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[22] L. J. Siegel, The unique bargaining relationship of the New York City Board of Education and the United Federation of Teachers (1964) 1 *Industrial Relations Forum* 1, 46.

[23] See Halton Cheadle, "Constitutionalising the Right to Strike" in Hepple, le Roux, and Sciarra, *Laws Against Strikes: The South African Experience in an International and Comparative Experience*, Franco Angeli, 2015, p. 69.

[24] Paragraph 147 of the Written Statement of the International Organisation of Employers, 16 May 2024.

activities that do so — whether through collective bargaining contemplated in Article 4 of Convention No. 98 or through its mobilizing its members to pressure their government to improve conditions of labour through law or policy or take concerted action to "further and defend" the interests of workers.

(3) Thirdly, if the rights in Article 3 (1) are limited only to internal activities, that would mean that, although the organization can be established without government interference, government can prohibit it from pursuing its legitimate activities. Put simply, without the right of an organization to lawfully pursue its object and purpose, there would be no reason to establish it or protect it by way of an international convention.

The objects and purpose of the treaty in Article 3 (1)

11. The objects and purpose of the Convention, apart from guaranteeing the individual dimension of the principle of freedom of association, are evident from the following:

(1) The UN resolution on Trade Union Rights (1947) recognized the inalienable right of trade union freedom of association "as well as other social safeguards, essential to the *improvement of the standard of living of workers* and to their economic well-being"[25] and called upon the ILO to adopt a convention to guarantee the right.

(2) The preamble specifically recognizes the principle of freedom of association "to be a *means* of improving conditions of labour"[26].

(3) The purpose of the Convention is also plainly to provide those safeguards firstly by defining a workers' organization as one to "further and defend" the interests of workers and then to guarantee the right of that organization to do precisely that, provided that it is lawful.

(4) The requirement that, in the exercise of the rights, the "law of the land had to be respected" recognizes the government's need to regulate, in the public interest, the exercise of collective bargaining and concerted action in the form of strikes, protests and petitions.

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[25] The sixth recordal of the preamble of the UN resolution on Trade Union Rights (1947); emphasis added.

[26] The third recordal of the preamble of Convention No. 87; emphasis added.

Subsequent practice in Article 31 (3) *(b)*

12. Subsequent practice confirms that the Convention includes strikes as one of the "activities" of worker organizations:

(1) The Committee on Freedom of Association (CFA) and the Committee of Experts have consistently and uniformly interpreted the Convention to include a limited right to strike for 72 years in the case of the CFA and 65 years in respect of the Committee of Experts.

(2) The Conference Committee on the Application of Standards (CAS) — that is the tripartite conference committee — has up until 2012 relied upon those interpretations in its selection of States for individual examination, including those that concern the right to strike.

(3) The General Surveys on Freedom of Association in 1959, 1973 and 1983 included the developing jurisprudence on the right to strike and were discussed by the CAS and no objection was raised as to the existence of the right in that Convention at that time. It is also important to note that the 1983 Committee of Experts' jurisprudence on the right to strike had been extensively developed as the General Survey of that year demonstrates — 24 pages are devoted to the right to strike and its limitations. Accordingly, it is not correct for the IOE to state that the right to strike was not fully developed by 1989[27].

(4) The overwhelming majority of ratifications of Convention No. 87 occurred after the CFA had stated in its 1952 Reports to the Governing Body that "the right to strike and that of organising trade union meetings are essential elements of trade union rights" (145 ratifications out of 158). There were 130 ratifications after the Committee of Experts had interpreted the Convention as including a limited right to strike. Accordingly, those Member States must be taken to have known of the import of the Convention at the time of ratification and did so on the basis that the Convention included a limited right to strike.

(5) As the IOE concedes, it remained silent during the Cold War for reasons, among others, geopolitical[28]. Good faith requires a dispute to be raised immediately and in a sustained way in order for it to be determined before States that become party to a treaty give effect to the

[27] Paragraph 26 of the IOE's Written Comments of 16 September 2024.

[28] *Ibid.*

interpretation in their legislation and practice[29]. Prior to 1992, States placed reliance on the Committee's observations to amend their laws and practice, one of which was the Republic of South Africa.

(6) Notwithstanding the IOE raising its objection in 1992, States continue to rely on the Committee's observations to amend their laws[30], and the endnote lists 45 States that, in different ways,

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[29] See 1981 Interpretation of the Algerian Declarations of 19 January 1981 by the Iran-US Claims Tribunal, ILR 62 (1982) 605.

[30] States that have brought their laws into line with the Committee of Expert's observations since 2000, include: Albania, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4061294,102532; Argentina, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2196810,102536; Armenia, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4379663,102540; Bangladesh, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4060432,103500,Bangladesh,2020; Belize, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2184503,103222; Bolivia, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3143330,102567; Bulgaria, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4056422,102576; Canada, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4057888,102582; Chad, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2155582,103386,Chad,1996; Chile, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3297604,102588; Columbia, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2299004,102595,Colombia,2008, and https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2196957,102595; Costa Rica, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3301187,102599; Croatia, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2171515,102700; Cyprus, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2284792,103070; Eswatini, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2198023,103336,Eswatini,2000; Fiji, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2287716,103278,Fiji,2007; Georgia, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4118100,102639; Guatemala, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2204249,102667; Japan, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2197132,102729; Kazakhstan, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4060436,103542; Kyrgyzstan, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2172236,103529; Latvia, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2172967,102738; Lithuania, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4314707,103504; Moldova, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2178734,102695; Mozambique, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2173163,102964; Nicaragua, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2173289,102780; Peru, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2245492,102805; Romania, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2197981,102824; Myanmar, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3086184,103159; Namibia, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2220390,103008; North Macedonia, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2326677,103555; Pakistan, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4320814,103166; Panama, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2698659,102792; Peru, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3252698,102805; Slovakia, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2155505,102717,Slovakia,1996, and

amended their laws and practices to comply with the Committee's interpretation on the right to strike. The members of the South African Development Community adopted the 2023 Protocol on Employment and Labour that specifically refers to Convention No. 87 and includes the right to strike, taking into account the jurisprudence, obviously, of the ILO supervisory bodies[31].

Rules of international law in Article 31 (3) *(c)*

13. I want to turn now to the rules of international law in Article 31 (3) *(c)*. The endorsement of the right to strike in subsequent international conventions and treaties, which, if not express, have been interpreted to include the right to strike, constituting an evolving interpretative framework within which the CFA and the Committee of Experts have developed a jurisprudence on the right to strike[32].

14. Given the nature of the ILO's ratification process of Member States individually acceding to conventions, the interpretation of Convention No. 87 has to be interpreted in the light of the evolving interpretative framework.

15. That evolving international interpretative framework in respect of a limited and lawful right to strike is to be found in:

(1) Article 8 (1) *(d)* of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[33] which specifically refers to Convention No. 87;

(2) Article 22 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the "right to freedom", which the Human Rights Committee has interpreted to include the right[34];

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https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2206024,102717,Slovakia,2001; South Africa, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2175642,102888; Spain, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4320854,102847; Switzerland, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2196936,102861; Tajikistan, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2175186,103547; Togo, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4317723,103050; Turkey, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3189640,102893; United Kingdom, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2170806,102651.

[31] Https://www.sadc.int/sites/default/files/2025-05/EN%20-%20SADC%20Protocol%20on%20Employment%20and%20Labour%20-%202023.pdf.

[32] The Dossier: ILO Collection of Documents — Part IV: Documents 323 to 334.

[33] Entered into force on 3 January 1976 and has been ratified by 172 States. See also the Joint Statement.

[34] See the decisions of the Human Rights Commission in ILO Dossier: Part IV: Documents 343 to 347.

(3) the jurisprudence of the European Court of Human Rights interpreting Article 11 of the European Convention of Human Rights guaranteeing "freedom of association" also includes a right to strike[35];

(4) the 2016 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association find that the "right to strike has been established in international law for decades, in global and regional instruments, and is also enshrined in the constitutions of at least 90 countries. The right to strike has, in fact, become customary international law"[36]; and

(5) the Joint Statement in 2019 by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee[37] on the basic principles of freedom of association protected, among others, Convention No. 87 which recalls that the "right to strike is the corollary to the effective exercise of the freedom to form and join trade unions".

16. The right to strike is also explicitly and implicitly guaranteed in 101 constitutions[38] and at different levels of intensity recognized in national legislation[39], reflecting widespread State practice and *opinio juris*[40].

Comment by IOE and the Government of Japan

17. I want to deal briefly with a comment by the IOE and the Government of Japan. In its Written Statement, the IOE argues that the rights accorded under Article 3 are of equal value to both workers' and employers' organizations and accordingly the right to strike is "plainly not such a right"[41], which Japan argues is one that only a workers' organization can exercise[42].

18. There are two reasons why this construction does not hold water:

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[35] ILO Dossier: Part IV: Documents 361 to 363.

[36] At paragraph 54, https://documents.un.org/doc/undoc/gen/n16/287/16/pdf/n1628716.pdf?token=3kghpDzEwIxuV9yKU9&fe=true.

[37] 6 December 2019. ILO Dossier: Part IV: Document 314.

[38] The Dossier: ILO Collection of Documents — Part II: Document 140 (Appendix III). See also Halton Cheadle, "Constitutionalising the Right to Strike" in Hepple, le Roux and Sciarra, *Laws against Strikes: The South African Experience in an International and Comparative Experience*, Labour Law in National, Integrated and Transitional Legal Systems, Franco Angeli, Milano 2015 (attached to the Government's Written Statement of 15 May 2024).

[39] *Op. cit*.

[40] See James Brudney, "The Right to Strike as Customary International Law", *Yale Law Journal of International Law*, Vol 46:1 (attached to the Government's Written Statement of 15 May 2024).

[41] Paragraph 144 of the Written Statement of the International Organization of Employers of 16 May 2024.

[42] Paragraph 13 of the Written Statement of the Government of Japan of 16 May 2024.

(1) A strike is the cessation of work initiated by the trade union in order to put pressure on the employer either to accede to its demands or to prevent the employer from imposing its demands. Both sides are exerting economic pressure on each other: the employer's resistance places pressure on the workers and the workers' persistence places pressure on the employer.

(2) A strike is a cessation of work initiated by workers or worker organizations. A lockout is a cessation of work initiated by employers or employer organizations. As an exercise of economic pressure, it does not matter who initiates the cessation of work because both are exerting economic pressure on each other.

19. The CFA has recognized the right of employers to lockout in its findings in respect of the Norway complaint[43], and protest action in the Uruguayan[44] and the Venezuelan complaints[45].

20. The Committee of Experts has regarded restrictions on the right to lockout in Australia as not complying with the Convention[46]. The Committee has also expressed "deep regret" in its observations in respect of Bangladesh because its requested changes regarding the power given to an official to prohibit *lockouts* in export processing zones had not been effected[47].

21. The Committee of Experts expressed its deep concern in its observation in respect of Cameroon that the act on the suppression of terrorism could apply to protests, demonstrations and strikes by both workers and employers[48].

22. Accordingly, both conceptually and as a matter of application, the right to engage in concerted action is an "activity" in terms of Article 3 of Convention No. 87 and applies equally to both workers' and employers' organizations.

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[43] Report No. 372, June 2014, Case No. 3038 (Norway), para 470, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3173689.

[44] Report No. 348, November 2007, Case No. 2530 (Uruguay), para 1190, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2910501.

[45] Report No. 334, June 2004, Case No 2254 (Venezuela (Bolivian Republic of)), https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2907673.

[46] Https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4378434,102544,Australia,2023.

[47] Https://normlex.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4322754,103500,Bangladesh,2022.

[48] Https://normlex.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3959185,103038,Cameroon,2018.

Conclusion

23. In conclusion, South Africa accordingly submits that concerted action in the form of lawful strikes, lockouts, protests and petitions by worker and employer organizations to "further and defend" their interests and to improve the conditions of labour are legitimate and protected activities contemplated in Article 3 of Convention No. 87.

24. That concludes the oral presentation of South Africa. Thank you for your attention.

The PRESIDENT: I thank the representatives of South Africa for their presentation. I now invite the next participating delegation, Germany, to address the Court and I call upon Ms Tania von Uslar-Gleichen to take the floor.

Ms VON USLAR-GLEICHEN:

ORAL STATEMENT ON BEHALF OF THE FEDERAL REPUBLIC OF GERMANY

1. Mr President, honourable Members of the Court, it is a privilege and an honour to appear before you today on behalf of Germany. Allow me to congratulate you, Mr President, on your election to the presidency of the Court and to congratulate Judge Hmoud on his election and the taking up of his judgeship.

2. I would also like to express Germany's sincere condolences on the passing of the long-time Member and former Vice-President of the Court, Judge Shigeru Oda.

3. Mr President, honourable Members of the Court, Germany attaches great importance to the current advisory proceedings. Please allow me to start out with a couple of points that illustrate where we as a country come from on the issue of the right to strike, which is before you today.

4. In Germany, cooperation between employers and employees has a tradition that is long and strong. It forms a key pillar of our social market economy and our democracy. We call the institutionalized cooperation between employers' associations and trade unions *social partnership*. These partners jointly regulate wages and working conditions by means of collective agreements. This social partnership effectively fulfils an important role for the common good in our society.

5. Germany happens to be a country where one of the very first collective bargaining agreements was concluded. This happened back in 1873. It was a collective agreement between the Association of Factory Workers in Berlin and the Association of Berlin Master Printers. This

collective agreement was a milestone and was, moreover, concluded in the context of several strikes. This fact illustrates that collective bargaining in Germany has long been closely linked with recognition of the right to strike. We consider it an essential element that permits negotiations between workers and employers to take place on equal footing. Recognition of this principle has been a constant feature throughout German history, with the only exception being during the period of Nazi rule from 1933 to 1945. Germany ratified ILO Convention No. 87 in 1957, soon after its re-entry into the ILO, and has consistently aligned itself with those who hold that the Convention safeguards the right of workers to strike.

6. In our written submission, we set out that the essential legal reasons why Germany regards the right to strike to be implicitly included in the guarantee of freedom of association under Convention No. 87. I will come back to the essence of this argument later.

7. In today's statement, however, I would like to begin by first recalling the sequence of events that led to disagreement on the right to strike within the ILO. This sequence of events will also illustrate the history of interpretation within the ILO and why these proceedings are so important.

8. Only then, as my second point, will I sum up our legal interpretation of why ILO Convention No. 87 guarantees the right to strike.

9. Thirdly, I would like to invite the Court to consider the parallel interpretations that both our national courts and the European Court of Human Rights arrived at in a similar situation. A situation where courts held that the right to strike is encompassed when freedom of association is guaranteed, without the word strike having to be explicitly mentioned.

10. Finally, I will turn to the fact that the right to strike can be subject to limitations.

11. So first, Mr President, allow me to turn to the history of events and to the history of interpretation that led to these current proceedings.

12. The Court has been seised with the question of whether the right to strike of workers and their organizations is protected under the Freedom of Association and Protection of the Right to Organise Convention of 1948, ILO Convention No. 87.

13. The fact that this question can be posed at all is because it is true that the word *strike* does not appear in Convention No. 87 as it was adopted in 1948. This does not mean, however, that the right to strike is not or cannot be contained therein.

14. On the contrary, the ILO's Committee of Experts on the Application of Conventions and Recommendations recognized as early as in 1959[49] that the Convention contained a right to strike. For decades, this understanding was hardly disputed by ILO forums. Neither workers' nor employers' representatives, and only very few governments, ever questioned it.

15. In 1972, for example, not a single member of the International Labour Conference voted against a resolution that condemned the denial of the right to strike in what were then the Portuguese colonies of Angola, Mozambique and Guinea-Bissau[50].

16. In 1986, the German Democratic Republic — the East German GDR — was alone in expressing the opinion that Convention No. 87 did not guarantee the right to strike — a view which at the time no one supported. The Federal Republic of Germany has never endorsed this view.

17. Rather, there was broad acceptance over a very long time in the International Labour Conference of the position that the right to strike is indeed protected under Convention No. 87. This broad acceptance cannot be explained merely through the prisms of the Cold War. Western members of the ILO often disagreed on many issues. However, their acceptance of the right to strike was almost unanimous.

18. Importantly, there was no turning point on interpretation in 1989. It is true that employers' representatives at the International Labour Conference began to voice concerns in 1989[51]. They emphasized that only the International Court of Justice could issue authoritative interpretations of international labour conventions. Yet, at the same time, they expressly declared themselves to be "far from challenging the right to strike". They merely called for its exercise to be subject to reasonable restrictions — especially where life and health might be endangered[52].

19. This line of argument was reiterated in 1997, when the employers' side explicitly affirmed that the principle of industrial action formed part of the principle of freedom of association as set out in Convention No. 87. Their criticism was directed not at the existence of the right to strike as such,

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[49] International Labour Conference, 43rd Session, 1959, Report III (Part I), Information and Reports on the Application of Conventions and Recommendations, Summary of Reports on Ratified Conventions (Articles 22 and 35 of the Constitution), pp. 114-115.

[50] International Labour Conference, 57th Session, 1972, Resolution concerning the Policy of Colonial Oppression, Racial Discrimination and Violation of Trade Union Rights Pursued by Portugal in Angola, Mozambique and Guinea (Bissau).

[51] International Labour Conference, 76th Session, 1989, *Record of Proceedings*, p. 26/6.

[52] *Ibid.*, p. 26/43.

but at what they considered to be an overly expansive jurisprudence on the content of the right to strike[53].

20. It was only in 2012 that the employers' organizations advanced the claim that no right to strike at all existed under Convention No. 87. This had significant consequences for the International Labour Organization. For the first time since its creation in 1926, the Committee on the Application of Standards could not discuss even a single case concerning the right to strike[54]. Subsequently, a long debate developed within the ILO on how this issue could be resolved — and if it could not be resolved through dialogue, whether the advisory opinion of this Court should be sought.

21. In light of this historical record of events, it is clear that there was a long and to a very large extent consistent history of interpretation within the ILO according to which ILO Convention No. 87 guarantees a right to strike. At first, the only disagreement voiced was over the exact *scope and content* of the right to strike under ILO Convention No. 87, not on whether it existed or not. Only very lately did the very *existence* of such a right become seriously disputed.

22. Over the last 13 years, since the events of 2012, this disagreement has turned into an intricate problem for the International Labour Organization, one that could not be resolved within it. The disagreement has blocked an important part of its activities. Thus, Germany stands before you today in the firm hope that these advisory proceedings will untangle the issue. We trust that you will give the necessary legal guidance to the Organization and its Members.

23. Let me now turn to my second point, Mr President, and that is the essence of Germany's legal argument.

24. According to Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

25. Let me start with the ordinary meaning of the terms of the treaty in their context. Article 10 of Convention No. 87 protects workers' organizations "for furthering and defending the interests of

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[53] *Ibid.*

[54] Committee on the Application of Standards at the Conference, 101st Session, 2012, *Record of Proceedings*, Part I/7, 13, 23.

workers". It is precisely in the interest of workers that their working conditions vis-à-vis their employers are regulated collectively, through agreements struck by workers' organizations.

26. Article 3, paragraph 1, of the Convention confirms that workers' organizations enjoy the right "to organise their . . . activities". Paragraph 2 of that same Article points out that the authorities must not restrict the lawful exercise of this freedom.

27. Taken together, these provisions in accordance with the ordinary meaning given to them and in their context stipulate that workers' organizations are, in principle, free to decide for themselves what activities they undertake in order to fulfil their purpose.

28. Germany therefore respectfully submits that Articles 10 and 3 of Convention No. 87 should be interpreted to jointly protect both the aim of workers' organizations to regulate working conditions collectively, and their right to determine for themselves the lawful activities they deem necessary to achieve this aim.

29. Let me now turn to the object and purpose. The object and purpose of Convention No. 87 is to be understood by its underlying economic logic. The provisions in Articles 10 and 3 of the Convention would in practice be without effect if they did not also protect the workers' organizations' activities themselves. It would be logically incoherent if workers were first allowed to unite legally in organizations, then permitted to determine their activities, only to find themselves ultimately deprived of the right to actually undertake those activities efficiently, by exercising collective pressure in the form of strikes. Germany, therefore, respectfully submits that in light of the object and purpose of the Convention, the right to strike of workers and their organizations must be protected under it.

30. From Germany's point of view, we can also conclude from the historic practice mentioned above that both the ILO's supervisory bodies and the overwhelming majority of State parties have consistently recognized that freedom of association under Convention No. 87 protects the right to strike — without it being explicitly mentioned in the Convention.

31. This also reflects the legal situation in Germany and thus brings me to my third point: my invitation to the Court to consider how other courts have ruled in such a situation, where freedom of association is guaranteed, but the right to strike is not explicitly mentioned.

32. There are of course also human rights instruments and constitutions that expressly stipulate and regulate the right to strike. Convention No. 87 and Germany's Constitution are, in terms of legislative technique, the exception in this respect — as is the European Convention on Human Rights. These distinct regulatory frameworks are each interpreted to include a right to strike, although it is not explicitly mentioned in the given instrument.

33. To turn to the example of the German Constitution, both our Federal Constitutional Court and our Federal Labour Court have consistently held that the right to strike is guaranteed under our Constitution — without it being explicitly mentioned therein.

34. The German Constitution dates from 1949. And just like Convention No. 87, which dates from 1948, our Constitution explicitly protects freedom of association, while not expressly mentioning a right to strike. This omission was deliberate. The "mothers and fathers" of our Constitution had the numerous political strikes of the Weimar Republic in the back of their minds. They were divided on whether an explicit constitutional reference to the right to strike might raise unanswerable questions about the scope of such a right. They opted to leave the matter unregulated, on the understanding that a right to strike existed. They left it to judicial and legislative developments to determine its precise contours. The Federal Constitutional Court and Federal Labour Court in Germany have indeed since then continuously shaped the legal framework for workers' right to strike.

35. Mr President, honourable Members of the Court, allow me to quote the German Federal Labour Court, which said:

> "Workers and their trade unions depend on strikes in order to establish a balanced negotiating position. Collective agreements only become a reality if they are, where necessary, obtained by force by trade unions through industrial action. Thus, strikes must be possible in our free collective bargaining system to settle conflicts of interest that could otherwise not be resolved."[55]

Or, as the Federal Labour Court has equally held:

> "Working conditions shall be negotiated on a collective level as there is a typical imbalance between the employer and the individual worker which interferes with or makes impossible the autonomous, individual negotiation of a contract of employment and working conditions at the individual rights level."[56]

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[55] German Federal Labour Court (BAG), decision of 12 March 1985, 1 AZR 636/82.

[56] *Ibid.*

36. For these reasons, Germany holds the firm legal view that the right to strike is an intrinsic corollary of freedom of association. We believe that the German Federal Labour Court's reasoning cited can be of use in illustrating what is also at the same time the object and purpose of Convention No. 87.

37. Last but not least, Germany wishes to draw the Court's attention to the *jurisprudence constante* of the European Court of Human Rights, which it reaffirmed recently in 2023 in a case called *Humpert* v. *Germany*[57]. The European Court of Human Rights in that case held that Article 11 of the European Convention on Human Rights guarantees the right to strike, although — like Convention No. 87 and the German Constitution — it does not expressly mention it.

38. To reach its conclusion, the European Court of Human Rights reasoned that strikes allow "a trade union to make its voice heard". Thus, according to the Court, the right to strike "constitutes an important instrument for the trade union to protect the occupational interests of its members and in turn for the members of a trade union to defend their interests".

39. Germany respectfully invites this Court to take into account that consistent line of reasoning as a matter of judicial dialogue, as it did in its Judgment on compensation in the *Diallo* case[58].

40. Finally, allow me to point out that Germany also firmly believes that the right to strike can be subject to limitations, especially with regard to civil servants. According to German law, the right to strike does not apply to persons who enjoy the privileged status of a public servant. This neither calls Germany's compliance with Convention No. 87 into question, nor does it undermine Germany's legal view that Convention No. 87 guarantees a right to strike. The question of whether there is a right to strike differs fundamentally from the question of how broadly the right to strike extends under Convention No. 87.

41. The *Humpert* case also illustrates that there are limits to the right to strike. In that judgment, the European Court of Human Rights upheld Germany's strike ban for teachers who have been accorded civil servant status. The possibility for State parties to restrict the right to strike under

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[57] European Court of Human Rights, case of *Humpert and others* v. *Germany* (Applications Nos. 59433/18, 59477/18, 59481/18 and 59494/18), Judgment of 14 December 2023.

[58] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 331, para. 13, pp. 334-335, para. 24, p. 337, para. 33, and pp. 339-340, para. 40.

Convention No. 87 may in particular be derived from Article 8 of the Convention, which requires trade unions to respect the law of the land, provided such laws do not impair the guarantees of the Convention.

42. Mr President, honourable Members of the Court, effective international institutions are essential for the protection and defence of human rights, democracy and the rule of law.

43. The United Nations remains the backbone of the rules-based international order. The ILO empowers workers around the world. It fights poverty, hunger and social inequality and combines multilateralism with a promise to fulfil people's need for social advancement.

44. Social advancement cannot always come from governments. Sometimes it has to be won by workers themselves. Freedom of association means freedom of negotiation, and a meaningful negotiation requires bargaining power. Thus, the right to strike is an intrinsic corollary of the right to association and therefore an integral part of Convention No. 87.

45. Germany is deeply concerned about the dissensus within the ILO, arising from the controversy over such fundamental questions of workers' rights. Germany strongly believes that the Court, with its balanced and well-considered decision, will contribute to the settlement of this question.

46. Mr President, honourable Members of the Court, thank you for your kind attention.

The PRESIDENT: I thank the representative of Germany for her presentation. I now invite the delegation of Australia to address the Court and I give the floor to Mr Jesse Clarke. You have the floor, Sir.

Mr CLARKE:

I. INTRODUCTION

1. Mr President, Madam Vice-President, Members of the Court, it is a great honour to appear before you again on behalf of Australia.

A. Introduction and outline of Australia's submissions

2. Australia's participation in these proceedings reflects our long-standing commitment to the ILO and its critical role in setting international labour standards. These standards positively impact working conditions and practices around the world.

3. Australia reiterates the importance of certainty concerning the protection of the right to strike of workers and their organizations under the Freedom of Association and Protection of the Right to Organise Convention, 1948 — or "Convention No. 87"[59], as we will now refer to it. As one of the ten fundamental ILO conventions, and the principal instrument regulating the right to freedom of association, clarity on the rights and obligations that exist under Convention No. 87 is essential. Given the divergence of views, an advisory opinion from the Court is very important in achieving that clarity.

4. By way of outline of Australia's submissions:

(a) I will begin by making some observations on jurisdiction and on the scope of the question put to the Court.

(b) I will be followed by Australia's Solicitor-General, Dr Stephen Donaghue, KC, who will address our submission that Convention No. 87 protects the right to strike, subject to limitations.

(c) Dr Kate Parlett will then conclude Australia's oral observations.

B. Jurisdiction of the Court and the question before it

5. Mr President, Members of the Court, the Court has jurisdiction to render an advisory opinion in these proceedings under Article 65, paragraph 1, of the Court's Statute[60]. No participant in this proceeding contests this. Further, Australia agrees with the vast majority of participants that there is no reason for the Court to decline to provide an opinion[61].

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[59] Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise, adopted 9 July 1948, 68 *UNTS* 17 (entered into force generally 4 July 1950 and for Australia 28 February 1974) (also available at ILO Dossier Document No. 120) (Convention No. 87).

[60] Statute of the International Court of Justice, adopted 26 June 1945, 33 *UNTS* 993 (entered into force 24 October 1945), Article 65 (1).

[61] See Written Statement of Australia, 16 May 2024, paras. 16-17; Written Comments of Australia, 16 September 2024, paras. 5-6; Written Statement of Colombia, para. 1.29; Written Statement of the OACPS, para. 18; Written Statement of Vanuatu, para. 13; Written Statement of the ILO, para. 124; Written Statement of the ITUC, para. 2.9; Written Statement of Brazil, para. 9; Written Statement of Mexico, paras. 15-19; Written Comments of the ITUC, para. 2.3; Written Comments of Mexico, para. 3; Written Comments of the IOE, para. 8. See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 113, para. 65; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004 (I)*, p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion,*

6. Australia reiterates its view, consistent with the Court's jurisprudence, that "[t]he Court's reply is only of an advisory character: as such, it has no binding force"[62]. That is consistent with the fact that the Court's advisory jurisdiction may be taken up by international organizations for the purposes of seeking such non-binding advice. That conclusion is not displaced by the use of the term "decision" in Article 37, paragraph 1, of the ILO Constitution[63]. The use of that term does not transform an advisory opinion into a binding decision[64]. That said, Australia considers that the Court's opinion will be of great assistance in resolving the impasse caused by the competing interpretations of Convention No. 87. Resolving that impasse is integral to the ILO's continuing ability to carry out its core mandate of setting and protecting labour standards.

7. The question before the Court is whether the right to strike of workers and their organizations is protected under Convention No. 87. The question is clear and confined. It does not ask the Court to express an opinion on the scope and extent of the right to strike. In Australia's view, there is no need to reformulate the question nor to expand its scope[65].

8. Mr President, that concludes my preliminary observations. I request that you give the floor to Dr Donaghue.

The PRESIDENT: I thank Mr Clarke. I now invite Dr Stephen Donaghue to the podium. Sir, you have the floor.

Mr DONAGHUE:

II. CONVENTION NO. 87 PROTECTS THE RIGHT TO STRIKE

1. Mr President, Madam Vice-President, Members of the Court, it is an honour to appear before the Court again. I will be addressing Australia's primary submission: that Convention No. 87 protects the right to strike. That submission, which is consistent with the positions of most of the participants

I.C.J. Reports 2010 (II), p. 416, para. 30.

[62] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 189.

[63] Instrument for the Amendment of the Constitution, adopted by the International Labour Conference at its twenty-ninth session, adopted 9 October 1946, *UNTS*, Vol. 15, p. 35 (entered into force 20 April 1948) Article 37 (1) (ILO Dossier Document No. 118).

[64] See Written Comments of Australia, paras. 8-11.

[65] *Ibid.*, paras. 13-17.

in this proceeding[66], involves the straightforward application of the customary international law principles of interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention")[67].

A. Ordinary meaning of Article 3 (1) in its context, in light of the object and purpose of Convention No. 87

2. The customary rule reflected in Article 31 (1) requires that the terms of Convention No. 87 be given their ordinary meaning in their context, and in light of the Convention's objects and purposes.

1. Ordinary meaning of terms of Article 3 (1)

3. Article 3 (1) of Convention No. 87 states that workers' and employers' organizations shall have the right "to organise their administration and activities and to formulate their programmes".

4. In identifying the rights protected under Article 3 (1), the ordinary meaning of the terms "activities" and "programmes" are critical. Both are words of broad ambit[68].

(a) "Activity" is commonly defined as "something which a person . . . or group chooses to do"[69]; "a specific deed or action; sphere of action"[70]; or "the work of a group or organization to achieve an aim"[71].

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[66] Written Statement of the OACPS, para. 10; Written Comments of the OACPS, paras. 3-4; Written Statement of Spain, p. 20; Written Statement of Colombia, para. 1.2; Written Statement of the International Cooperative Alliance, para. 3; Written Statement of the Netherlands, paras. 2.7, 2.10, 2.28; Written Comments of the Netherlands, para. 2.2; Written Statement of Vanuatu, paras. 20-25; Written Comments of Vanuatu, paras. 2, 4; Written Statement of Norway, para. 15; Written Statement of South Africa, paras. 36-37, 52; Written Comments of South Africa, paras. 7-8; Written Statement of the ILO, para. 5; Written Statement of the ITUC, para. 4.5; Written Comments of the ITUC, paras. 3.1, 3.19; Written Statement of Brazil, paras. 22, 27; Written Statement of Tunisia, p. 1; Written Statement of the French Republic, para. 39; Written Statement of Mexico, paras. 44-45, 50-55; Written Comments of Mexico, paras. 5-6, 8, 11-13, 32; Written Statement of the WFTU, paras. 7, 14; Written Statement of Poland, paras. 2.2, 4.1; Written Statement of Italy, para. 18; Written Statement of the Somali Federal Republic, pp. 1-2; and Written Statement of Germany, paras. 12, 16, 19, 22.

[67] Vienna Convention on the Law of Treaties, opened for signature 23 May 1968, *UNTS*, Vol. 1155, p. 331 (entered into force 27 January 1980), Article 31, Article 32. See Written Statement of Australia, paras. 3, 30-31, 96; Written Comments of Australia, paras. 3, 18-22, 31, 37-38, 58.

[68] See also Written Statement of the OACPS, paras. 38-48; Written Statement of Colombia, paras. 2.13, 3.4; Written Statement of the Netherlands, para. 2.5; Written Statement of Vanuatu, paras. 20-25; Written Comments of Vanuatu, paras. 2-4; Written Statement of Norway, para. 18; Written Statement of Germany, para. 16; Written Statement of South Africa, paras. 36-37; Written Comments of South Africa, paras. 2-4; Written Statement of the ITUC, para. 4.13; Written Comments of the ITUC, paras. 3.1-3.30; Written Statement of Brazil, para. 22; Written Comments of Mexico, para. 9.

[69] *Oxford English Dictionary* (online) "activity" (def. 3.a), available at https://www.oed.com/dictionary/activity_n?tab=meaning_and_use&tl=true.

[70] Macquarie Dictionary (online) "activity" (def. 3), available at https://app.macquariedictionary.com.au/?search_word_type=dictionary&word=activities.

[71] Cambridge English Dictionary "activity" (def. B2 (Work)), available at https://dictionary.cambridge.org/dictionary/english/activity?q=activities.

(b) "Programme" is often defined as "a planned series of activities or events"[72]; "a plan or system under which action may be taken towards a goal"[73]; or "a plan of activities to be done or things to be achieved"[74].

5. Article 3 (1) does not impose any limitation on the scope of the activities or programmes that it protects. Both words should therefore be accorded their full breadth. The central question with which this advisory opinion is concerned is whether, in the context of Convention No. 87, either or both of those words includes strike action.

6. A "strike" is commonly defined as a "cessation of work on the part of a body of workers, for the purpose of obtaining some concession from the employer"[75] or "to compel an employer to accede to demands or in protest against terms or conditions imposed by an employer"[76]. As such, a strike that is organized by a trade union is squarely within the ordinary meaning of the word "activities" within Article 3 (1).

7. Strikes may also form part of a planned series of activities and therefore fall within the scope of a "programme". Indeed, strike action is one of the fundamental means available to workers and their organizations to promote their economic and social interests[77], and it is an important means of pursuing the objective of the protection of freedom of association.

8. In Australia's submission, the ordinary meaning of the terms "activities" and "programmes", in the context of Article 3 (1), encompasses strike action which furthers or defends the interests of workers and their organizations.

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[72] Oxford English Dictionary (online) "programme" (def. 4), available at https://www.oed.com/dictionary/programme_n#28124181.

[73] Merriam-Webster Dictionary (online) "program" (def. 3), available at https://www.merriamwebster.com/dictionary/ program.

[74] Cambridge English Dictionary (online) "programme" (def. B2), available at https://dictionary.cambridge.org/dictionary/english/programme.

[75] Oxford English Dictionary (online) "strike" (def. 9.a), available at https://www.oed.com/dictionary/strike_nl?tab=meaning_and_use#20188362.

[76] Macquarie Dictionary (online) "strike" (def. 57), available at https://app.macquariedictionary.com.au/?search_word_type=dictionary&word=strike. See also Cambridge English Dictionary (online) "strike" (def. B2), available at https://dictionary.cambridge.org/dictionary/english/strike ("to refuse to continue working because of an argument with an employer about working conditions, pay levels, or job losses").

[77] ILO, "Substantive provisions of labour legislation: the right to strike", *Industrial and Employment Relations Department-Social Dialogue,* accessible at <https://webapps.ilo.org/static/english/dialogue/ifpdial/llg/noframes/ch5.htm>.

2. The object and purpose of Convention No. 87

9. The object and purpose of Convention No. 87 confirms that conclusion. The Convention's title makes it clear that that object and purpose is to protect workers' and employers' freedom of association and right to organize. The same object and purpose is also expressed in the preamble, which refers to the ILO Constitution declaring "recognition of the principle of freedom of association"[78], and in Part I of the Convention, entitled "Freedom of Association"[79].

10. The right to freely associate enables individuals to group together voluntarily for a common goal. Workers' strikes are inherently linked to freedom of association. They are one of the principal actions available to workers' organizations to advocate for and to advance the interests of workers. Thus, the object and purpose of Convention No. 87 to advance freedom of association supports the conclusion that the right to strike is encompassed within the right of workers to "organize . . . their activities and to formulate their programmes"[80].

3. The relevant context of Convention No. 87

11. The context of Convention No. 87 further confirms that the right to strike is protected as part of the freedom of association.

12. Part II of the Convention, which is entitled "Protection of the Right to Organise", comprises a single provision, Article 11, which is relevant context to the interpretation of Article 3. Article 11 requires States parties to "take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise". Protecting the right of workers to organize is a necessary component of the effective exercise of the freedom of association. Such joint action is, of necessity, the primary means for workers to pursue and defend their interests at work, because of the distinct imbalance of bargaining power between employers and individual workers. Such joint action includes collective bargaining to pursue better pay and conditions, and action by way of strikes.

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[78] Convention No. 87, preamble.

[79] Convention No. 87, Part I. See Written Statement of Australia, para. 32.

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

13. The inherent link between the right to organize and strike action in the context of collective bargaining has been recognized by States, including through judicial decisions. For example, in the *Viking* case, the European Court of Justice stated that

> "it must be recalled that the right to take collective action, including the right to strike, is recognised . . . by various international instruments which the Member States have signed or cooperated in, such as . . . Convention No. 87"[81].

14. Although this Court has not been asked to express an opinion on the scope and extent of the right to strike, it is clear that the right is not absolute or without limitations[82]. That is confirmed by the context, including Article 8, paragraph 1, which provides that the exercise of rights provided for in Convention No. 87 "shall respect the law of the land"[83]. That makes clear that the rights protected by Convention No. 87, including the right to strike, may be regulated by domestic law.

15. Such regulation is itself subject to the limitation in Article 8, paragraph 2, that the "law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention". The meaning of "impair" in this context is informed by the purpose of the guarantee in question. The rationale for protecting the right to strike is to secure workers' freedom of association and right to organize, which includes the promotion of effective collective bargaining. National laws should not be understood to "impair" that right if they are consistent with that rationale. Accordingly, Australia considers that the right to strike under Convention No. 87 is properly understood as a right that must be exercised consistently with national laws, provided those laws do not substantially impair the ability of workers to pursue their interests through collective

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[81] *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU)* v. *Viking Line*, Case C-438/05, Judgment of 11 December 2007 [2007] ECR I-10779, para. 43, <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CJ0438>. See also Written Statement of the Federative Republic of Brazil, para. 23; Written Statement of Germany, para. 22; Written Statement of the OACPS, paras. 39, 49; Written Statement of the Kingdom of the Netherlands, para. 2.7; Written Statement of Mexico, paras. 28, 59; Written Statement of the Kingdom of Norway, para. 18; Written Statement of the Republic of Colombia, para. 3.69; Written Statement of the ITUC, paras. 4.24-4.25, 4.57; Written Statement of the Republic of Vanuatu, para. 31; Written Statement of the WFTU, para. 14.

[82] See Written Statement of Australia, para. 31; Written Statement of the Kingdom of Norway, para. 5; Written Statement of the Swiss Confederation, paras. 101-102; Written Statement of the French Republic, para. 87; Written Statement of Germany, paras. 50, 53, 71; Written Statement of the OACPS, paras. 42, 50; Written Statement of the Republic of Colombia, para. 3.67; Written Statement of the Kingdom of the Netherlands, para. 4.27; Written Statement of the Republic of Vanuatu para. 6, 10; Written Statement of the Republic of South Africa, p. 30; Written Statement of the ILO, para. 73; Written Statement of the Republic of Poland, para. 3.2; Written Statement of Italy, para. 10. Written Comments of Australia, para. 13; Written Comments of Japan, para. 41; Written Comments of Mexico, para. 25; Written Comments of the ITUC, paras. 5.24, 7.6.

[83] See Written Statement of the OACPS, para. 42; Written Statement of the Republic of Vanuatu, para. 6; Written Statement of the Kingdom of Norway, paras. 8, 16; Written Statement of Germany, para. 38; Written Comments of Mexico, para. 31; Written Comments of the People's Republic of Bangladesh, para. 53.

bargaining[84]. This interpretation is reinforced by the diverse approaches of States to regulating the right to strike in their own domestic laws, as illustrated by the participants in this proceeding in their written submissions[85].

B. Subsequent agreement or subsequent practice

16. Under Article 31 (3) *(a)* and *(b)* of the Vienna Convention, subsequent agreements and subsequent practice may be taken into account in interpreting Convention No. 87.

17. Two resolutions adopted by the International Labour Conference following the entry into force of Convention No. 87 explicitly confirm that it protects the right to strike.

(a) First, the 1970 resolution concerning Trade Union Rights and their Relation to Civil Liberties referred to Conventions Nos. 87 and 98, and the rights that flowed from them, including, specifically, the right to strike[86].

(b) Second, the 1972 resolution concerning Policy pursued by a Member State in Africa recognized the "right to strike" as a trade union right under Convention No. 87[87].

18. No State voted against those resolutions. Thus, they may properly be taken into account when interpreting Convention No. 87 either as subsequent agreements or subsequent practice within the meaning of Article 31 (3) of the Vienna Convention.

19. For those reasons, the ordinary meaning of the terms of Convention No. 87, read in context and in view of the Convention's object and purposes, and the subsequent agreement and practice of States, uniformly support the conclusion that the right to strike is protected by Convention No. 87.

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[84] See Written Statement of Australia, para. 41; *Saskatchewan Federation of Labour* v. *Saskatchewan* [2015] 1 SCR 245 (Supreme Court of Canada, Abella J) p. 284, para. 61 (ILO Dossier Document No. 342); *Société des casinos du Quebec Inc.* v. *Association des cadres de la Société des casinos du Quebec* [2024] SCC 13, paras. 33, 36, 42; *Dunmore* v. *Ontario* [2001] 3 SCR 1016, p. 1046, para. 23, p. 1048, para. 25; *Health Services and Support — Facilities Subsector Bargaining Assn.* v. *British Columbia* [2007] 2 SCR 391, pp. 443-444, paras. 90, 92. See also Written Statement of Australia, fn. 49; *Meredith* v. *Canada* [2015] 1 SCR 125, pp. 142-143, para. 24 ("the courts must ask whether state action has substantially impaired the employees' collective pursuit of workplace goals"); *Mounted Police Association of Ontario* v. *Canada* (Attorney-General) [2015] 1 SCR 3, pp. 50-51 para. 76; *Humpert* v. *Germany* (European Court of Human Rights, Grand Chamber, Application Nos. 59433/18, 59477/18. 59481/18 an<759494/18, 14 December 2023), para. 128.

[85] See Written Comments of Australia, paras. 39-40.

[86] International Labour Conference, 54th Session, 1970, Resolution concerning Trade Union Rights and Their Relation to Civil Liberties (ILO Dossier Document No. 136).

[87] International Labour Conference, 57th Session, 1972, Resolution concerning the Policy of Colonial Oppression, Racial Discrimination and Violation of Trade Union Rights Pursued by Portugal in Angola, Mozambique and Guinea (Bissau) (ILO Dossier Document No. 137).

C. Relevant rules of international law and supplementary means of interpretation

20. Mr President, Members of the Court, Australia submits that the Court should also have regard to supplementary means of interpretation, in accordance with Article 32 of the Vienna Convention, to confirm that Convention No. 87 protects the right to strike.

21. Our written submissions address five separate categories of supplementary means. I will briefly address each of them.

1. State practice incorporates the right to strike in domestic law

22. The first category is State practice in the form of domestic law. Most States parties to Convention No. 87 recognize the right to strike in their national laws, be it in their constitutions, legislation, by judicial decisions or a combination of those[88].

23. In 2015, in the context of a meeting on Convention No. 87, a comprehensive analysis of State practice was undertaken in respect of the right to strike. It records that at least 97 Member States expressly protect strike action in their national constitutions and that many of these States, as well as most other countries, have regulated strike action by legislation[89].

24. As the written submissions of the participants in this proceeding highlight, there are a variety of ways in which States balance the protection of the right to strike with other interests, such as the preservation of life, health and safety, and the provision of essential services[90]. Thus, State practice supports the existence of the right to strike and demonstrates a general consensus that such right is not absolute and may be subject to limitations[91].

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[88] International Labour Conference, 101st Session, 2012, Report III (Part IB), *Giving globalization a human face*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, p. 50, para. 123 (ILO Dossier Document No. 236).

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

[90] See Written Comments of Australia, para. 41.

[91] See International Labour Conference, 101st Session, 2012, Report III (Part IB), *Giving globalization a human face*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, paras. 123-161 (ILO Dossier Document No. 236).

2. Public statements of States and their organs confirming that Convention No. 87 protects the right to strike

25. The second category of supplementary means of interpretation are the public statements of States parties recognizing that the right to strike is protected by Convention No. 87.

26. For example, during the 101st International Labour Conference of 2012, Norway publicly declared that it fully accepted the interpretation of the Committee of Experts that the right to strike was protected under Convention No. 87[92]. Furthermore, during the negotiations for the International Covenant on Economic, Social and Cultural Rights, which I shall refer to as "ICESCR"[93], Chile expressed the view that Convention No. 87 protects the right to strike and that the protections in ICESCR should not derogate from Convention No. 87[94]. Argentina[95], Venezuela, Germany, France, Italy and Panama have made similar statements[96].

27. Australia has long accepted that Convention No. 87 protects a right to strike[97]. In 1993, the Australian Parliament made amendments to the Industrial Relations Act of 1988 to regulate and protect strike action — the right to strike — and, in doing so, it identified the source of Australia's international obligations with respect to the right to strike as including Convention No. 87[98].

28. Domestic courts of States parties have likewise confirmed that the right to strike is protected by Convention No. 87. For example, the Supreme Court of Canada has noted the ILO supervisory bodies' acceptance that Convention No. 87 protects the right to strike, and the Court proceeded on the basis that the right to strike was protected[99].

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[92] International Labour Conference, 101st Session, 2012, Report of the Committee of Experts on the Application of Standards, para. 90 (ILO Dossier Document No. 268).

[93] International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ILO Dossier Document No. 284).

[94] Economic and Social Council, Commission on Human Rights, Summary Record of the 299th meeting, 8th session, 299th meeting, UN Doc E/CN.4/SR.299 (2 June 1952) pp. 10-11.

[95] International Labour Organization, Governing Body, 349th *bis* (Special) Session, Minutes of the 349th *bis* (Special) Session of the Governing Body of the International Labour Office (Minutes, 31 January 2024), para. 87 (draft Minutes at ILO Dossier Document No. 31).

[96] International Labour Office, Governing Body, GB.323/INS/5/Appendix II, The Standards Initiative — Appendix II, Final Report 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 (Geneva, 23-25 February 2015), 13 March 2015, paras. 11, 17, 18, 23, 25 (ILO Dossier Document No. 108). See Written Statement of Australia, para. 56.

[97] See Commonwealth of Australia's submissions in *Victoria* v. *Commonwealth* (1996) 187 CLR 416, p. 467.

[98] Explanatory Memorandum, Industrial Relations Reform Bill 1993, <https://classic.austlii.edu.au/au/legis/cth/bill_em/irrb1993321/memo_0.html>, p. 61.

[99] *Saskatchewan Federation of Labour* v. *Saskatchewan* [2015] 1 SCR 245 (Supreme Court of Canada, Abella J), para. 67 (ILO Dossier Document No. 342).

3. Other relevant treaties

29. The third category of supplementary material is other relevant treaties, notably the ICCPR[100] and the ICESCR, both of which protect the right to strike and explicitly refer to Convention No. 87[101].

30. These treaties are particularly relevant to the interpretation of Convention No. 87 in view of the substantial commonality of State parties to all three treaties. Of the 158 States parties to Convention No. 87, 149 are also party to the ICESCR and 151 are also party to the ICCPR[102].

31. The ICESCR and the ICCPR both refer to Convention No. 87 in their text. They also explicitly give preference to, and protect the guarantees provided for, in the Convention[103]. The fact that, subsequent to the conclusion of Convention No. 87, the vast majority of State parties to that Convention have entered into two human rights covenants which protect the right to strike, and which expressly refer to Convention No. 87, reinforces the conclusion that Convention No. 87 protects the right to strike.

4. Findings and views expressed by ILO supervisory bodies and Commissions of Inquiry

32. The fourth category of supplementary material is views expressed by ILO supervisory bodies. The Committee of Experts, the Committee on the Freedom of Association (CFA) and the Commissions of Inquiry established under Article 26 of the ILO Constitution (Commissions of Inquiry) all support the conclusion that the right to strike is protected under Convention No. 87[104].

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[100] International Covenant on Civil and Political Rights, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 for all provisions except those of Article 41; 28 March 1979 for the provisions of Article 41 (Human Rights Committee)) (ILO Dossier Document No. 285).

[101] See Written Statement of Canada, para. 12; Written Statement of the Kingdom of the Netherlands, paras. 2.25-2.28, 3.1-3.23; Written Statement of the Republic of Vanuatu, paras. 44-49; Written Statement of the ILO, paras. 376-385; Written Statement of the Republic of Tunisia, p. 2. See also Written Comments of the ITUC, paras. 5.1-5.26.

[102] See Ratifications of C087 — Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), *International Labour Organization Ratification by conventions* (Web Page) <https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232>; *International Covenant on Economic, Social and Cultural Rights*, *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en>; *International Covenant on Civil and Political Rights*, *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>.

[103] See ICESCR, Articles 8 (1) *(d)*, 8 (3); ICCPR, Article 22 (3).

[104] See Written Statement of the OACPS, para. 54; Written Statement of the Republic of Colombia, para. 3.42; Written Statement of the Kingdom of the Netherlands, para. 2.20; Written Statement of the Republic of Vanuatu, para. 32; Written Statement of the Republic of South Africa, para. 55; Written Statement of the ILO, para. 266; Written Statement of the ITUC, paras. 4.75-4.76; Written Statement of the Federative Republic of Brazil, para. 27; Written Statement of the Kingdom of Norway, para. 22; Written Statement of Japan, paras. 58-59; Written Statement of the French Republic, para. 93; Written Statement of Italy, para. 5.

33. The Committee of Experts has confirmed that Convention No. 87 protects the right to strike. In its 1959 report, it noted a prohibition on strikes by workers "may run counter to Article 8, paragraph 2, of [Convention No. 87]"[105]. Subsequently, in its 2012 survey, it "reaffirm[ed] that the right to strike derives from [Convention No. 87]"[106].

34. Similarly, the Committee on the Freedom of Association considers that "[t]he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87"[107]. The CFA has also recognized that limitations on the right to strike are acceptable[108].

35. Further, in 1984 and 1989, two Commissions of Inquiry that addressed Convention No. 87 and the right to strike supported the conclusion that the right to strike is protected by Convention No. 87[109].

36. Australia relies on the findings and views of these bodies on the same basis that the Court has referred to views expressed by other independent bodies which were established to supervise the applications of treaties in confirming its own interpretation of those treaties[110]. Participants in these proceedings have differing perspectives on the basis upon which the views of the Committee of Experts and the CFA may be relied upon[111]. However, whatever precise legal characterization is

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[105] International Labour Conference, 43rd Session, 1959, Report III (Part IV), *Information and Reports on the Application of Conventions and Recommendations*, Report of the Committee Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35), pp. 114-115, para. 68 <http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1959-43).pdf>.

[106] International Labour Conference, 101st Session, 2012, Report III (Part 1B), *Giving globalization a human face*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, p. 49, para. 119 (ILO Dossier Document No. 236).

[107] International Labour Office, Compilation of decisions of the Committee on Freedom of Association, sixth edition, 2018, p. 143, para. 754 (ILO Dossier Document No. 282).

[108] *Ibid.*, at p. 145, para. 761; p. 150, para. 799; p. 149, para. 790; p. 146, para. 768; p. 146, para. 767; p. 150, para. 796; p. 164, para. 864; p. 180, para. 965. See Written Statement of Australia, para. 78.

[109] Report of the Commission instituted under article 26 of the Constitution of the International Labour Organisation to examine the complaint on the observance by Poland of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) presented by delegates at the 68th Session of the International Labour Conference, *Official Bulletin*, Vol. LXVII, 1984, p. 127, para. 517 (ILO Dossier Document No. 277); International Labour Office, Truth, reconciliation and justice in Zimbabwe, Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of Zimbabwe of Conventions Nos. 87 and 98, *Official Bulletin*, Vol. XCIII, 2010, p. 156, para. 575 (ILO Dossier Document No. 280).

[110] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 663-664, para. 66; cf. *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. 104, para. 101.

[111] See Written Comments of Australia, para. 51.

preferred, the views of these bodies confirm that Convention No. 87 protects the right to strike and that that right may be subject to a range of limitations under domestic law.

5. The negotiating history of Convention No. 87 and the circumstances of its conclusion

37. Finally, as a fifth means of supplementary interpretation, Australia submits that the drafting history of Convention No. 87 and the circumstances of its conclusion support the view that it protects the right to strike.

38. In 1948, the ILO circulated a questionnaire to States to facilitate discussion on the adoption of an instrument on freedom of association at the Conference that year[112]. In their responses to that questionnaire, the vast majority of States confirmed that it was important to exclude a right to strike of public officials from the proposed freedom of association provisions. This implies that States recognized that those protections, including the right to strike, would apply to all other workers[113].

39. The broader circumstances of the conclusion of Convention No. 87, and the development of the protection of freedom of association between the ILO's inception in 1919 and the negotiation of Convention No. 87 in 1948, further confirm that conclusion. Specifically, freedom of association has been a central objective of the ILO since its inception. Reports and studies by the ILO on the topic in the years preceding the adoption of Convention No. 87 recognized the connection between freedom of association and the right to strike; set out numerous examples of national laws protecting the right to strike; and confirmed that strikes formed part of the ordinary activities of trade unions[114].

40. In that context, when drafting the Convention in 1948, the Conference opted to set down general principles relating to freedom of association, rather than to regulate specific activities of trade unions[115]. But, at that time, it would have been obvious to the drafters of the Convention that the

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[112] International Labour Conference, 31st Session, 1948, Questionnaire, Freedom of Association and Protection of the Right to Organise (ILO Dossier Document No. 157).

[113] International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise (ILO Dossier Document No. 158) and International Labour Conference, 31st Session, 1948, Report VII (Supplement), Freedom of Association and Protection of the Right to Organise (ILO Dossier Document No. 159).

[114] Jean Nicod, "Freedom of Association and Trade Unionism: An Introductory Survey" (1924) 9(4) *International Labour Review* pp. 471, 474-478; International Labour Office, Studies and Reports, Series A (Industrial Relations) No. 28, *Freedom of Association: Volume I: A Comparative Analysis* (1927), p. 75, <https://www.ilo.org/public/libdoc/ilo/ILO-SR/ILO-SR_A28_engl_vol.1.pdf>.

[115] See Janice R. Bellace, "The ILO and the Right to Strike" (2014), 153 (1) *International Labour Review*, pp. 41-42.

"right to strike" formed part of the freedom of association, such that it was not necessary to refer to it explicitly[116].

41. Mr President, thank you for the Court's attention. I request that you give the floor to Dr Parlett to conclude Australia's submissions.

The PRESIDENT: I thank Dr Donaghue. I now give the floor to Dr Kate Parlett. Madam, you have the floor.

Ms PARLETT:

III. LACK OF SUPPORT FOR ALTERNATIVE ARGUMENTS PUT FORWARD BY PARTICIPANTS

1. Mr President, Madam Vice-President, Members of the Court, I will address three arguments that have been put forward by some participants in this proceeding to contend that the right to strike is not protected by Convention No. 87.

2. First, a minority of participants submit that the absence of an express reference to the "right to strike" or the term "strike" in Convention No. 87 means that the Convention does not cover that right[117]. That argument is overly simplistic and should not be accepted. The absence of an express reference to the right to strike is not determinative.

3. This Court and its predecessor have previously accepted that the absence of an express term in a convention does not determine its proper interpretation. In *Navigational and Related Rights*, the Court recognized that "even if no provision expressly guaranteeing a right of non-commercial navigation . . . [could] be found in the Treaty, the question must be asked whether such a right does not flow from other provisions"[118].

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[116] *Ibid.*

[117] See Written Statement of the People's Republic of Bangladesh, para. 3.1; Written Comments of the People's Republic of Bangladesh, paras. 14-15; Written Statement of the IOE, paras. 11, 137-141 and 150-151; Written Comments of the IOE, paras. 33-47; Written Statement of Japan, para. 11; Written Comments of Japan, para. 10; Written Statement of the Swiss Confederation, paras. 50-51; Written Comments of the Swiss Confederation, para. 11; Written Statement of Costa Rica, para. 7; Written Statement of Business Africa, para. 33; and Written Comments of Business Africa, para. 2. Cf. Written Comments of the ITUC, paras. 3.12-3.18 and Written Comments of Mexico, para. 5.

[118] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 246, para. 77; see also *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 104; see also Written Statement of the French Republic, para. 36; *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*, pp. 39-41; *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, *Advisory Opinion, 1932, P.C.I.J., Series A/B) No. 50*, pp. 375-376.

4. Further, this argument does not account for the fact that Article 3 does not refer to any particular "activities" or "programmes". It would make no sense if an activity or programme in which a workers' organization were allowed to engage, including strike action, was entitled to protection only if specifically mentioned in Article 3 (1)[119]. Instead, as Dr Donaghue has explained, the terms "activities" and "programmes" are of broad remit and, when read in the context of the Convention, should be understood as protecting strike action which furthers or defends the interests of workers and their organizations.

5. Secondly, and in a similar vein, one participant contends that because the preamble of Convention No. 87 expressly refers to "freedom of association" and to the "right to organise" but does not expressly refer to "the right to strike", the right to strike is not covered by the Convention[120]. The Court has previously determined that an *a contrario* interpretation is warranted only "when it is appropriate in light of the text of all of the provisions concerned, their context and the object and purpose of the treaty"[121]. It is not warranted here, where the ordinary meaning of the treaty provision, read in its context and in light of the object and purpose of the Convention, leads to the conclusion that Convention No. 87 protects the right to strike.

6. Thirdly, two participants have argued that Article 3 must be interpreted as only enshrining rights that can be attributed to both workers' and employers' organizations[122]. Australia disagrees with this argument, as do others[123]. Nothing in Article 3 suggests that the protections it confers on workers' organizations and employers' organizations are identical. Such an interpretation is at odds with reality and is unworkable. In Australia's submission, the broad protections of Convention No. 87 necessarily manifest themselves in different ways for workers and for employers.

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[119] See Written Comments of Australia, para. 28; Written Statement of the ITUC, para. 4.38; Written Statement of the Republic of Vanuatu, para. 23; Written Statement of the WFTU, para. 15; Written Statement of the French Republic, paras. 37-38, 49; Written Statement of the OACPS, paras. 37, 41; Written Statement of Germany, paras. 12-17; Written Statement of Norway, para. 15; Written Statement of Mexico, para. 45.

[120] Written Statement of Japan, paras. 10-11.

[121] See e.g. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 19, para. 37; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 30, para. 64. See also Abdulqawi A. Yusuf and Daniel Peat, "*A Contrario* Interpretation in the Jurisprudence of the International Court of Justice" (2017), *Canadian Journal of Comparative and Contemporary Law*, Vol. 3, Issue 1, pp. 1-19 (noting that an *a contrario* interpretation is "never in and of itself determinative of a particular interpretation").

[122] Written Statement of Japan, paras. 13, 21, 24; Written Statement of the IOE, para. 144.

[123] Written Comments of the Republic of South Africa, paras. 18-28; Written Comments of the ITUC, paras. 3.6-3.11.

7. To conclude, Australia submits that the Court should answer the question before it in the affirmative — that is, Convention No. 87 protects the right to strike. Australia further submits that, if the Court is minded to express an opinion on the content of the right to strike, it should confirm that the right to strike, as protected by Convention No. 87, is not absolute and may be subject to appropriate limitations under domestic law.

8. I thank the Court for its kind attention. This concludes Australia's submissions.

The PRESIDENT: I thank the representatives of Australia 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 4.25 p.m.to 4.45 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now invite the next participating delegation, Bangladesh, to address the Court and I call His Excellency Ambassador Tareque Muhammad to the podium. You have the floor, Sir.

Mr MUHAMMAD:

I. INTRODUCTION

1. Mr President, distinguished Members of the Court, it is an honour and a privilege to appear before you today on behalf of the People's Republic of Bangladesh in this advisory proceeding before the International Court of Justice.

2. The Court has been requested to render, on an urgent basis, an advisory opinion on the question of whether ILO Convention No. 87 protects the right to strike of workers and their organizations[124].

3. My country has chosen to participate in this important advisory proceeding in accordance with Article 11 of its political Constitution, which proclaims that: "The Republic shall be a

[124] Request for Advisory Opinion, transmitted to the Court pursuant to the resolution of the Governing Body of the International Labour Organization of 10 November 2023, p. 6.

democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed."[125]

4. My country recognizes the right to strike as a human right protected under the International Covenant on Economic, Social and Cultural Rights[126], to which it is a State party. However, it does not consider that this right is protected under ILO Convention No. 87.

5. ILO Convention No. 87 is widely regarded as a cornerstone of international labour law, safeguarding the freedom of workers and employers to form and join organizations of their own choosing[127]. Yet, despite the important role played by the ILO supervisory bodies in developing its interpretation, the Convention does not contain any express provision recognizing the right to strike. The Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association have inferred such a right from the Convention's text[128] — but such inferences raise legitimate concerns about the boundaries of interpretation.

6. In this oral statement, Bangladesh will submit that, under the applicable customary rules of treaty interpretation, ILO Convention No. 87 cannot be understood to implicitly guarantee the right to strike. Our argument is based on an analysis of the Convention's text, context, object and purpose, the subsequent practice of States, and its preparatory work. Taken together, these elements demonstrate that the drafters made a deliberate choice not to include the right to strike in the Convention, and that its legal protection must instead be sought in other, more explicit instruments.

7. Mr President, I respectfully ask that you invite Professor Raimondo to the podium to present the legal submissions of my country in further detail.

The PRESIDENT: I thank Ambassador Muhammad. I now give the floor to Professor Fabián Raimondo. Sir, you have the floor.

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[125] The Constitution of the People's Republic of Bangladesh, available on the website of the Government of the People's Republic of Bangladesh, Legislative and Parliamentary Affairs Division, at http://bdlaws.minlaw.gov.bd/act-367.html.

[126] Article 8 (1) *(d)*.

[127] ILO Convention No. 87, Article 2.

[128] See the Dossier prepared by the ILO through its International Labour Office pursuant to the Order of the Court dated 16 November 2023 and Article 65, paragraph 2, of the Statute of the Court, Part III, Documents 165-170 and Document 266, for example.

Mr RAIMONDO:

II. TREATY INTERPRETATION UNDER CUSTOMARY INTERNATIONAL LAW

1. Mr President, distinguished Members of the Court, it is once again an honour and a privilege to appear before you, this time to present the legal submissions of Bangladesh on the applicable rules of treaty interpretation.

2. It is well established in the jurisprudence of this Court that the rules on treaty interpretation set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties reflect customary international law[129]. In the absence of interpretative provisions within ILO Convention No. 87 itself, it is the view of Bangladesh that the Convention must be interpreted in accordance with those rules, as expressions of general international law binding upon all States.

3. Article 31 (1) of the Vienna Convention sets out the general rule of interpretation, providing that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

4. Article 32 supplements this general rule by allowing recourse to preparatory work and the circumstances of the treaty's conclusion as supplementary means of treaty interpretation. These tools may be used to confirm the meaning resulting from the application of Article 31, or to resolve ambiguity or obscurity. Accordingly, the rules of interpretation under customary international law require that the meaning of a treaty be derived, first and foremost, from its text, read in context and in light of its object and purpose, and, where necessary, confirmed or clarified by reference to its drafting history.

5. Article 33, on the interpretation of treaties authenticated in two or more languages, does not bear upon the question at hand.

1. Ordinary meaning of the text

6. Your Honours, Article 2 of ILO Convention No. 87 provides that: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

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[129] See e.g. *Obligations of States in Respect of Climate Change, Advisory Opinion of 23 July 2025*, para. 176.

7. This provision clearly establishes the right of workers and employers to form and join organizations. However, it contains no express reference to a right to strike, nor can such a right be reasonably inferred from its terms.

8. Article 3 (1) further provides that workers' and employers' organizations shall have the right "to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes". While this Article affirms the autonomy of organizations in managing their internal affairs, it does not specifically include or imply the right to strike.

9. The omission of any reference to the right to strike is particularly notable when contrasted with other international instruments that recognize both the right to form and join trade unions and the right to strike — such as the International Covenant on Economic, Social and Cultural Rights, the European Social Charter and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights[130] — all of which explicitly guarantee that right. This textual contrast strongly suggests that the drafters of Convention No. 87 deliberately elected not to guarantee such right. Or, as the Appellate Body of the World Trade Organization once observed: "Sometimes the absence of something means simply that it is not there."[131]

2. Context of the treaty

10. Your Honours, Article 31 (2) of the Vienna Convention requires that the context of the treaty be taken into account, including its preamble and any related instruments. The preamble to Convention No. 87 underscores the principle of freedom of association and the right to organize as a means of improving labour conditions. It makes no reference to the right to strike, instead focusing squarely on organizational and associational freedoms.

11. Additional context is provided by the broader ILO normative framework. One year after Convention No. 87 was adopted, the ILO adopted Convention No. 98, which deals with the right to organize and to bargain collectively. Yet this convention also omits any reference to the right to

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[130] Articles 8 (1) *(a)* and *(d)*, 5 and 6 (4), and 8 (1) *(a)* and *(b)*, respectively.

[131] *Canada — Term of Patent Protection Report*, World Trade Organization Appellate Body, WT/DS170/AB/R (2000), para. 78.

strike. If the drafters had considered strike action integral to freedom of association, it would reasonably have been included in at least one of these foundational instruments.

3. Object and purpose of the Convention

12. Your Honours, the object and purpose of Convention No. 87, as expressed in its preamble, is to protect the freedom of association and the right to organize for workers and employers. Its focus is on enabling the formation of organizations and participation in them without external interference.

13. The right of workers to strike, though an important labour right, is not inherently linked to the organizational freedom protected by the Convention. It is a distinct form of collective action, governed by other international treaties, most notably the International Covenant on Economic, Social and Cultural Rights. The inclusion of the right to strike would have altered the nature of the Convention, and there is no evidence that the drafters intended to create such a comprehensive labour rights instrument.

4. Subsequent practice and State understanding

14. Your Honours, Article 31 (3) *(b)* of the Vienna Convention provides that the subsequent practice of States parties may inform the interpretation of a treaty. However, there is no consistent subsequent practice evidencing agreement among such States that ILO Convention No. 87 protects the right to strike, as is evident from the resolution of the ILO Governing Body that gave rise to this advisory proceeding[132].

15. The Employers' Group within the ILO has likewise opposed such an interpretation, arguing that the Committee of Experts has exceeded its mandate by inferring rights not present in the treaty text[133]. In 2012, disagreement over this issue led to a deadlock in the ILO's Conference Committee on the Application of Standards[134]. This impasse underscores the absence of any settled agreement among States that would justify the expansive reading proposed by the Committee.

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[132] Request for Advisory Opinion, transmitted to the Court pursuant to the resolution of the Governing Body of the International Labour Organization of 10 November 2023, p. 4, first and second preambular paragraphs.

[133] See the Dossier prepared by the ILO through its International Labour Office pursuant to the Order of the Court dated 16 November 2023 and Article 65, paragraph 2, of the Statute of the Court, Part III, Document 268, pp. 147-149.

[134] *Ibid.*, para. 150.

5. Supplementary means: preparatory work

16. Your Honours, the exclusion of the right to strike from ILO Convention No. 87 was not incidental; it was a deliberate choice shaped by the views expressed by a majority of States during the preparatory process. In their responses to a questionnaire circulated by the International Labour Office, a number of governments expressly stated that the Convention should not address the right to strike. Others, while recognizing the importance of safeguarding freedom of association, made clear that any attempt to resolve the question of the right to strike within the framework of Convention No. 87 would be inappropriate. The prevailing view was that the Convention ought to focus exclusively on organizational freedoms and avoid engaging with the more contentious issue of strike action[135].

17. This exclusion was strategic. It enabled the adoption of a Convention that could be ratified by States with divergent legal and political systems. By focusing on organizational freedom, and avoiding the divisive issue of the right to strike, the drafters ensured broader support and legal clarity.

6. Final observation

18. Your Honours, a careful application of the customary rules on treaty interpretation leads to a single, coherent conclusion: ILO Convention No. 87 does not stipulate, either expressly or implicitly, the right to strike. The ordinary meaning of its terms, its context, object and purpose, the preparatory work and the lack of consistent subsequent practice all confirm that this right was deliberately left outside its scope. As the saying goes, treaty interpretation is not the art of finding meanings that are not there.

19. Mr President, I now invite you to give the floor to Ambassador Muhammad, who will present the concluding observations on behalf of Bangladesh. Thank you.

The PRESIDENT: I thank Professor Raimondo. I now give the floor back to Ambassador Tareque Muhammad. You have the floor, Sir.

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[135] See the Dossier prepared by the ILO through its International Labour Office pursuant to the Order of the Court dated 16 November 2023 and Article 65, paragraph 2, of the Statute of the Court, Part III, Document 158, pp. 67, 87.

Mr MUHAMMAD:

III. CONCLUSION

1. Mr President, Members of the Court, my country submits that ILO Convention No. 87 does not guarantee or protect the right to strike. Expanding the interpretation of the Convention to include that right would depart from the text and structure of the Convention and would carry serious legal and policy implications. Above all, it would risk undermining a foundational principle of international law: that treaty obligations are based on State consent.

2. Treaty interpretation must remain faithful to the will of the parties, as reflected in the terms they have expressly agreed. To read into ILO Convention No. 87 a right that its drafters deliberately excluded — against the backdrop of significant debate and divergent national practices — would exceed the permissible boundaries of interpretation under customary international law. It would amount not to interpretation, but to revision.

3. Such overreach would also carry consequences beyond this instance. It could discourage States from ratifying future ILO instruments, out of concern that their obligations might later be unilaterally expanded through supervisory interpretation. This would erode confidence in the ILO's standard-setting function and in the broader integrity of international labour law.

4. Mr President, Members of the Court, the right to strike is indeed an essential element of democratic society and a vital tool for the protection of workers' interests. But it must be protected through legal instruments that expressly provide for it — such as the International Covenant on Economic, Social and Cultural Rights, or regional treaties that include it within their scope. To infer it from ILO Convention No. 87, which is silent on the matter, would unsettle the treaty framework and compromise the clarity and legitimacy of international legal obligations.

5. My country therefore respectfully invites the Court to conclude that ILO Convention No. 87 does not, either explicitly or implicitly, protect the right to strike.

6. Mr President, Members of the Court, I thank you for your attention and for the opportunity to present my country's views in these important proceedings.

The PRESIDENT: I thank the representatives of Bangladesh for their presentation. I now invite the next participating delegation, Colombia, to address the Court and I call upon His Excellency Mr Mauricio Jaramillo Jassir to take the floor.

Mr JARAMILLO JASSIR:

I. INTRODUCTION

1. Mr President, Madam Vice-President, distinguished Members of the Court, I am deeply honoured to appear before you in these proceedings on behalf of the Republic of Colombia. In the context of this debate, Colombia considers important to underscore that it was one of the founding States of the International Labour Organization and has actively participated in its tripartite bodies throughout the years. This sustained engagement reflects our firm commitment to human rights and to the international labour laws and standards, which has, in turn, significantly contributed to the normative and constitutional development of labour and trade union rights in our country.

2. In this regard, Colombia emphasizes the critical importance of upholding the right to strike as an integral component of freedom of association, a fundamental principle of international labour law. This commitment is particularly relevant in today's global context where persistent and widespread violations of workers' right to strike remain a source of serious concern[136].

3. Therefore, we deem essential to prevent the ongoing dispute from undermining the credibility of the International Labour Organization, its supervisory functions and its standing as a standard-setting body. In line with this concern and acting on behalf of a group of 44 Member States, Colombia proposed the draft resolution requesting an advisory opinion, which was subsequently adopted during the Special Session of the Governing Body held on 10 November 2023. This initiative reflects a constructive and principled approach aimed at resolving the dispute in a manner fully aligned with the provisions of the ILO Constitution.

4. Mr President, Colombia's position on the issues raised throughout these proceedings is set out fully in our Written Statement. My oral presentation will, therefore, only focus on a few key aspects relating to the issues that still divide the participants. Thus, I shall first refer to jurisdiction

[136] ITUC, Global Rights Index 2024, p. 49, available at https://www.ituc-csi.org/IMG/pdf/2024_ituc_global_rights_index_en.pdf?31226/ce28bb2139c2fe0d4e5f0a36d726ac7334d1c2d9be8b29dd88b4d2b9d89f5654. (Last visited 26 Sept. 2025.)

and discretion of the Court. Then, I will turn to the relevant interpretation of Convention No. 87, including subsequent practice on the right to strike, as well as the applicable rules of international law of human rights, confirming the right to strike as a corollary to the right of freedom of association. Finally, I will conclude this statement by setting out a series of final observations.

II. JURISDICTION AND DISCRETION

5. Mr President, I will firstly refer to the issue of the jurisdiction and discretion of the Court to render the requested advisory opinion. While none of the written statements and observations submitted to the Court challenges its jurisdiction to issue an advisory opinion in response to the request, one participant in these proceedings has urged the Court to exercise its discretion to decline to respond[137], arguing as a *compelling reason* that the request concerns a bilateral dispute between workers and employers, and that the latter has not consented to the jurisdiction of the Court to resolve that dispute[138]. Adding to this argument, it has also been suggested that the dispute arises as a result of ideological positions with broader reach than just a legal question[139].

6. Colombia firmly disagrees with this reasoning on several grounds. *First*, there is no legal basis to extend beyond States, exclusively, the requisite of consent for the submission of disputes to the Court. *Second*, there is no basis to understand the subject-matter of the request in the present advisory proceedings as being a bilateral matter. In fact, in the present proceedings the question refers to an issue of general concern for ILO membership, embodied in a clear legal question.

7. And *third*, the question raised in the request is indeed framed in legal terms, since it is required from the Court to determine whether the right to strike is protected under Convention No. 87. The question is to be answered through the application of rules of international law, and therefore, constitutes a legal question which could form the basis of a request for an advisory opinion.

8. Colombia, thus, considers that the Court has jurisdiction to respond to the question raised by ILO's Governing Body and that there are no compelling reasons to exercise its discretion to decline to respond to this question.

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[137] Indonesia, Written Statement, para. 4.

[138] *Ibid.*, paras. 25-29.

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

III. RELEVANT INTERPRETATION CONFIRMING THAT CONVENTION NO. 87 PROTECTS THE RIGHT TO STRIKE

9. Mr President, distinguished Members of the Court, I will now focus on the issue of treaty interpretation, which in our view is of essential relevance for the Court's consideration in these proceedings. The customary rules in regard to the interpretation of treaties, as reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, establish that treaties should be read in good faith, by their ordinary meaning and in context, and in light of their object and purpose, along with supplementary means of interpretation, when necessary.

10. Colombia is of the view that, absent an explicit provision on the right to strike in Convention No. 87, this instrument should be interpreted systematically along with other international and customary rules, according to the rules briefly described above. The Convention, by expressly safeguarding the freedom of association and the right to organize and carry out activities, seems to suggest that a broad spectrum of concerted actions — including the right to strike — must be protected to enable workers' organizations to effectively pursue their legitimate objectives.

1. General rules of interpretation under the Vienna Convention on the Law of Treaties

11. According to the principle of good faith embodied in Article 31 (1) of the Vienna Convention on the Law of Treaties, Convention No. 87 clearly provides for the protection of the right to strike. This conclusion, shared by a significant number of participants[140], is based on the following reasoning:

(a) The ordinary meaning of the terms of Convention No. 87 leads to the conclusion that the right to strike is protected under this treaty, given the intrinsic relationship between this right and the freedom of association. Any conclusion to the opposite would effectively undermine the object and purpose of the Convention to guarantee freedom of association and protection of the right to organize.

[140] See e.g. France, Written Statement, para. 99; Vanuatu, Written Statement, para. 42; OACPS, Written Statement, para. 35; ITUC, Written Statement, para. 4.222; Australia, Written Statement, para. 25; Norway, Written Statement, paras. 12-13; Mexico, Written Statement, para. 57.

(b) Additionally, State practice of parties to the Convention No. 87 proves that there is a broad agreement regarding the protection of the right to strike under said treaty.

(c) Finally, other relevant rules of international law confirm the protection of the right to strike under Convention No. 87, based on the close connection between this right and the freedom of association.

12. Colombia fully aligns with these views and thus considers that the right of workers and their organizations to *organize activities* encompasses the right to carry out concerted actions for the purpose of collective bargaining or mutual aid or protection, provided such actions respect the *law of the land*. An interpretation to the contrary would render moot the very essence of these rights and the protections they are meant to guarantee.

13. Along the same lines, under Article 31 (2) of the Vienna Convention on the Law of Treaties, this conclusion is further reinforced. This norm provides that the context for treaty interpretation includes "the text . . . its preamble and annexes". Convention No. 87 preamble emphasizes that the "improve[ment of the] conditions of labour" is a central purpose of freedom of association[141]. The Permanent Court of International Justice found that this goal was the main concern during the drafting of Part XIII of ILO's Constitution[142].

14. In practice, strikes are a paramount course by which workers secure bargaining leverage and, without it, the freedom of association enshrined in the Convention would be *de facto* futile and the improvement of the conditions of labour would turn impossible.

15. In this regard, it would be inconsistent to recognize freedom of association without simultaneously guaranteeing the right to strike as a legitimate means of defending collective interests. This correlation is expressly supported by Article 10 of Convention No. 87, which enshrines the right of workers' organizations to promote and defend the interests of their members.

16. Mr President, Members of the Court, State practice confirms this interpretation. Over 90 States explicitly recognize the right to strike in their domestic law, many at the constitutional

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[141] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Constitution of the ILO, preamble.

[142] *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. 374.

level[143]. Pursuant to Article 31 (3) *(b)* of the Vienna Convention on the Law of Treaties, this subsequent practice in the application of Convention No. 87, reflects agreement among the parties regarding its interpretation. This understanding, which has been widely supported across these proceedings, reaffirms that the right to strike is inseparable from freedom of association and is protected under the Convention[144].

17. While a small minority of States may hold a divergent view, their position diverges from the consistent and near-universal practice of the vast majority of State parties. Moreover, Article 31 (3) *(b)* does not require unanimity. As recognized by the International Law Commission, subsequent practice need not be entirely uniform to establish agreement among the parties[145].

2. The protection of the right to strike is confirmed by the supplementary means of interpretation

18. Distinguished Members of the Court, Colombia fully shares the view of some participants, suggesting that, under Article 32 of the Vienna Convention on the Law of Treaties, there are supplementary means of interpretation that lead to the same conclusion regarding Convention No. 87, resulting from the application of Article 31.

19. Should the Court find it necessary to assess the question at hand under such supplementary tools, where applicable, these means serve to confirm the conclusions previously outlined. Allow me to briefly present two of these supporting arguments.

20. *In the first place*, when it comes to the discussion about the *travaux préparatoires* of Convention No. 87 as a supplementary means of interpretation[146], Colombia supports the view of other States and organizations[147], when it is argued that these *travaux préparatoires* remain inconclusive to determine that the Convention was not intended to protect the right to strike, as

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[143] See e.g. ILC, 101st Session, 2012, Report III (Part 1B), *Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, 2008, p. 50, para. 123.

[144] See e.g. Australia, Written Statement, paras. 42-45; Brazil, Written Statement, para. 22; Canada, Written Statement, para. 6; Germany, Written Statement, para. 22; Indonesia, Written Statement, paras. 13-19; Italy, Written Statement, para. 17; Mexico, Written Statement, paras. 47-55.

[145] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *YILC*, 2018, Vol. II, Part Two, Conclusion 9, commentary, para. 12.

[146] See e.g. Australia, Written Comments, paras. 52-57; ITUC, Written Comments, paras. 6.5-6.11; Bangladesh, Written Comments, para. 45.

[147] See e.g. Australia, Written Comments, para. 55. ITUC, Written Comments, para. 6.11.

mentioned by other participants[148]. It is evident from the *travaux préparatoires* that the Convention was not conceived to be a code of regulations but rather a statement of certain fundamental principles, such as the freedom of association[149]. A comprehensive interpretation of Articles 3 and 10 of the Convention, in line with the general rules of treaty interpretation, supports the inclusion of the right to strike as a means of furthering and defending the interests of workers and as an essential element of the freedom of association, despite not being explicitly mentioned.

21. *Secondly*, when discussing Article 32 *(a)* and *(b)* of the Vienna Convention on the Law of Treaties, we concur with those assertions sustaining that there is a clear interpretation of the Convention No. 87 by the State parties that is reflected in their domestic law and jurisprudence[150]. The practice of the State parties to incorporate, protect and regulate the right to strike in their domestic law, developed by the vast majority of them, allows to demonstrate that this subsequent practice of the parties confirmed that the Convention included the right to strike and leaves no ambiguous or obscure meaning, nor does it lead to an absurd or unreasonable result.

22. Colombia respectfully posits that any interpretation which fails to take into account the foregoing considerations may be deemed incompatible with the object and purpose of Convention No. 87, as established under the Vienna Convention on the Law of Treaties. Such an outcome would be unwarranted, particularly in light of the consistent and widespread practice of States parties and the authoritative interpretative guidance provided by the ILO's supervisory bodies, an issue I will address below.

3. Pratique ultérieure découlant de l'interprétation de la convention n° 87 par les organes de contrôle de l'OIT

23. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, l'interprétation cohérente des dispositions de la convention, conformément à l'article 31 de la convention de Vienne sur le droit des traités, a été constamment confirmée par l'examen des organes de contrôle de l'OIT. Cette pratique interprétative constante renforce la clarté normative et la cohérence juridique de l'application de la convention dans tous les systèmes normatifs nationaux.

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[148] See e.g. Switzerland, Written Statement, para. 81; Japan, Written Statement, para. 45.

[149] International Labour Conference, 31st Session, 1948, Record of Proceedings, Appendix X: Freedom of Association and Protection of the Right to Organise, p. 477.

[150] See e.g. ITUC, Written Comments, paras. 6.12-6.15 ; Australia, Written Comments, paras. 38-42.

24. Depuis plus de70 ans, le travail de la Commission d'experts sur les conventions et recommandations est cohérent, indépendant et technique, contribuant à la protection et à la promotion des droits du travail, y compris le droit de grève. De même, le Comité de la liberté syndicale est une instance tripartite qui parvient à des accords en toute légitimité. Dans ce contexte, les recommandations de ce comité sont approuvées par le Conseil d'administration de l'OIT, garantissant toujours le tripartisme et le respect des droits garantis par les conventions.

25. La Colombie soutient respectueusement que ni le caractère tripartite du système de l'OIT, ni le statut juridique et technique de ses organes de contrôle ne sauraient être invoqués comme motifs formels pour méconnaître le droit de grève ou porter atteinte à la solidité juridique et à la légitimité politique du cadre de contrôle de l'Organisation. La cohérence de ce système et l'autorité de ses organes de contrôle ont été largement reconnues au fil du temps par la communauté internationale, y compris notre pays au regard de sa pratique nationale.

26. À cet égard, en tant que pratique ultérieure à l'adoption de la convention, la Colombie est parvenue à faire reconnaître, dans sa Constitution de 1991, le droit de grève comme un droit fondamental, ainsi que l'incorporation des conventions internationales du travail dans la législation nationale. Depuis 1991, nos plus hautes juridictions, en particulier à travers le contrôle de constitutionnalité exercé par la Cour constitutionnelle, se sont appuyées sur les conventions de l'OIT et sur les interprétations de ses organes de contrôle, comme des arguments et des critères d'interprétation valides, acceptés et juridiquement contraignants[151].

27. La Cour constitutionnelle a même déclaré, par ailleurs, que la convention nº 87 fait partie, en droit interne, du bloc de constitutionnalité *stricto sensu*[152]. Dans cet esprit, les recommandations émises par le Comité de la liberté syndicale — reflétant souvent et inspirées par les points de vue de la Commission d'experts pour l'application des conventions et recommandations — sont légalement

[151] Cour constitutionnelle de la République de Colombie, arrêt T181/24, par. 133, accessible à l'adresse suivante : https://www.corteconstitucional.gov.co/relatoria/2024/t-181-24.htm (dernière visite le 26 septembre 2025).

[152] Cour constitutionnelle de la République de Colombie, arrêt C-401/05, par. 18-19, accessible à l'adresse suivante : https://www.corteconstitucional.gov.co/relatoria/2005/c-401-05.htm (dernière visite le 26 septembre 2025).

contraignantes au niveau interne, lorsqu'elles sont approuvées par le Conseil d'administration de l'Organisation[153].

28. En conséquence, la Colombie souligne que la reconnaissance universelle et continue du droit de grève renforce plus de trois décennies de jurisprudence nationale constante, fermement ancrée dans l'interprétation constitutionnelle du droit international du travail. Cette reconnaissance reflète le travail entrepris par les États, les employeurs et les travailleurs, dans le cadre institutionnel de l'OIT. Le respect de ce droit contribue à la sécurité juridique, renforce la cohérence de l'ordre constitutionnel colombien et affirme son attachement aux obligations internationales découlant de la convention nº 87.

29. Monsieur le président, à la lumière de ce qui précède, la Colombie estime que les recommandations émises par les organes de contrôle de l'OIT constituent des orientations interprétatives faisant autorité pour les États parties, qui doivent être dûment prises en compte dans la mise en œuvre des obligations découlant de la convention nº 87. Compte tenu de l'expertise juridique et technique de ces organes, leurs conclusions ont été systématiquement observées et appliquées par les États parties, ce qui a donné lieu à une pratique ultérieure au sens de l'article 31 3) *b)* de la convention de Vienne sur le droit des traités.

30. La Colombie invite respectueusement la Cour à reconnaître qu'une telle pratique ultérieure, dérivée des interprétations cohérentes et faisant autorité des mécanismes de contrôle de l'OIT, et largement acceptée par les États parties à la convention nº 87, reflète une solide compréhension de la portée de la convention.

4. Le droit de grève et les droits humains

31. Monsieur le président, un argument constamment présenté tout au long de cette procédure soutient que le droit de grève est un corollaire de la liberté syndicale et qu'il est implicitement mais fermement protégé par la convention nº 87.

32. Comme l'indique la déclaration écrite de la Colombie, la relation entre la liberté syndicale et les droits humains fondamentaux est double. D'une part, la liberté syndicale constitue un

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[153] *Ibid.*, arrêt T603/03, par. 3, accessible à l'adresse suivante : https://www.corteconstitucional.gov.co/relatoria/2003/t-603-03.htm (dernière visite le 26 septembre 2025) ; Cour suprême de justice de la République de Colombie, arrêt SL1680-2020, p. 10-11, accessible à l'adresse suivante : https://cortesuprema.gov.co/corte/wp-content/uploads/2020/07/SL1680-2020-81296.pdf (dernière visite le 26 septembre 2025).

instrument essentiel pour promouvoir la reconnaissance et la protection d'autres droits humains. D'autre part, elle est elle-même soutenue par ces droits, car c'est grâce à eux que l'activité syndicale se concrétise efficacement[154].

33. À cet égard, la Colombie rappelle que, outre la protection juridique accordée à la liberté syndicale par le Pacte international relatif aux droits civils et politiques[155] et par la convention américaine relative aux droits de l'homme[156], le droit de grève est expressément consacré par d'autres traités relatifs aux droits humains, tels que le Pacte international relatif aux droits économiques, sociaux et culturels[157], le protocole de San Salvador[158], la Charte des droits fondamentaux de l'Union européenne[159] et la Charte sociale européenne[160].

34. De plus, contrairement à certaines affirmations formulées dans certaines observations écrites[161], le droit de grève n'échappe pas au champ d'application de la convention n° 87. Au contraire, ce droit a été expressément reconnu par des tribunaux internationaux comme la Cour interaméricaine des droits de l'homme[162] et la Cour européenne des droits de l'homme[163]. Ces deux tribunaux, en s'appuyant sur les interprétations fournies par les organes de contrôle de l'OIT, ont reconnu que le droit de grève est un corollaire du droit à la liberté syndicale.

35. Au sein du système des Nations Unies, le rapporteur spécial sur les droits à la liberté de réunion pacifique et la liberté d'association a également affirmé que le droit de grève avait acquis le

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[154] Exposé écrit de la Colombie, par. 3.61.

[155] Pacte international des droits civils et politiques, art. 22.

[156] Convention américaine relative aux droits de l'homme, art. 16.

[157] Pacte international relatif aux droits économiques, sociaux et culturels, art. 8, par. *d)*.

[158] Protocole additionnel à la convention américaine relative aux droits de l'homme portant sur les droits économiques, sociaux et culturels, art. 8, par. *b)*.

[159] Charte des droits fondamentaux de l'Union européenne, art. 28.

[160] Charte sociale européenne, art. 6, par. 4.

[161] Voir, par exemple, observations écrites du Japon, par. 3 ; observations écrites de la Confédération des employeurs de Business Africa, par. 2 ; observations écrites de la Suisse, par. 17 ; observations écrites du Bangladesh, par. 13.

[162] Cour interaméricaine des droits de l'homme, *Droit à la liberté d'association, droit de négociation collective et droit de grève, et leur relation avec d'autres droits, dans une perspective de genre*, avis consultatif OC-27/21 du 5 mai 2021, par. 96 et 97, accessible à l'adresse suivante : https://www.corteidh.or.cr/docs/opiniones/seriea_27_esp1.pdf (dernière visite le 26 septembre 2025).

[163] Cour européenne des droits de l'homme, affaire *Ognevenko c. Russie*, arrêt du 20 novembre 2018, par. 70, accessible à l'adresse suivante : https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-187732%22]} (dernière visite le 26 septembre 2025).

statut de droit international coutumier. Cette reconnaissance se fonde non seulement sur les traités internationaux susmentionnés, mais aussi sur les articles 3, 8 et 10 de la convention nº 87[164].

36. De même, le Comité des droits de l'homme a interprété la notion de réunion pacifique comme englobant celle de protestation ou de manifestation. Ces expressions ont été, dans divers contextes, comprises comme synonymes du droit de grève, ou du moins comme un concept large dans lequel ce droit s'inscrit[165]. En examinant les protestations et les grèves sous un angle unifié, le Comité souligne l'indivisibilité et l'interdépendance de ces droits, essentiels au fonctionnement des sociétés démocratiques.

37. La Colombie rappelle que les organes de contrôle de l'OIT ont eux-mêmes établi que le droit de grève est l'un des nombreux moyens dont disposent les travailleurs et leurs organisations pour promouvoir et défendre leurs intérêts économiques et sociaux, après avoir réaffirmé que « [l]e droit de grève est un corollaire indissociable du droit syndical protégé par la convention nº 87 »[166]. Par conséquent, il existe un lien direct et indissociable entre le droit de grève, le droit syndical et la liberté syndicale, tous protégés par la convention nº 87. La Colombie souscrit pleinement à cette interprétation et la soutient activement.

38. Ainsi, la Colombie souligne que, comme cela a été démontré précédemment, il existe un *corpus juris* consolidé dans le domaine des droits de l'homme, qui incorpore le droit de grève comme élément essentiel et corollaire du droit à la liberté syndicale, tel que garanti aux travailleurs et à leurs organisations dans le cadre de la convention nº 87.

39. La Colombie considère qu'une interprétation restrictive et littérale de la portée de la convention nº 87, qui conclurait qu'elle ne protège pas le droit de grève, laisserait effectivement les travailleurs et leurs organisations sans protection dans l'exercice d'un aspect fondamental de la liberté syndicale.

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[164] Nations Unies, rapport du rapporteur spécial sur le droit de réunion pacifique et la liberté d'association, 14 septembre 2016, doc. A/71/385, par. 56, accessible à l'adresse suivante : https://documents.un.org/doc/undoc/gen/n16/287/17/pdf/n1628717.pdf (dernière visite le 26 septembre 2025).

[165] Nations Unies, Comité des droits de l'homme, « Observation générale nº 37 (2020) sur le droit de réunion pacifique (art. 21) », 17 septembre 2020, doc. CCPR/C/GC/37, par. 6, accessible à l'adresse suivante : https://documents.un.org/api/symbol/access?j=G2023216&t=pdf&i=CCPR/C/GC/37_9403006 (dernière visite le 26 septembre 2025).

[166] Bureau international du Travail, « La liberté syndicale — Compilation des décisions du Comité de la liberté syndicale », 6e éd., 2018, par. 754, accessible à l'adresse suivante : https://www.ilo.org/fr/publications/la-libert%C3%A9-syndicale-compilation-des-d%C3%A9cisions-du-comit%C3%A9-de-la-libert%C3%A9 (dernière visite le 26 septembre 2025).

40. Nous réaffirmons en outre que si le droit à la liberté syndicale, tel que garanti par la convention n° 87, était compris uniquement comme la capacité de promouvoir la création d'organisations, sa portée et son objectif seraient indûment limités en excluant le droit de grève, qui est essentiel à l'exercice effectif de cette liberté[167].

41. Par conséquent, la Colombie invite respectueusement la Cour à reconnaître que le droit de grève, entendu comme une composante intégrante et un corollaire du droit à la liberté syndicale consacré par la convention n° 87, est aussi étroitement lié au droit à la liberté d'expression. Ce lien souligne l'interdépendance des droits fondamentaux essentiels au fonctionnement des sociétés démocratiques.

IV. CONCLUSION

42. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les Membres de la Cour, en conclusion, la Colombie soutient respectueusement que la Cour internationale de Justice est particulièrement bien placée pour contribuer de manière significative au renforcement normatif du système de contrôle de l'OIT, en reconnaissant expressément le droit de grève comme un corollaire de la liberté syndicale, tel qu'interprété de manière constante par les organes de contrôle tripartites de l'Organisation depuis 1948 et qui reflète une conception bien établie et largement acceptée au sein du monde du travail international.

43. Les grèves, ou similaires, constituent l'un des principaux moyens par lesquels les travailleurs peuvent trouver un levier de négociation pour défendre leurs intérêts. Sans ce droit, les organisations sont en réalité impuissantes à contraindre les employeurs à engager efficacement des discussions ou à négocier.

44. Loin d'être un phénomène anormal qu'il faut purger ou restreindre à tout prix, la grève est un droit indiscutablement lié au respect des droits humains et des libertés fondamentales, notamment la liberté syndicale, dont l'exercice permet la participation équitable des travailleurs à la réalisation d'un niveau de vie plus élevé, du plein emploi et de conditions de progrès et de développement économiques et sociaux.

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[167] Exposé écrit de la Colombie, par. 3.65.

45. À la lumière de ces considérations et des raisons avancées dans sa déclaration écrite, la Colombie prie respectueusement la Cour de conclure ce qui suit :

i) Il n'existe aucune raison impérieuse de refuser de rendre l'avis consultatif demandé.

ii) Considérant le texte, le contexte, l'objet et le but de la convention n° 87, la pratique ultérieure constante des États parties et même les moyens complémentaires d'interprétation, la convention n° 87 protège le droit de grève.

iii) La convention n° 87 sur la liberté syndicale et la protection du droit syndical est, sans aucun doute, un instrument fondamental qui garantit et protège le droit de grève en tant que corollaire du droit fondamental à la liberté syndicale.

46. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les juges, je vous remercie de votre attention. Ceci conclut l'exposé oral de la République de Colombie.

The PRESIDENT: I thank the representative of Colombia for his presentation. This concludes this afternoon's sitting. The oral proceedings will resume tomorrow at 10.30 a.m., in order for Brazil, Spain and Indonesia to be heard on the question submitted to the Court.

The sitting is closed.

The Court rose at 5.35 p.m.

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