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**International Court  
of Justice**

**THE HAGUE**

**Cour internationale  
de Justice**

**LA HAYE**

**YEAR 2025**

*Public sitting*

*held on Wednesday 8 October 2025, at 10 a.m., at the Peace Palace,*

*President Iwasawa presiding,*

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

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**VERBATIM RECORD**

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**ANNÉE 2025**

*Audience publique*

*tenue le mercredi 8 octobre 2025, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Iwasawa, président,*

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

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**COMPTE RENDU**

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

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*Présents* : M. Iwasawa, président  
M<sup>me</sup> Sebutinde, vice-présidente  
MM. Tomka  
Abraham  
M<sup>me</sup> Xue  
MM. Bhandari  
Nolte  
M<sup>me</sup> Charlesworth  
MM. Brant  
Gómez Robledo  
M<sup>me</sup> Cleveland  
MM. Aurescu  
Tladi  
Hmoud, juges  
  
M. Gautier, greffier

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

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

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

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

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

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

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

***The Government of the Swiss Confederation is represented by:***

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***The Government of the Republic of Vanuatu is represented by:***

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S. Exc. M<sup>me</sup> Alejandra de Bellis, ambassadrice, représentante permanente de la République orientale de l'Uruguay auprès de l'Organisation des Nations Unies,

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

M<sup>me</sup> Rossina Álvarez González, assistante, ambassade de la République orientale de l'Uruguay au Royaume des Pays-Bas.

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

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M<sup>me</sup> Murielle Metsan Meltenoven, commissaire au travail,

M<sup>me</sup> Florence Williams Samuel, *Solicitor General*,

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

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***The International Cooperative Alliance is represented by:***

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

***Business Africa is represented by:***

Mr Kaizer Moyane, Special Adviser, Business Africa,

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

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

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M. Kaizer Moyane, conseiller spécial, Business Africa,

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

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

The Court meets this morning to hear the oral statements of Uruguay, Somalia, Switzerland, Vanuatu, the International Cooperative Alliance and Business Africa. I recall that each of the delegations has 30 minutes at its disposal for its presentation. The Court will observe a short break after Switzerland.

I shall now give the floor to His Excellency Ambassador Álvaro González Otero, speaking on behalf of Uruguay. Sir, you have the floor.

Mr GONZÁLEZ OTERO:

### I. INTRODUCTION

1. Mr President, distinguished Members of the Court, it is an honour to appear before you today on behalf of the Oriental Republic of Uruguay as Ambassador to the Kingdom of the Netherlands.

2. This is the second time that Uruguay appears before this Court in an advisory opinion procedure, a fact that underlines the importance we attach to the advisory function of this tribunal.

3. My country has closely followed the development of these proceedings from their inception, fully aware of the importance of the legal issues raised for the international community and for the interpretation of one of the core instruments of the International Labour Organization. In light of the far-reaching implications that this advisory procedure may have for the international legal order and for the credibility of the multilateral system, Uruguay considered it essential to join the deliberations of this Court at this final stage, so as to share its long-standing experience and commitment to the protection of labour rights, freedom of association and the central role of the International Labour Organization within the United Nations system.

4. I have the honour of introducing the delegation representing Uruguay. With me is Ambassador Alejandra de Bellis, Permanent Representative of Uruguay to the United Nations and Specialized Agencies in Geneva; and we are also accompanied by Ms Rossina Álvarez, an assistant from the Embassy. Thank you.

The PRESIDENT: I thank His Excellency Ambassador González Otero for his presentation. I now call upon Her Excellency Ambassador Alejandra de Bellis to take the floor. Madam, you have the floor.

Ms DE BELLIS:

**II. ON THE COURT’S JURISDICTION AND THE ABSENCE OF COMPELLING REASONS TO DECLINE TO RENDER AN OPINION**

1. Mr President, distinguished Members of the Court, the Court has consistently affirmed that it enjoys discretion in deciding whether to render an advisory opinion, even when jurisdictional requirements are met. This discretion, however, must be exercised only in the presence of “compelling reasons” not to respond.

2. Uruguay respectfully submits that no compelling reasons exist that would justify the Court declining to exercise its jurisdiction in the present case.

3. First, the request was submitted by the International Labour Organization, a specialized agency of the United Nations empowered to seek advisory opinions pursuant to Article 96 (2) of the Charter and Article 65 of the Statute of the Court. There is no doubt as to the competence of the requesting body or the admissibility of the question.

4. Second, the question posed is legal in nature. It concerns the interpretation of a multilateral treaty — Convention No. 87 — ratified by 155 ILO Members. The Court’s jurisprudence, from the *Western Sahara* Advisory Opinion (1975) to the *Chagos Archipelago* Opinion (2019), confirms that politically sensitive questions can still be of a legal nature and admissible.

5. Third, the institutional autonomy of the ILO is not compromised by this request. Rather, the ILO’s own Governing Body has, by majority, chosen to refer this matter to the Court.

6. Fourth, the suggestion that the issue is better resolved through ILO internal mechanisms (Article 37 (2) of the ILO Constitution) ignores the deadlock that has characterized those mechanisms in recent years. Diverging views between workers’ and employers’ groups on the scope of Convention No. 87 have reached an impasse. The Court is thus uniquely positioned to provide clarity.

7. Fifth, the Court's advisory function exists precisely to assist United Nations organs and specialized agencies when legal clarity is needed. Rendering an opinion in this case would advance the object and purpose of the ILO Constitution, particularly Articles 1 and 19, which emphasize legal certainty and coherence in international labour standards.

8. Finally, Uruguay is convinced that a favourable opinion by this Court would not only reaffirm the authority of the International Labour Organization, but also bring to an end the long-standing debates that have divided its supervisory system for decades. Such an authoritative pronouncement would dispel uncertainty, close this chapter of controversy and provide the clarity required for the effective and coherent functioning of the multilateral system.

### **III. ON THE INTERPRETATION OF ILO CONVENTION NO. 87**

9. On the interpretation of the ILO Convention No. 87, Mr President, Members of the Court, Uruguay considers it appropriate to centre its submissions around three key dimensions of the issue before the Court.

10. First, the effects that a reaffirmation of the ILO's long-standing position may have for the future of the multilateral system. Second, the extent to which such a clarification will ensure the fulfilment of the basic objectives of the International Labour Organization. And third, the protection of the fundamental right to freedom of association, of which the right to strike is an essential expression.

11. The Government of the Oriental Republic of Uruguay fully shares the view that social dialogue and the search for tripartite consensus are absolutely essential in the field of labour relations at all levels.

12. However, Uruguay recalls that such a mechanism has already taken place in the international sphere since 2012. Despite the good faith and commitment of all constituents, it was not possible to reach an agreement, thereby leaving open the avenue of Article 37 (1) of the ILO Constitution.

13. Uruguay shares and supports the legal interpretation that the right to strike is protected under Convention No. 87, as an essential component of the right to freedom of association and stands here to further develop this interpretation and its arguments.

14. This interpretation has been consistently affirmed by the ILO's supervisory bodies, in particular the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR). While their opinions are not legally binding in a judicial sense, Uruguay considers their interpretative guidance to carry considerable legal and institutional weight, especially given the long-standing and consistent nature of their position over several decades.

15. The right to strike, in our view, is not merely an ancillary element, but rather an intrinsic expression of the rights recognized in Articles 3, 8 and 10 of Convention No. 87, which guarantee the autonomy of workers' organizations to organize their activities and formulate their programmes, and the right to organize actions to promote and defend the workers' interests.

16. In particular, Article 3 (1) affirms that workers' organizations shall have the right to organize their activities and to formulate their programmes, and Article 8 (1) provides that in exercising the rights provided for in the Convention, workers' organizations shall respect the national law. The ILO supervisory bodies have long interpreted this to include strike action as a legitimate means to defend occupational interests.

17. Uruguay submits that the correct approach to the interpretation of Convention No. 87 must be teleological, in line with Article 31 (1) of the Vienna Convention on the Law of Treaties. That provision requires that treaties be interpreted in good faith, in accordance with the ordinary meaning of their terms, in their context and in the light of their object and purpose.

18. Applied to Convention No. 87, the principle of good faith entails that the freedom of association cannot be understood in a purely formal or minimalist sense. To interpret this freedom in a way that would exclude the right to strike would deprive workers' organizations of their most essential tool to defend and promote their interests. Such a restrictive reading would not reflect good faith interpretation, but rather a mechanical literalism that empties the treaty of its practical meaning. Good faith requires that the Convention be read in a way that makes its protections effective in the real world of labour relations.

19. Moreover, good faith interpretation cannot be separated from the object and purpose of Convention No. 87, which is to ensure the genuine and effective exercise of freedom of association for workers and employers. The *travaux préparatoires* confirm that the drafters intended to enshrine

a broad and flexible protection, leaving space for the natural development of trade union freedoms, including strike action. Thus, Uruguay respectfully submits that the principle of good faith, as codified in Article 31 of the Vienna Convention, requires this Court to recognize the right to strike as both a right in itself and a corollary that gives real force to the freedom of association protected under Convention No. 87. Only such an interpretation ensures the effectiveness of the treaty and maintains the coherence of the international legal system.

20. The object and purpose of Convention No. 87 is to secure the effective enjoyment of freedom of association for workers and employers alike. Within this framework, the right to strike emerges not as an extraneous addition, but as an inherent element of freedom of association. It is the natural corollary of the autonomy of workers' organizations to formulate their programmes and organize their activities.

21. Uruguay wishes to emphasize the systemic and indivisible nature of freedom of association under Convention No. 87. There exists a natural and almost automatic dynamic between organization, collective bargaining and strike action, to the point that any attempt to artificially separate these elements distorts their very essence. Trade union organization, collective negotiation of working conditions and the right to strike are inseparable expressions of freedom of association. The absence of any of these components undermines the others; together, they form an integrated whole.

22. In this sense, the right to freedom of association is not exhausted by the possibility of creating and affiliating to unions, drafting statutes or administering organizations. Above all, it implies the right to exercise trade union activity in its broadest sense, as enshrined in Article 3 of Convention No. 87. While it is not possible to determine exhaustively all activities that fall within this scope, it is difficult to conceive that the right to strike — the most singular and distinctive instrument available to workers — would not be included.

23. The strike, as a right that allows the suspension of the employment contract without sanction by the employer, requires a robust legal recognition. Such recognition can only be achieved by acknowledging its intrinsic link to freedom of association. For that reason, the omission of the word "strike" in the text of Convention No. 87 does not exclude it, but rather confirms that the general notion of "trade union activity" is sufficiently broad to encompass it.

24. Moreover, under Article 31 (3) (b) of the Vienna Convention on the Law of Treaties, subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation must be taken into account. The consistent practice of States, as well as the interpretative guidance of ILO supervisory bodies over more than six decades, confirms that the right to strike is firmly understood as part of the freedom of association protected by Convention No. 87.

25. With regard to the importance of the matter at the level of fundamental rights, Uruguay wishes to emphasize that the dual character of the right to strike is its connection with freedom of association.

26. First, it is a right in itself, as the full exercise and natural corollary of freedom of association — no other foundation could sustain it.

27. Second, it is a right that guarantees the effectiveness of other rights, for it operates as the essential source of effectiveness of freedom of association. Without the possibility of strike action, the right to organize would remain largely theoretical, lacking the force necessary to protect the interests of workers in practice.

28. The long and fruitful work of the International Labour Organization in the development of international labour standards would be incomplete if those norms lacked effective mechanisms for their realization. As in any field of law, rights require instruments to make them operational. In labour relations, such instruments may be heteronomous, through laws, decrees or regulations, but they may also be autonomous, arising from the initiative of workers themselves. The strike, exercised through their representative organizations, is the foremost autonomous mechanism for ensuring compliance with labour rights.

29. This powerful legal instrument, recognized by international labour law, finds its justification in the structural inequality that characterizes the employment relationship. The worker, by definition, must submit to the authority and direction of the employer within a régime of legal subordination. In such a context, strike action is the indispensable counterweight that enables workers collectively to defend their interests and to ensure respect of their rights.

30. As some of the most distinguished contemporary labour law jurists have pointed out, it is only through the right to freedom of association — and the equalizing opportunity it provides — that

the subordination of one person to another in the employment relationship can be considered acceptable within a framework of justice and human dignity.

31. Uruguay's own constitutional and legal framework reflects a unique feature: while the right to strike is explicitly recognized in Article 57 of our Constitution, its exercise remains subject to only minimal statutory regulation. This deliberate choice has left a wide normative space in which international standards, and in particular ILO Convention No. 87, serve as the fundamental point of reference for both the organization and activities of trade unions and for the legitimacy of strike action. Its exercise continues to be subject to regulation by law or collective agreement.

32. In this regard, Convention No. 87 has operated as the primary legal axis shaping the conduct of labour relations in Uruguay. Our judiciary and social partners consistently rely upon it to assess the scope and permissible limits of collective action. This practice illustrates how the Convention functions not only as an international obligation but also as a domestic normative compass for trade union freedoms, including criteria for determining the maintenance of essential services during the strike.

33. The Inter-American human rights framework, to which Uruguay is a party, also reinforces this perspective. The Protocol of San Salvador (Article 8) protects trade union rights.

34. Furthermore, Uruguay also recalls Advisory Opinion No. 27, delivered by the Inter-American Court of Human Rights in 2021, at the request of the Inter-American Commission on Human Rights, who asked the Court to clarify the scope of States' obligations under the American Convention on Human Rights in relation to freedom of association, the right to collective bargaining and the right to strike, and to explain their interrelationship with other rights such as freedom of expression, freedom of assembly, and the right to work and to just, equitable and satisfactory working conditions, with a gender perspective.

35. In its response, the Inter-American Court affirmed that the right to strike is not an accessory, but an essential component of freedom of association, inseparable from the autonomy of workers' organizations to pursue their objectives. It further emphasized that any restrictions must be strictly limited, meeting requirements of legality, necessity, proportionality and legitimacy in a democratic society. The authoritative pronouncement demonstrates that strike action operates both

as a right itself and as a necessary corollary that gives real and practical effect to the freedom of association.

36. Finally, the right to strike, while universally recognized as a cornerstone of labour law, has never been the subject of a separate international treaty nor of any codification project at the global level. This absence does not reflect a normative vacuum, but rather the widespread understanding that the right to strike is necessarily encompassed within the guarantees of freedom of association enshrined in Convention No. 87 and, thus, confirms our reasoning.

37. Therefore, and in the light of all the foregoing, Uruguay respectfully submits that the right to strike is not an external addition to Convention No. 87, but a core element of the freedom of association it enshrines. A contrary interpretation would render the protections under the Convention incomplete and ineffective, and would weaken a pillar of the international labour legal system.

#### IV. CONCLUSIONS

38. In conclusion, Mr President, Members of the Court, Uruguay respectfully submits that the right to strike is inseparable from the right to freedom of association. It is at once a right in itself and an essential guarantee that gives genuine strength and effectiveness to trade union freedoms.

39. The rights to organize unions to bargain collectively and to declare strikes are not isolated entitlements, but complementary expressions of a single legal source: freedom of association, as recognized in Article 3 of ILO Convention No. 87. The object and purpose of that Convention, in light of Article 31 (1) of the Vienna Convention on the Law of Treaties, can only be fulfilled if the right to strike is understood as inherent within it.

40. A pronouncement by this Court that reaffirms the long-standing interpretation of the ILO supervisory system would bring clarity to decades of debate, ensuring legal certainty and reinforcing the credibility of the multilateral system of labour standards. It would also recognize the subsequent practice of States, including Uruguay, that has consistently treated strike action as part of the freedom of association protected by Convention No. 87.

41. Mr President, Members of the Court, Uruguay therefore invites this Court to confirm that the right to strike is not external to Convention No. 87, but forms part of its very essence, giving practical meaning and effectiveness to the fundamental right to freedom of association.

42. It is our understanding that, at the end of the first quarter of the twenty-first century, these human rights should be fully recognized and enforced in line also with Sustainable Development Goal (SDG) 8 on sustainable economic growth, full and productive employment, and decent work for all.

43. This concludes Uruguay's oral submissions before this Court. We thank you for your attention. Thank you.

The PRESIDENT: I thank the representatives of Uruguay for their presentation. I now invite the next participating delegation, Somalia, to take the floor and I call Her Excellency Ambassador Khadija Ossoble Ali to the podium.

Ms OSSOBLE ALI:

### **1. OPENING STATEMENT**

1. *Bismillah al-Rahman al-Rahim*. Mr President, honourable Members of the Court, good morning. It is an honour to appear before you on behalf of the Federal Republic of Somalia.

2. Somalia welcomes the Governing Body of the ILO's decision to request this advisory opinion on whether the right to strike is protected under Convention No. 87 on Freedom of Association and Protection of the Right to Organise.

3. The question before the Court is both simple and fundamental. It is simple because it asks, in binary terms, whether Convention No. 87 protects the right to strike. It is fundamental because the answer will determine the stability and credibility of the ILO's supervisory system — a system that has guided States for decades in applying international labour standards.

4. On the merits, Somalia's position is very clear: the right to strike is a fundamental element of freedom of association and is protected under Convention No. 87. At the time of Somalia's ratification of the Convention, Somali legislators acted on the belief that the right to strike was an integral and indispensable part of freedom of association. The preparatory work for the adoption of the Convention did not reveal a contrary view, which further confirms that the right to strike is firmly anchored in the spirit and the purpose of this instrument. Without it, freedom of association is

hollow — workers' organizations would be free to exist in letter but denied the meaningful tool required to defend their members' interests.

5. Upholding the right to strike also preserves the authority of the ILO's supervisory system. For decades, its supervisory bodies have affirmed that Convention No. 87 protects this right. To deny it now would not only unsettle the expectations of States, workers and employers who have relied on that consistent practice, but also erode the credibility of the ILO's unique supervisory architecture.

6. The international recognition of the right to strike is mirrored in Somalia's own constitutional framework. Article 24 of our Constitution explicitly guarantees every worker the right to strike. This aligns Somalia with the long-standing position of ILO supervisory bodies.

7. Since ratifying Convention No. 87 in 2014, Somalia has worked with the ILO to align domestic law with international standards. Earlier this year, Somalia adopted a new Labour Code, the first major modernization of Somalia's labour legislation in more than five decades. In undertaking this reform, Somalia took guidance from the ILO to ensure that the new Labour Code conforms with international labour conventions and recommendations. Indeed, in accordance with Convention No. 87, this law expressly safeguards the right to strike and provides for its effective enforcement in practice. By harmonizing our international obligations with domestic law, Somalia has ensured that the right to strike is protected through clear and enforceable legal provisions.

8. Importantly, the right to strike in Somalia is not confined to paper guarantees. It is fully recognized, respected and exercised in practice. Somali workers are empowered to use this right lawfully in defence of their economic and social interests. This demonstrates Somalia's strong commitment to giving life to both its international obligations and its constitutional promises.

9. Somalia's experience has taught us that durable peace and sustainable development depend on effective labour institutions. Freedom of association, including the right to strike, is indispensable to balancing the interests of workers and employers, preventing disputes from escalating, and fostering fair and stable industrial relations.

10. Somalia, therefore, respectfully requests the Court to confirm in its advisory opinion that Convention No. 87 protects the right to strike as an integral component of freedom of association.

11. This concludes my remarks. I thank the Court for its kind attention and request, Mr President, that you please invite Mr Guled Yusuf to address the Court. Thank you very much.

The PRESIDENT: I thank Her Excellency Ambassador Ossoble Ali for her presentation. I now call upon Mr Guled Yusuf to take the floor.

Mr YUSUF:

## **2. LEGAL SUBMISSIONS IN RESPECT OF THE RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87**

### **I. Introduction**

1. Mr President, honourable Members of the Court, it is a privilege to appear before you, for a variety of reasons, on behalf of the Federal Republic of Somalia in these proceedings.

2. The preamble to the Constitution of the ILO sets out the aims of the Organization. Formed after the First World War to advance social justice, the ILO's core objective — stated in the second paragraph — is the improvement of labour conditions, whose neglect had produced such unrest that “the peace and harmony of the world [were] imperilled”<sup>1</sup>. Put simply, the ILO exists to set standards that promote workers' rights and thereby advance social justice.

3. Since 1919, the ILO has recognized that the improvement of labour conditions requires the effective recognition of freedom of association<sup>2</sup>. To that end, in 1948, it adopted Convention No. 87 on Freedom of Association and Protection of the Right to Organise — one of the Organization's eight “fundamental” Conventions<sup>3</sup> — which its supervisory bodies have consistently read as protecting the right to strike.

4. In this context, I will address the Court on three matters:

- (a) *First*, that the starting-point should be the conclusive interpretations of the Committee of Experts;
- (b) *Second*, that, as a matter of treaty interpretation, the right to strike is protected under the Convention; and
- (c) *Third*, a brief reply to the arguments advanced by a minority who dispute the existence of such a right.

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<sup>1</sup> International Labour Organization Constitution of 1919, preamble.

<sup>2</sup> *Ibid.*

<sup>3</sup> International Labour Organization, *Rules of the Game: An introduction to the standards-related work of the International Labour Organization*, Centenary edition (Geneva, ILO, 2019), p. 18.

## II. Preliminary issues

5. Before turning to the substance of the question, two preliminary points on the Court's role in these advisory proceedings must be addressed.

6. I do not propose to address the Court on matters of jurisdiction. There is overwhelming consensus that the Court does have jurisdiction to give the advisory opinion requested.

7. However, in my first preliminary submission, I wish to address a further issue that has arisen as a result of events leading to this request. On 24 October 2023, the International Organisation of Employers told the ILO Director-General that an advisory opinion would not resolve the dispute over the right to strike because there exists "uncertainty regarding a binding effect of ICJ advisory opinions for the ILO and its constituents"<sup>4</sup>.

8. The International Organisation of Employers did not maintain that position in their written submissions to seek to dissuade the Court from exercising its discretion. Even so, Somalia submits that the Court should address the matter, not least because, in the Committee of the Whole at the 349th Session of the Governing Body, the employers' group stated that "they would not accept any advisory opinion of the ICJ, irrespective of its content"<sup>5</sup>.

9. As a general matter, advisory opinions are, of course, non-binding and do not constitute "decisions" within the meaning of Article 94 (1) of the United Nations Charter and Article 59 of the Statute of this Court. The Court said as much early on in *Interpretation of Peace Treaties*<sup>6</sup>.

10. Yet in *Interpretation of Peace Treaties*, the Court also drew a distinction between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court<sup>7</sup>.

11. Here, Article 37 (1) of the ILO Constitution provides that "[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the

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<sup>4</sup> IOE, *Comments to the background report prepared by the Office titled "Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference"*, dated 24 October 2023 (ILO Dossier, Document No. 25), p. 5.

<sup>5</sup> Draft Minutes of the 349th bis (Special) Session of the Governing Body, November 2023 (ILO Dossier, Document No. 31), paras. 70-71.

<sup>6</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

<sup>7</sup> *Ibid.*

International Court of Justice”. In other words, the Organization thereby gives the Court’s answer a final and determinative effect, whatever the view of the employers’ organization may be. This is not dissimilar to other international treaties that provide similar effect to this Court’s advisory opinions, including, for instance, Article 30 of the Convention on the Privileges and Immunities of the United Nations.

12. The ILO has itself noted that, for more than a century, all tripartite constituents — employers included — have accepted the binding legal effect of advisory opinions given at the ILO’s request<sup>8</sup>. If it were correct that, despite the express reference to a “decision” in Article 37 (1), the opinions of this Court were not binding, then the provision’s role as a dispute-settlement mechanism would be meaningless and without effect.

13. The Court has not previously ruled on whether an advisory opinion can be treated as a “decision”. Given the employers’ position, Somalia submits that it is necessary for the Court to specify this time, that when an organization’s constitutional instrument expressly refers a question to the Court for a “decision”, the organization itself accepts in advance that the Court’s advisory opinion will be determinative within its institutional framework.

14. My second preliminary submission concerns the scope of the answer that the Court may properly give to the question posed to it.

15. Apart from legal submissions, the International Organisation of Employers has sought to draw the Court’s attention to certain “wider implications”<sup>9</sup>. The purpose of these observations was never articulated in their written submissions and remains untethered to any principle of law. Nevertheless, it bears noting that the International Organisation of Employers has posited that, “[i]f the Court decided that [Convention No. 87] protected the right to strike, the majority — if not all — State parties to [Convention No. 87] would be found in violation of the Convention under the [Committee of Expert’s] guidance of the right to strike”<sup>10</sup>.

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<sup>8</sup> International Labour Organization, *Note concerning the binding legal effect of ICJ advisory opinions*, September 2023 (ILO Dossier, Document No. 20), para. 9.

<sup>9</sup> See Written Statement of the International Organisation of Employers, Section VI; Written Comments of the International Organisation of Employers, Section V.

<sup>10</sup> Written Statement of the International Organisation of Employers, para. 301.

16. That submission is plainly without merit. The role of the Court in these proceedings is to answer a narrow and specific question. By answering that question in the affirmative, the Court would not be recognizing the right to strike as an absolute right, for it is not<sup>11</sup>. Any right recognized by the Court would exist only within the terms of the Convention and remain subject to the limitation in Article 8 (1), which requires all rights under the Convention to be exercised in conformity with the law of the land. Thus, any limitations on such a right remain a matter of municipal law. What such limitations may be requires an analysis of national law — an issue not before this Court.

### **III. Consideration of the views of the Committee of Experts**

17. Turning then to the substance of the question before this Court. The question before the Court is narrow and binary: whether the Convention recognizes the existence of a right to strike. The Court has not been asked to define the scope or modalities of its exercise under national law. It is not concerned with the permissible limits, conditions or implementation of that right. In short, these proceedings concern its existence, not its extent or regulation.

18. Somalia, with the vast majority of participants, submits that the right to strike is a fundamental corollary of freedom of association and, therefore, protected under Article 3 of the Convention.

19. By way of background, it is important to reiterate that, although the question has come before this Court for a final determination, the issue itself is not novel.

20. Since 1959, the Committee of Experts on the Application of Conventions and Recommendations has noted that a prohibition on the right to strike may run counter to the Convention<sup>12</sup>. In the General Survey of 2012, the Committee squarely addressed the question before this Court and concluded — by reference to the Vienna Convention on the Law of Treaties — that “the absence of a concrete provision [on the right to strike] is not dispositive” and “the right to strike derives from [Convention No. 87]”<sup>13</sup>.

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<sup>11</sup> See e.g. ILO, *Compilation of decisions of the Committee on Freedom of Association*, sixth edition, 2018 (ILO Dossier, Document No. 282), pp. 143-182 (Chapter 10).

<sup>12</sup> ILC, 43rd Session, 1959, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part IV), pp. 101-29, para. 68.

<sup>13</sup> ILC, 101st Session, 2012, *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, Report III (Part 1B), paras. 117-119.

21. It is well established that for over 70 years the Committee of Experts has treated the right to strike as a corollary of freedom of association and, therefore, as recognized and protected by Convention No. 87<sup>14</sup>. The question for the Court is what weight should properly be given to those long-standing and consistent views.

22. Somalia does not suggest that the Committee exercises a judicial function. The Committee itself acknowledges that its opinions and recommendations “are non-binding, being intended to guide the actions of national authorities”<sup>15</sup>. As noted earlier, only this Court can give an authoritative interpretation.

23. Still, that does not render the Committee’s work irrelevant. The Court’s jurisprudence demonstrates that the views of specialized, independent bodies provide a valid and persuasive starting-point for resolving questions before it.

24. The Committee comprises 20 independent high-level jurists — judges, professors and other legal experts — that are appointed by the ILO’s Governing Body<sup>16</sup>. Its role is to provide an impartial, technical analysis of how labour conventions are applied by Member States. Its mandate, endorsed by all tripartite constituents, is clear: it “must determine the legal scope, content and meaning of the provisions of the Conventions” — that is, to interpret them.

25. The Court has given great weight to the interpretative practice of such specialist bodies. That principle was established in *Diallo*<sup>17</sup> and reaffirmed in the *Application of the CERD*<sup>18</sup>. Explaining the rationale of this approach, the Court stated that “[t]he point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled”<sup>19</sup>. That logic applies in the present case.

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<sup>14</sup> See Written Statement of the International Organisation of Employers, para. 85.

<sup>15</sup> ILC, 103rd Session, 2014, Report III (Part 1A), *Report of the Committee of Experts on the Application of Conventions and Recommendations* (ILO Dossier, Document No. 105), para. 31.

<sup>16</sup> International Labour Organization, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact* (ILO Dossier, Document No. 68), 2003, p. 7.

<sup>17</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66.

<sup>18</sup> *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.

<sup>19</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66.

26. Of course, the Court is not required to follow the Committee's interpretations<sup>20</sup>. However, as Members of this Court have observed in individual opinions, experts serving on such bodies may be considered to "fall into the category of the 'most highly qualified publicists' in this field"<sup>21</sup>. Accordingly, their views fall within Article 38 (1) (d) of the Statute and must inform the Court's consideration of the questions before it.

27. This approach is also reflected in the practice of regional courts. The European Court of Human Rights, for example, has taken account of the position of the ILO supervisory mechanism on the right to strike as an element of international law for the purpose of "defining the meaning of terms and notions in the text" of the Convention<sup>22</sup>. On that basis, the European Court of Human Rights had no hesitation in determining that a right to strike indisputably exists under the Convention<sup>23</sup>.

28. In short, when a specialized expert body within a treaty's structure consistently interprets the instrument it supervises, such interpretations form persuasive evidence of the treaty's ordinary meaning. The Court should depart from the Committee's long-standing view only for compelling reasons. None exist in our view. The Committee's interpretation aligns fully with the Convention's meaning under customary rules of treaty interpretation.

#### **IV. Interpretation of Convention No. 87 pursuant to the customary rules of treaty interpretation**

29. There is broad agreement that the question before the Court is one of treaty interpretation under the customary rules reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

30. The question must, therefore, be answered by applying those well-established general rules of interpretation.

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<sup>20</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66; *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.

<sup>21</sup> *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*, diss. op. Judge Bhandari, p. 142, para. 22.

<sup>22</sup> *Demir and Baykara v. Turkey*, ECtHR, Judgment, 12 November 2008, para. 85.

<sup>23</sup> *Enerji Yapi-Yol Sen v. Turkey*, ECtHR, Judgment, 21 April 2009, para. 24.

31. For decades, Article 31 has been applied holistically. The ILC Commentaries describe interpretation as a “single combined operation” in which wording, context, and object and purpose are “thrown into a crucible”<sup>24</sup>.

32. This holistic approach is particularly apt in the case of treaties such as Convention No. 87, which protect human rights, such as the right to freedom of association. The Study Group of the International Law Commission on the Fragmentation of International Law observed that, in respect of human rights treaties, interpretation tends to seek their *effet utile* in a context “perhaps wider than for regular treaties”<sup>25</sup>.

33. This is consistent with the Court’s own practice in the interpretation of human rights and humanitarian instruments. In the *Namibia* Advisory Opinion, the Court recognized the need to account for the evolutionary nature of broad concepts — such as “sacred trust” — and to interpret them in light of present conditions and purposes<sup>26</sup>. Similarly, in the *Wall* Advisory Opinion, when interpreting the ICCPR, the Court considered the broader object and purpose of human rights law in occupied territories<sup>27</sup>. Those principles apply with equal force here: in interpreting the right to freedom of association, the Court must ensure that it is effectively protected, beyond a strict textual or originalist reading.

34. The starting-point of this approach remains, however, the ordinary meaning of the terms of the treaty, informed by their context, with the entire text being given effect by reference to its object and purpose.

35. In that respect, Article 3 (1) must be read together with Articles 2 and 10.

36. The plain language of Article 3 (1) provides for the protection of the workers’ freedom “to organise their . . . activities”. The ordinary meaning of “activities” is broad. The only limit appears in Articles 8 and 9. Article 8 provides that, in exercising rights provided by the Convention, those concerned “shall respect the law of the land”, but such a law “shall not be such as to impair . . . the

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<sup>24</sup> ILC, *Draft Articles on the Law of Treaties with commentaries*, *YILC*, 1966, Vol II, pp. 219-220.

<sup>25</sup> ILC Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, UN Doc A/CN.4/L.682, para. 428.

<sup>26</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports* 1971, p. 31, para. 53.

<sup>27</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports* 2004 (I), p. 179, para. 109.

guarantees provided” in the Convention. Article 9 prescribes that national law determines the extent to which the guarantees provided by the Convention “apply to the armed forces and the police”.

37. Thus, Article 3 grants a right to organize activities without qualification. It is accepted by participants in these proceedings that the term “activities” of workers’ organizations is of broad import and includes the right to strike. Nothing in the text limits it to administrative or organizational acts. In the ordinary English and French usage, it encompasses collective industrial action. This reading is reinforced by Article 10, which defines an “organisation” under the Convention as one “for furthering and defending the interests of workers”. A workers’ “organisation”, as contemplated in Article 10, would lose all meaning, or its *effet utile*, if the right to strike were not protected.

38. Read together, Articles 2, 3 and 10 form a coherent sequence: the right to form organizations (in Article 2), to conduct their activities (in Article 3) and to defend workers’ interests (in Article 10). Each provision builds on the next. None can operate effectively without the possibility of collective action, including the right to strike.

39. This interpretation is further supported by the Convention’s object and purpose. As I explained at the outset, the ILO Constitution seeks to improve labour conditions by recognizing freedom of association. The freedom of association is not, as the minority of participants in these proceedings contend, an isolated and self-contained right detached from the realities of industrial relations. Freedom of association in labour relations is inherently functional; it exists to secure collective leverage, not abstract membership. The fact that the right to strike is an inherent component of such a freedom has been confirmed by expert bodies charged with the interpretation of multilateral human rights treaties, such as the ICCPR<sup>28</sup>; as well as regional bodies, including the European Court of Human Rights<sup>29</sup> and the Inter-American Court<sup>30</sup>.

40. Once the freedom of association is properly understood, it follows that the right to strike is within the object and purpose of the Convention. The title — “Freedom of Association and the

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<sup>28</sup> See e.g. HRC, CCPR/C/EST/CO/4 (2019), Concluding observations on the fourth periodic report of Estonia (ILO Dossier, Document No. 305), paras. 31-32.

<sup>29</sup> *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, ECtHR, Judgment (2014), para. 27.

<sup>30</sup> Advisory Opinion OC-27/21, Right to freedom of association, right to collective bargaining and right to strike, and their relation to other rights, with a gender perspective, IACtHR, (2021) (ILO Dossier, Document No. 323), paras. 95-105.

Protection of the Right to Organise” — and the preamble’s reaffirmation of that freedom to improve labour conditions<sup>31</sup>, confirm that the Convention protects activities aimed at that improvement, including strikes where necessary.

41. This inherent link between the right to strike and the freedom of association as protected by the Convention is confirmed by two further elements:

(a) *First*, the subsequent practice of States, which the Court must take into account pursuant to Article 31 (3) (b) of the Vienna Convention.

(b) *Second*, the applicable rules of international law, such as universal and regional human rights instruments, which the Court can take into account pursuant to Article 31 (3) (c) of the Vienna Convention.

42. These elements have been canvassed in detail in the written submissions before this Court and other States will have addressed them this week, so, you will be happy to hear, no doubt, I do not propose to rehearse them here. It suffices to say that taken together, the text, structure, object, purpose and consistent practice leave no interpretative gap and all point to a single conclusion: Convention No. 87 recognizes and protects the right to strike as an integral part of the freedom of association.

#### **V. Rebuttal to submissions opposing the existence of a right to strike**

43. I turn, briefly, to the minority’s objections. They make two points:

(a) *First*, the text of the Convention does not specifically mention a right to strike, which they argue excludes it.

(b) *Second*, as the Convention applies equally to workers and employers, the recognition of the right to strike would be inconsistent with the provisions of the Convention as such a right can only be exercised by workers and their organizations, not employers.

44. In my respectful submission, neither argument withstands scrutiny.

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<sup>31</sup> Convention No. 87, preamble.

45. As to the absence of express language protecting the right to strike, this Court and its predecessor have consistently recognized that silence in a treaty does not imply exclusion<sup>32</sup>.

46. Moreover, where it is accepted that the Convention sets out unqualified and broad protections, it would lead to absurdity if only particular enumerated rights were protected. A Convention drafted to guarantee freedom cannot be read as forbidding everything it does not spell out. For instance, ICCPR's Article 19 guarantees the freedom of expression, and it is universally accepted that this protection includes press freedom, even though press freedom is not expressly mentioned.

47. Similarly, the Court in its recent Advisory Opinion on *Obligations of States in respect of Climate Change* concluded that the right to a clean, healthy and sustainable environment is "inherent in the enjoyment of other human rights", including the right to life<sup>33</sup> — proving that fundamental rights derive from purpose, not mere phrasing.

48. As to the argument that Convention No. 87 applies equally to workers and employers, that is a red herring. There is no dispute that the Convention also protects the rights of employers and their organizations. However, those rights are not the issue before the Court in these proceedings.

49. To the extent it is argued that Article 3 provides identical rights to both employers and workers, that too is incorrect. The plain language shows that Article 2 applies "without distinction", but Article 3 protects the distinct rights of two classes — workers' organizations and employers' organizations — respectively. This is made clear by the repeated use of the word "their" in Article 3 (1).

50. In sum, none of the counter-arguments withstand a disciplined treaty interpretation. They mistake silence for exclusion and symmetry for identity. The text, structure and purpose of the Convention all point in one direction: the right to strike exists and always has. Every argument to the contrary asks this Court to rewrite, not interpret, the Convention.

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<sup>32</sup> *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, 43; *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, pp. 494, 497-498, paras. 77, 89-91; *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15*, pp. 18-21.

<sup>33</sup> *Obligations of States in respect of Climate Change, Advisory Opinion of 23 July 2025*, para. 393.

## VI. Concluding remarks

51. Mr President, Members of the Court, to conclude, the Court's advisory opinion presents an opportunity to continue the protection accorded to the foundational principle of the ILO: freedom of association.

52. The right to strike is not an abstraction. It is a practical means by which workers pursue better conditions on equal footing. Its consistent affirmation over the decades has empowered workers to advance their rights before domestic courts and has provided States with stability in the frameworks they adopt to advance international labour standards. By affirming that the right to strike is protected under Convention No. 87, the Court will reinforce the global consensus on the necessity of collective bargaining as a tool for advancing social justice.

53. Mr President, honourable Members of the Court, this concludes Somalia's submissions.

54. I thank you very much for your attention.

The PRESIDENT: I thank the representatives of Somalia for their presentation. J'invite à présent la délégation de la Suisse à la barre, S. Exc. l'ambassadeur Franz Perrez. Vous avez la parole.

M. PERREZ :

### A. INTRODUCTION

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, c'est un honneur pour moi et ma collègue Valérie Berset Bircher de nous présenter devant vous au nom de la Confédération suisse.

2. La question de la protection du droit de grève au titre de la convention n° 87 est débattue depuis plus de 30 ans au sein de l'Organisation internationale du Travail. Elle constitue un enjeu fondamental qui concerne l'ensemble des mandants tripartites de l'OIT.

3. Depuis 1989, certains mandants contestent l'interprétation selon laquelle le droit de grève est protégé par la convention n° 87<sup>34</sup>. La controverse s'est progressivement intensifiée pour donner

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<sup>34</sup> Exposé écrit de l'Organisation internationale des employeurs (ci-après, l'« OIE »), Annex C : Table of countries disagreeing with the CEACR's view on the right to strike in ILO Convention 87 ; exposé écrit du Japon, par. 72 et suiv. ; exposé écrit de la Confédération syndicale internationale (ci-après, la « CSI »), par. 4.124 ; exposé écrit de l'Indonésie, par. 13 ; exposé écrit de Business Africa, par. 37 ; observations écrites de l'OIE, par. 27 ; observations écrites du Japon, par. 32 ; observations écrites du Bangladesh, par. 21.

lieu, en 2012, à une crise institutionnelle majeure. Le système de contrôle de l'OIT s'est, pour la première fois, trouvé dans l'impossibilité d'accomplir son travail et de fonctionner<sup>35</sup>.

4. Face à ce blocage, la Suisse a engagé en 2013 un processus de médiation entre partenaires sociaux internationaux qui a porté sur l'interprétation des normes de l'OIT et l'ensemble du système de contrôle de l'organisation.

5. Plus d'une décennie s'est écoulée depuis. En participant à la présente procédure, la Suisse souhaite de nouveau contribuer à permettre à l'OIT et ses mandants de surmonter le problème à l'origine de la demande d'un avis consultatif à votre Cour.

6. Fidèle à son attachement au tripartisme et au dialogue social, la Suisse espère vivement qu'une solution durable soit trouvée afin de préserver un climat de travail serein, constructif et juridiquement sûr au sein du système multilatéral tripartite de l'OIT.

7. Dans son intervention, ma délégation abordera d'abord le sens et la portée de la question posée à la Cour, avant d'analyser l'interprétation de la convention n° 87, notamment au regard de ses but et objet, ainsi que de la pratique ultérieurement suivie. Nous évoquerons ensuite la question de la compétence pour définir les modalités d'exercice du droit de grève.

## **B. SENS ET PORTÉE DE LA QUESTION POSÉE À LA COUR**

8. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, la Suisse, tout comme l'ensemble des parties à cette procédure, considère que la Cour a compétence pour rendre un avis consultatif en réponse à la demande du Conseil d'administration de l'OIT.

9. Je souhaite néanmoins brièvement m'arrêter sur le contenu de la question soumise à la Cour et la manière dont elle doit être interprétée. Une interprétation trop limitée de la question — à savoir uniquement si le droit de grève des travailleurs et de leurs organisations est, ou non, protégé par la convention n° 87 — ne permettrait ni à l'OIT ni à ses mandants de bénéficier de la sécurité juridique nécessaire. Plus précisément, dans le cas où votre juridiction devait considérer que le droit de grève est protégé par la convention n° 87, il serait opportun que votre Cour fournisse des éléments permettant de déterminer les compétences pour définir les modalités du droit de grève.

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<sup>35</sup> CIT, 101<sup>e</sup> session, 2012, « Rapport de la Commission de l'application des normes » [document n° 268], par. 82-236.

10. La question des compétences et modalités d'application est l'un des points de droit véritablement en jeu dans le cadre de la présente procédure.

11. Il ressort en effet des exposés et observations que toutes les parties à la procédure reconnaissent l'existence d'un droit de grève, qu'il soit ou non protégé par la convention n° 87, tout en admettant qu'il ne saurait être absolu<sup>36</sup>. De nombreuses contributions détaillent la manière dont ce droit est exercé, par qui et dans quelles circonstances<sup>37</sup>.

12. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, la question de la protection du droit de grève, et notamment par la convention n° 87, a toujours été liée à d'autres éléments institutionnels du système de contrôle de l'OIT.

13. Ainsi, par exemple, le blocage survenu en 2012 et auquel j'ai fait allusion en introduction, a certes émergé autour de la question du droit de grève et de la convention n° 87, mais il concernait également le fonctionnement des organes de contrôle de l'OIT<sup>38</sup>. Les discussions et les déclarations faisant suite à ce blocage portaient non seulement sur la convention n° 87 et le droit de grève, mais aussi sur les modalités de ce droit, le mandat de la Commission d'experts pour l'application des conventions et recommandations (la « Commission d'experts ») et la nécessité d'améliorer les procédures de contrôle et d'examen des normes<sup>39</sup>.

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<sup>36</sup> CA, 323<sup>e</sup> session, 2015, « L'initiative sur les normes — Appendice I — Résultat de la Réunion tripartite sur la convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948, pour ce qui est du droit de grève ainsi que les modalités et pratiques de l'action de grève au niveau national », GB.323/INS/5/Appendice I [document n° 106], (ci-après, « GB.323/INS/5/Appendice I »), par. 5 ; exposé écrit du Bureau international du Travail (ci-après, le « BIT »), par. 412, et faisant référence aux organes de supervision aux par. 329, 348 et 360 ; exposé écrit de la République française, par. 25 ; exposé écrit de la République fédérale d'Allemagne, par. 35 et suiv. ; exposé écrit de la République de Pologne, par. 2.7. ; exposé écrit de Business Africa, par. 55 ; exposé écrit de l'OIE, par. 7 ; exposé écrit du Canada, par. 9 ; exposé écrit de la Confédération suisse, par. 93 et suiv., et 99 et suiv. ; exposé écrit du Royaume de Norvège, par. 23 ; exposé écrit de la République tunisienne, p. 3 ; exposé écrit de l'Australie, par. 19 ; exposé écrit du Japon, par. 2 ; exposé écrit de la République du Costa Rica, p. 6 ; exposé écrit du Royaume des Pays-Bas, par. 5.20 ; exposé écrit du Belize, p. 2 et suiv. ; observations écrites de l'Australie, par. 41 ; observations écrites de l'OIE, par. 160 ; observations écrites du Japon, par. 45.

<sup>37</sup> Exposé écrit du Belize, p. 2 et suiv. ; exposé écrit du BIT, par. 329 et suiv., et 349 et suiv. ; exposé écrit de Business Africa, par. 39 et suiv. ; exposé écrit du Canada, par. 8 et suiv. ; exposé écrit de la Confédération suisse, par. 85 et suiv. ; exposé écrit des États-Unis d'Amérique, par. 1.5 et suiv. ; exposé écrit des États-Unis du Mexique, par. 20 et suiv. ; exposé écrit de la République d'Indonésie, par. 3 ; exposé écrit de la République du Costa Rica, p. 2 et suiv. ; exposé écrit de la République fédérale d'Allemagne, par. 28 et suiv. ; exposé écrit de la République fédérale de Somalie, p. 1 et suiv. ; exposé écrit de la République italienne, par. 6 et suiv. ; exposé écrit de la République de Pologne, par. 2.1 et suiv. ; exposé écrit de la République sud-africaine, par. 40 et suiv. ; exposé écrit de la République tunisienne, p. 3 ; exposé écrit du Royaume d'Espagne, p. 41 et suiv. ; exposé écrit du Royaume de Norvège, par. 44 et suiv. ; exposé écrit du Royaume des Pays-Bas, par. 3 ; observations écrites des États-Unis du Mexique, par. 26 et suiv. ; observations écrites du Japon, par. 45 ; observations écrites du Royaume des Pays-Bas, chap. 3.

<sup>38</sup> CIT, 101<sup>e</sup> session, 2012, « Rapport de la Commission de l'application des normes », par. 82-236.

<sup>39</sup> CA, 322<sup>e</sup> session, 2015, « Initiative sur les normes — Suivi de la session de 2012 de la Commission de l'application des normes de la Conférence internationale du Travail », GB.322/PV, par. 209 ; GB.323/INS/5/Appendice I.

14. Ces éléments doivent être gardés à l'esprit. Ils vous permettent d'apprécier la portée de la question posée.

15. Afin de répondre aux préoccupations légitimes de tous les mandants, il serait opportun que votre Cour aborde, dans un premier temps, la question de l'existence d'une protection du droit de grève dans la convention n° 87. Si elle devait répondre positivement à cette question, il serait alors nécessaire de définir s'il relève de la compétence :

- a) des législateurs nationaux ;
- b) des législateurs tripartites de la Conférence internationale du Travail ;
- c) des organes de contrôle de l'OIT ; ou
- d) des juges d'un tribunal interne<sup>40</sup>

de fixer le contenu, les modalités d'exercice et les limites éventuelles du droit de grève.

16. L'approche qui est préconisée s'inscrit dans une démarche plus large afin d'intégrer les préoccupations exprimées par l'ensemble des mandants tripartites<sup>41</sup>. Les réponses de votre haute juridiction permettront de guider les mandants tripartites en offrant des pistes concrètes assurant la sécurité juridique et le bon fonctionnement du système de contrôle de l'OIT.

17. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, ces remarques concluent mon intervention et je vous remercie de votre attention. Je vous demande respectueusement de bien vouloir donner la parole à l'ambassadrice Valérie Berset Bircher, qui abordera l'interprétation de la convention n° 87 et la question des compétences pour définir les modalités d'application du droit de grève. Je présenterai ensuite quelques éléments de conclusion.

Le PRÉSIDENT : Je remercie l'ambassadeur Franz Perrez pour son exposé. Je donne maintenant la parole à S. Exc. l'ambassadrice Valérie Berset Bircher. Madame, vous avez la parole.

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<sup>40</sup> Constitution de l'Organisation internationale du Travail, art. 37, par. 2.

<sup>41</sup> Exposé écrit de l'Indonésie, par. 5 et 32 ; exposé écrit de l'OIE, par. 5 et 31 ; observations écrites de l'Australie, par. 41 ; observations écrites de la République de Pologne, par. 2.15 ; observations écrites de la République tunisienne, p. 2 ; observations écrites des États-Unis du Mexique, par. 25 et 34.

M<sup>me</sup> BERSET BIRCHER :

### C. INTERPRÉTATION DE LA CONVENTION

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, c'est un honneur et un privilège pour moi de me présenter devant vous au nom de la Suisse.

2. J'aborderai deux aspects de l'interprétation de la convention n° 87 : l'objet et le but de la convention, ainsi que la pratique ultérieure.

#### 1. Objet et but de la convention

3. S'agissant de l'objet et du but de la convention, le titre et le préambule de la convention n° 87 indiquent que son objet et son but consistent à garantir et à protéger la liberté syndicale ainsi que le droit d'association.

4. La grève n'est pas le seul moyen pour défendre les intérêts des travailleurs et protéger la liberté syndicale. En effet, les travailleurs et leurs organisations disposent de nombreux moyens pour défendre leurs intérêts, tels que les protestations, les campagnes médiatiques, les pétitions, les recommandations électorales, ainsi que des mécanismes de médiation et d'arbitrage<sup>42</sup>. L'importance et l'effectivité de l'une ou l'autre de ces méthodes varient considérablement entre les États.

5. Dans ce contexte, permettez-moi d'évoquer brièvement le principe de la paix du travail tel qu'il s'applique en Suisse et qui est probablement unique à mon pays.

6. Le droit de grève est expressément reconnu dans la Constitution de mon pays et il est soumis à quatre conditions : la grève doit se rapporter aux relations de travail ; elle doit être conforme aux obligations de maintien de la paix du travail ; respecter le principe de proportionnalité ; et être appuyée par une organisation de travailleurs pouvant conclure une convention collective de travail.

7. Cette obligation de maintenir la paix du travail est fondamentale dans l'ordre social suisse. Elle impose aux parties à une convention collective de travail de régler les conflits liés à des revendications couvertes par cette dernière par le dialogue et la négociation sans recourir à la grève ou au *lock-out*.

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<sup>42</sup> Observations écrites de l'OIE, par. 45.

8. La paix du travail et les conventions collectives en Suisse favorisent non seulement la stabilité sociale, mais aussi une amélioration tangible des conditions de travail. En effet, cette paix du travail s'applique de manière exclusive aux parties liées par une convention collective de travail. Ce principe constitue un incitatif efficace à la conclusion de telles conventions et au renforcement du dialogue social. Concrètement, les travailleurs couverts par ces conventions bénéficient de meilleures conditions, notamment en matière de salaires et de temps de travail<sup>43</sup>.

9. La Suisse dispose ainsi d'une approche spécifique permettant de garantir et protéger la liberté syndicale et le droit d'association, préconisant le dialogue et permettant de recourir à la grève comme moyen de dernier recours.

10. J'aimerais maintenant faire une comparaison avec le Pacte international relatif aux droits économiques, sociaux et culturels que mon pays a ratifié. Cet instrument protège explicitement le droit de grève et définit les compétences pour déterminer les modalités de ce droit. Je cite l'article 8, alinéa premier, lettre *d*) : « le droit de grève, exercé conformément aux lois de chaque pays ». Ces exigences trouvent application en droit suisse.

11. La Suisse protège ainsi le droit de grève, en application de ses obligations internationales au sens du Pacte 1 de l'ONU. La convention n° 87 quant à elle, ne reconnaît pas explicitement le droit de grève mais garantit la liberté syndicale et le droit d'association, sans préciser de modalité d'application.

12. En outre, il est important de rappeler le contexte plus large relatif à l'objet et au but de la convention. En effet, les normes de l'OIT présentent plusieurs particularités : leur élaboration dans un cadre tripartite qui associe gouvernements, employeurs et travailleurs, l'impossibilité pour les États d'émettre des réserves, l'objectif de fixer des standards minimaux de protection assortis de clauses de flexibilité pour tenir compte des spécificités nationales et être applicables par le plus grand nombre.

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<sup>43</sup> Par exemple, accords salariaux conclus pour 2024 dans les domaines conventionnels, accessible à l'adresse suivante : <https://www.bfs.admin.ch/bfs/fr/home/actualites/quoi-de-neuf.gnpdetail.2024-0250.html>.

13. Ainsi, le fait que la convention n° 87 ne consacre pas expressément la protection du droit de grève ne l'empêche pas d'atteindre son but, qui est de garantir la liberté syndicale et le droit d'association. Le principe de l'effet utile n'est ainsi pas remis en cause<sup>44</sup>.

## 2. Pratique ultérieurement suivie

14. Il convient désormais de se pencher sur la pratique ultérieurement suivie, en mettant l'accent sur quatre exigences fondamentales de l'article 31 3) b) de la convention de Vienne sur le droit des traités.

15. En effet, bien que fondamentales, ces exigences ne semblent pas toujours avoir été analysées de manière approfondie dans le cadre de la présente procédure et cela a pu mener certains participants à conclure, à tort, qu'une telle pratique était constituée.

16. Tout d'abord, la conduite invoquée doit être *attribuable aux États parties* aux traités. À cet égard, la pratique d'un organe de supervision ne saurait, à elle seule, constituer une pratique ultérieure. Seul le comportement attribuable à un État peut revêtir cette qualification<sup>45</sup>.

17. La Commission d'experts ne peut donner naissance, à elle seule, à une pratique ultérieure, à moins que les États parties ne reprennent à leur compte cette interprétation dans l'application de la convention n° 87.

18. Cela m'amène au deuxième point : pour qu'une pratique subséquente soit pertinente aux fins d'interprétation d'un traité, elle doit être la volonté *de l'ensemble des États parties*<sup>46</sup>.

19. Or les déclarations relatives à l'application de la convention n° 87 divergent sensiblement d'un État à l'autre. La Suisse et le Japon, par exemple, avaient déjà indiqué, respectivement en 1973 et en 1965, que le droit de grève ne relevait pas de cette convention<sup>47</sup>. Depuis plus de 30 ans, plusieurs

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<sup>44</sup> Dans ce sens, *Sud-Ouest africain (Éthiopie c. Afrique du Sud ; Libéria c. Afrique du Sud)*, deuxième phase, arrêt, C.I.J. Recueil 1966, p. 48, par. 91.

<sup>45</sup> Nations Unies, rapport de la Commission du droit international sur les travaux de sa soixante-dixième session, 2018, *Documents officiels de l'Assemblée générale, soixante-dixième session, Supplément n° 10, A/73/10* (ci-après, « A/73/10 »), conclusion n° 13, par. 2.

<sup>46</sup> *Chasse à la baleine dans l'Antarctique (Australie c. Japon ; Nouvelle-Zélande (intervenant))*, arrêt, C.I.J. Recueil 2014, p. 257, par. 83 ; observations écrites du Bangladesh, par. 19 et suiv.

<sup>47</sup> CIT, 58<sup>e</sup> session, 1973, compte rendu des travaux, p. 590, par. 27 ; observations écrites du Japon, par. 32.

États se sont clairement opposés à l'interprétation selon laquelle la convention n° 87 protégerait le droit de grève<sup>48</sup>.

20. On ne peut pas non plus déduire des exposés et observations de la présente procédure l'existence d'une pratique ultérieure commune : en effet, certains États se sont explicitement opposés à la reconnaissance de la protection du droit de grève par la convention n° 87<sup>49</sup>, et de nombreux autres ne se sont pas prononcés<sup>50</sup>.

21. Troisièmement, la pratique ultérieure doit établir l'accord des parties à l'égard de l'interprétation du traité. Dans ce contexte, et malgré l'argument parfois avancé dans le cadre de la procédure écrite<sup>51</sup>, la ratification d'un traité ne permet pas d'établir l'accord des parties à l'égard de l'interprétation de celui-ci. Et cela d'autant plus que les réserves sont exclues dans le système de normes de l'OIT, comme je le rappelais tout à l'heure.

22. Ainsi, quand bien même une ratification serait postérieure aux premières observations de la Commission d'experts, la ratification subséquente, même par un grand nombre d'États, de la convention n° 87 ne saurait, en elle-même, constituer une telle pratique. Lorsqu'un État ratifie un traité, il consent à être lié à ce traité et non à l'ensemble des commentaires non contraignants relatifs à celui-ci.

23. La Suisse, par exemple, avait expressément précisé, lors de la ratification de la convention n° 87 que cette convention ne couvrait pas le droit de grève, et ce malgré les recommandations préexistantes de la Commission d'experts<sup>52</sup>.

24. En outre, la déclaration gouvernementale conjointe à l'OIT de 2015 n'établit pas l'existence d'un accord entre les gouvernements quant à l'interprétation de la convention n° 87. En effet, ceux-ci reconnaissent le lien entre le droit de grève et la liberté syndicale. Ils précisent toutefois

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<sup>48</sup> Voir note de bas de page n° 34.

<sup>49</sup> Exposé écrit du Bangladesh, par. 9 ; exposé écrit du Belize, p. 2 ; exposé écrit de Business Africa, p. 6 ; exposé écrit du Costa Rica, conclusion, par. 7 ; exposé écrit du Japon, par. 37 ; exposé écrit de l'OIE, par. 305 ; observations écrites de Business Africa, par. 21 ; observations écrites du Japon, par. 47 ; observations écrites de l'OIE, par. 163.

<sup>50</sup> Sur les 158 États parties à la convention, 20 États et une organisation internationale comprenant 69 États parties à la convention n° 87 ont pris part à la procédure.

<sup>51</sup> Exposé écrit de l'Organisation des États des Caraïbes, d'Afrique et du Pacifique (ci-après, l'« OACPS »), par. 50 ; exposé écrit des Pays-Bas, par. 2.20 ; observations écrites de la CSI, par. 3.47 et 4.12.

<sup>52</sup> « Rapport du Conseil fédéral à l'Assemblée fédérale sur les 57<sup>e</sup> et 58<sup>e</sup> sessions de la Conférence internationale du Travail et Message concernant deux conventions internationales », FF 1974 I 1577, accessible à l'adresse suivante : [https://www.fedlex.admin.ch/eli/fga/1974/1\\_1633\\_1577\\_1537/fr](https://www.fedlex.admin.ch/eli/fga/1974/1_1633_1577_1537/fr), p. 1595.

que ce droit n'est pas absolu et que les conditions de son exercice sont réglementées au niveau national, sans pour autant mentionner explicitement de lien entre le droit de grève et cette convention<sup>53</sup>.

25. Quatrièmement, pour être reconnue comme telle, la pratique ultérieure doit être suivie *dans l'application* du traité.

26. Bien que de nombreux États, dont la Suisse, reconnaissent le droit de grève et y attachent une importance particulière, leur pratique en la matière ne saurait être assimilée à une pratique ultérieure relative à l'application de la convention n° 87. En effet, le lien causal entre la protection par un État du droit de grève dans sa législation nationale et la reconnaissance de la protection de ce même droit par la convention n° 87 ne peut pas être établi.

27. S'il devait être admis qu'un comportement sans lien avéré avec l'application d'un traité, sans l'adhésion explicite ou tacite de l'ensemble des parties, et sans rattachement clair à la convention concernée puisse constituer une pratique ultérieure, cela créerait une insécurité juridique profonde.

28. En résumé, il n'existe pas d'éléments suffisants permettant de conclure à l'existence d'une pratique ultérieure reconnaissant la protection du droit de grève au titre de la convention n° 87.

#### **D. COMPÉTENCES POUR DÉFINIR LES MODALITÉS D'APPLICATION DU DROIT DE GRÈVE**

29. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, j'aimerais maintenant aborder la question de la compétence pour définir les modalités d'application du droit de grève.

30. Il ressort des différents exposés écrits que les modalités d'exercice du droit de grève sont définies au niveau national et relèvent de la compétence des États. Un grand nombre d'entre eux précisent que ces modalités sont encadrées par leur législation nationale, indépendamment de leur reconnaissance ou non d'une protection au titre de la convention n° 87<sup>54</sup>.

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<sup>53</sup> GB.323/INS/5/Appendice I.

<sup>54</sup> Exposé écrit de la République fédérale d'Allemagne, par. 35 et suiv. ; exposé écrit de la République italienne, par. 10 et suiv. ; exposé écrit de la République de Pologne, par. 2.1 et suiv. ; exposé écrit du Royaume d'Espagne, p. 42 et suiv.

31. La compétence des législateurs nationaux pour définir les modalités d'exercice est également reconnue dans plusieurs instruments internationaux<sup>55</sup> et elle a été rappelée par les États dans leur déclaration conjointe à l'OIT en 2015<sup>56</sup>.

32. S'agissant de la compétence au sein de l'OIT, une question demeure : les organes de contrôle disposent-ils de la compétence pour définir les modalités d'exercice du droit de grève, ou cette compétence relève-t-elle d'autres organes tels que la Conférence internationale du Travail ou un tribunal interne à l'OIT ?

33. Avant de présenter les mandats de ces différents organes, je souhaite rappeler que, conformément à la Constitution de l'OIT, seuls votre Cour ou un tribunal interne à l'OIT sont compétents pour interpréter les conventions de l'Organisation internationale du Travail<sup>57</sup>.

34. S'agissant du contrôle de questions ayant trait à la convention n° 87 ou aux droits et principes de la liberté d'association et de négociation collective, deux organes peuvent être saisis, à savoir la Commission d'experts et le Comité de liberté syndicale.

35. Le mandat de la Commission d'experts, défini en 1926 par la Conférence internationale du Travail, prévoyait que ses travaux seraient techniques et non judiciaires et que le contrôle de l'application des normes devait être séparé de l'interprétation de leur contenu<sup>58</sup>.

36. Depuis 2014, la Commission d'experts souligne, dans chaque rapport annuel, que son mandat consiste en une analyse technique et impartiale de la mise en œuvre des conventions ratifiées. Ce faisant, elle examine la portée juridique, le contenu et la signification des dispositions des conventions. Ses avis et recommandations ont un caractère non contraignant, leur objet étant de guider l'action des autorités nationales<sup>59</sup>.

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<sup>55</sup> Le Pacte I (art. 8, par. 3, *litt. d*) ; la convention européenne des droits de l'homme (art. 11) ; la Charte de l'Organisation des États américains (art. 45, par. 1, *litt. d*) ou le protocole additionnel de la convention américaine relative aux droits de l'homme traitant des droits économiques, sociaux et culturels (art. 8, par. 2).

<sup>56</sup> GB.323/INS/5/Appendice I, par. 5.

<sup>57</sup> Constitution de l'OIT, art. 37.

<sup>58</sup> CIT, 8<sup>e</sup> session, 1926, compte rendu des travaux, annexe V, traité de Versailles, art. 408, p. 393-408 [document n° 72], p. 400 ; exposé écrit du BIT, par. 218 ; exposé écrit de l'OACPS, par. 64.

<sup>59</sup> CIT, 102<sup>e</sup> session, 2013, « Rapport III (Partie 1A), Rapport de la Commission d'experts pour l'application des conventions et recommandations » [document n° 104], par. 29 ; CIT, 103<sup>e</sup> session, 2014, « Rapport III (Partie 1A), Rapport de la Commission d'experts pour l'application des conventions et recommandations » [document n° 85], p. 1-12, par. 31.

37. Bien que la Commission d'experts puisse être amenée à émettre des avis sur la portée et la signification de normes lors d'un examen de la mise en œuvre, il ne relève pas de sa compétence de les interpréter.

38. Le deuxième organe de contrôle est le Comité de la liberté syndicale. Il a pour mandat de déterminer si, de manière concrète, des législations ou pratiques nationales sont conformes aux principes de la liberté syndicale et de la négociation collective<sup>60</sup>. Il s'agit d'un organe tripartite dans lequel j'ai d'ailleurs représenté les gouvernements pendant quelques années.

39. Cet organe se penche sur des allégations spécifiques de non-respect du principe de la liberté d'association, et cela indépendamment du fait que l'État objet de ces allégations ait ou non ratifié l'une des conventions relatives à ce principe fondamental<sup>61</sup>. Les recommandations du Comité de la liberté syndicale ont valeur d'invitations ou de propositions faites aux gouvernements à adopter des mesures<sup>62</sup>.

40. Ainsi, et tout comme la Commission d'experts, le Comité de la liberté syndicale n'est pas habilité à interpréter les conventions de l'OIT.

41. La constitution de l'OIT confie à la Conférence internationale du Travail l'élaboration des normes internationales dans un cadre tripartite. Si la Conférence n'a pas compétence pour interpréter une norme existante, elle peut néanmoins l'amender ou adopter de nouvelles normes, voire même un protocole à une convention.

42. La Conférence pourrait par conséquent, si les mandants de l'OIT le souhaitent, adopter une nouvelle norme qui définirait les modalités du droit de grève. Ce serait techniquement et juridiquement possible.

43. Enfin, la création d'un tribunal interne à l'OIT prévu à l'article 37, paragraphe 2, de la Constitution de l'OIT, offrirait également un mécanisme tripartite rapide garantissant l'inclusion de

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<sup>60</sup> OIT, « Recueil de règles applicables au Conseil d'administration du Bureau international du Travail, Annexe II, Procédures spéciales en vigueur pour l'examen des plaintes en violation de la liberté syndicale au sein de l'Organisation internationale du Travail » [document n° 88], par. 14.

<sup>61</sup> BIT, « Compilation des décisions du Comité de la liberté syndicale du Conseil d'administration du BIT » [document n° 282], 6<sup>e</sup> éd., 2018, p. 143-183, par. 6 et 7.

<sup>62</sup> Organisation internationale du Travail (OIT), *La Liberté syndicale : Recueil de décisions et de principes du Comité de la liberté syndicale du Conseil d'administration du BIT*, 6<sup>e</sup> éd., Genève, BIT, 2018, par. 2 et 3.

tous les mandants et la sécurité juridique pour trancher les divergences d'interprétation susceptibles de survenir.

44. En résumé, s'il devait être admis que la convention n° 87 protège le droit de grève, il serait opportun de définir lequel de ces quatre organes serait compétent pour déterminer les modalités du droit de grève.

45. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie de votre attention. Je vous demande respectueusement de bien vouloir donner la parole à l'ambassadeur Perrez, qui conclura l'intervention de la Suisse.

Le PRÉSIDENT : Je remercie l'ambassadrice Berset Bircher pour son exposé. Je donne maintenant la parole à S. Exc. l'ambassadeur Perrez. Vous avez la parole.

M. PERREZ :

#### **E. CONCLUSIONS**

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, au nom de la Suisse, je souhaite avant tout exprimer notre gratitude pour l'attention portée à cette procédure et souligner combien il est fondamental que la Cour apporte des éclaircissements sur une situation complexe et sensible. L'absence de clarification a conduit à des tensions prolongées et à une incertitude préjudiciable tant aux États Membres qu'aux autres mandants qu'à l'OIT elle-même.

2. Il convient à cet égard de rappeler la spécificité du modèle tripartite de l'OIT, qui repose sur la recherche constante d'un équilibre et sur l'obtention d'un consensus entre gouvernements, employeurs et travailleurs.

3. Or, un tel consensus n'a pas pu être atteint sur la question du droit de grève au regard de la convention n° 87, ni au moment de l'adoption de cette convention, ni au cours de sa mise en œuvre.

4. Il importe également de garder à l'esprit les dispositions constitutionnelles et les procédures qui régissent le bon fonctionnement de l'OIT.

5. Ainsi, la constitution de l'OIT confère à la Conférence internationale du Travail, en tant qu'organe législatif, la possibilité, si les mandants le jugent opportun, d'adopter, sur la base d'un consensus tripartite, une nouvelle norme précisant les conditions d'exercice du droit de grève.

6. La constitution envisage également la mise en place d'un tribunal interne, qui pourrait être chargé de statuer sur des divergences d'interprétation. Une telle solution, respectueuse du cadre institutionnel de l'OIT, permettrait d'assurer inclusivité, équilibre et légitimité.

7. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, pour résumer, la question qui vous est posée n'est pas si un droit de grève existe. Toutes les parties à la procédure reconnaissent l'existence d'un tel droit. La question qui vous est posée est de savoir si la convention n° 87 couvre ce droit.

8. En ce qui concerne l'interprétation de la convention n° 87, il ressort qu'à la lumière des règles d'interprétation en droit international, cette convention ne protège pas le droit de grève.

9. Si votre juridiction devait toutefois considérer que le droit de grève est protégé par la convention n° 87, il serait alors essentiel de donner des indications supplémentaires aux mandants tripartites. Il existe, en effet, autant de manières d'appliquer le droit de grève qu'il y a d'États. Il est par conséquent indispensable que votre Cour détermine quel est l'organe ou l'autorité compétente pour définir les modalités d'exercice de ce droit.

10. Ces indications offriraient ainsi une meilleure prévisibilité et une plus grande cohérence dans l'application de cette norme.

11. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, dans un contexte de défiance croissante à l'endroit du multilatéralisme, il est d'autant plus crucial de restaurer la confiance entre les parties prenantes et de veiller à ce que l'OIT demeure un cadre fiable, prévisible et respecté pour la réglementation des relations de travail au niveau international. La sécurité juridique et la stabilité institutionnelle doivent rester au cœur de nos priorités. Elles constituent les fondements mêmes de l'engagement des États et de la pérennité du système multilatéral.

12. Je vous remercie de votre attention.

Le PRÉSIDENT : Je remercie les représentants de la Suisse pour leur exposé. Before I invite the next delegation to take the floor, the Court will observe a coffee break of 15 minutes. The hearing is suspended.

*The Court adjourned from 11.20 a.m. to 11.40 a.m.*

The PRESIDENT: Please be seated. The sitting is resumed. I now invite the next participating delegation, Vanuatu, to address the Court and I give the floor to Ms Angelyne Glenda Dovo Roy.

Ms DOVO ROY:

### **I. OPENING STATEMENT**

1. Mr President, distinguished Members of the Court, it is an honour to appear before you on behalf of the Republic of Vanuatu in these important advisory proceedings. My name is Angelyne Glenda Dovo Roy, Attorney-General of Vanuatu, and I am joined by my colleagues Ms Murielle Meltenoven, the Commissioner of Labour, and Ms Florence Williams Samuel, the Solicitor General of Vanuatu.

2. We come before you today compelled by Vanuatu's steadfast commitment to social justice, to the rule of law and to the fundamental rights of workers. Vanuatu, a small island developing State and proud member of the International Labour Organization (ILO), has ratified Convention No. 87 and has a direct stake in its correct interpretation.

3. At the outset, Vanuatu observes that the Court's jurisdiction to render this advisory opinion is clear, and there are no compelling reasons for the Court to decline answering the question posed by the ILO. On the contrary, an opinion from this Court will provide critical guidance to the ILO and its Members — including Vanuatu — and help resolve a long-standing dispute that has impeded the ILO's supervisory system.

4. We note further that an overwhelming majority of the written submissions in these proceedings affirm that Convention No. 87 does protect the right to strike. Vanuatu aligns itself with this broad consensus of States and international actors, while emphasizing that employees who wish to stage strikes must ensure they comply with the applicable national laws relating to the process of strike action. In particular, we share the view, expressed by many, that freedom of association would be devoid of substance if it did not include the right of workers to strike in defence of their interests. It is in this spirit of common purpose that Vanuatu offers its perspective — one grounded in our national experience and our principled commitment to the rule of law.

5. Mr President, Vanuatu's interest in these proceedings is both legal and deeply practical. As a sovereign nation, we champion the development of international law through institutions like this

Court. We understand the power of the Court's voice in clarifying international law. Here, the clarification of Convention No. 87 is urgently needed to strengthen the international framework protecting workers' rights. Vanuatu is also a country acutely vulnerable to forces that make the right to strike especially salient. We are on the frontlines of the climate crisis — facing intensifying cyclones, sea level rise and other impacts that threaten our people's way of life. For us, the concept of a "just transition" to a low-carbon, climate-resilient future is not abstract; it is a matter of survival and fundamental fairness. A just transition must ensure that workers can secure decent work and actively shape the economic transformations ahead. Vanuatu's view — informed by experience — is that the right to strike is a *fundamental enabler* of such a transition.

6. Moreover, labour mobility is a key pillar of Vanuatu's sustainable development strategy. Thousands of ni-Vanuatu citizens participate in seasonal and overseas work programmes. Their remittances accounted for roughly 19 per cent of Vanuatu's GDP in 2022 — a staggering figure that testifies to the importance of these workers for our economy and society. Yet our labour mobility experience has also underscored the challenges our workers face: difficulties in accessing decent wages and conditions abroad, separation from families and vulnerabilities as migrant workers. Vanuatu has learned that safeguarding workers' fundamental rights — notably the right to organize and, when necessary, to strike — is essential if labour mobility is to truly contribute to sustainable development. Simply put, the right to strike is a vital tool that allows our workers, whether at home or overseas, to advocate for fair treatment, safety and equitable benefits. Protecting this right at the global level is vital for Vanuatu to align its development strategies with our human rights obligations and the Sustainable Development Goals, ensuring that no one is left behind.

7. In light of these interests, Vanuatu respectfully submits that the Court should answer the question posed by the ILO in the affirmative: the right to strike of workers and their organizations *is* protected under ILO Convention No. 87. My colleague, Commissioner Meltenoven, will next speak to the broader importance of the right to strike — in the context of just transition, sustainable development and labour mobility — that frames why this question is so significant for States like Vanuatu. Thereafter, Solicitor General Samuel will elaborate the legal interpretation of Convention No. 87 and the supporting authorities in detail.

8. Before I yield the floor, allow me to underscore Vanuatu’s core message: affirming the right to strike under Convention No. 87 will reinforce a normative framework essential to social justice. It will help reactivate the ILO’s founding vision — to achieve universal peace through social justice — at a time when workers’ voices must be at the forefront of transformative change. I thank the Court for its attention, and I now ask you, Mr President, to invite Ms Murielle Meltenoven, Vanuatu’s Commissioner of Labour, to continue our presentation.

The PRESIDENT: I thank Ms Roy for her presentation. I now call upon Ms Murielle Meltenoven to take the floor.

Ms MELTENOVEN:

## II. THE REAL-WORLD STAKES OF THE QUESTION BEFORE THE COURT

1. Mr President, Members of the Court, it is a privilege to address you today. I will focus on why the right to strike is indispensable from a *practical and principled* standpoint — in particular, for ensuring a just transition in the face of climate change, for achieving sustainable development and for protecting the rights of workers (including migrant workers) through labour mobility. These contexts illustrate the real-world stakes of the legal question before you.

2. First, on the just transition. As the international community increasingly recognizes, a “just transition of the workforce” is imperative as we shift to environmentally sustainable economies. The Paris Agreement — ratified by nearly all ILO Member States — explicitly acknowledges “the imperative of a just transition of the workforce and the creation of decent work and quality jobs” in its preamble. This concept, born from trade union advocacy decades ago, reflects the understanding that climate action and labour rights must progress hand in hand. In practice, a just transition means that when industries transform or decline due to climate policies, workers are not abandoned; instead, they are retrained, protected and heard in decision-making processes. The right to strike is a crucial safeguard in this process. It empowers workers and their unions to insist on fair policies — for example, to demand inclusion in planning discussions, or to push for collective action. Workers’ pleas for a fair transition could too easily be ignored. The voice of labour is indispensable for turning a “transition” into a *just* transition. In Vanuatu’s experience, our workers’ resilience in the face of

climate threats has been bolstered by strong community and union solidarity. We view the right to strike as part and parcel of that solidarity — a means for working people to assert that climate action must also be climate justice. A world in which workers are forbidden from striking is a world ill-equipped to achieve a truly just and equitable transition to a low-carbon future.

3. Second, the broader sustainable development context. The right to strike is not only about resolving labour disputes over wages or conditions; it is fundamentally about enabling workers to participate in shaping their economic and social destinies. Decent work for all is a key goal of the 2030 Agenda for Sustainable Development (SDG 8). In practice, “decent work” requires that workers have a genuine voice — the ability to collectively negotiate and, when necessary, withdraw their labour. Societies that uphold the right to strike tend to have a more robust social dialogue mechanisms, which in turn lead to more stable and inclusive economies. Conversely, denying workers lawful strike rights often correlates with deeper social inequalities and unrest. Hence our alignment with the strong consensus that the right to strike is a fundamental component of freedom of association.

4. Third, labour mobility — a matter of special importance to Vanuatu and many other small States. As the Attorney General noted, a significant portion of our population works abroad in seasonal or temporary employment. For these workers, the right to strike can be a matter of basic dignity and safety. Far from home, often in low-skilled jobs, migrant workers are especially vulnerable to exploitation. They may face long hours, substandard housing or breaches of contract. In such situations, the ability to organize and collectively protest — including through strikes or work stoppages — can be their only effective recourse to prompt improvement of conditions. I wish to emphasize that when Vanuatu sends its sons and daughters overseas to work, we entrust their well-being partly to the framework of international labour standards. We rely on the promise that *all* States that benefit from their labour will respect fundamental rights. Among these, the right to strike is a litmus test of a State’s commitment to treating workers fairly. If our citizens abroad are legally barred or practically prevented from ever striking, this is a signal that something is amiss in the balance of power. Conversely, in environments where strikes are absolutely forbidden, we have seen grievances fester and morale deteriorate, undermining productivity and development outcomes.

5. Importantly, labour mobility has also impacts at home: while it brings income, it can lead to skills shortages and social strains when so many workers are abroad. A well-managed labour mobility scheme thus requires input from workers' organizations to ensure it remains sustainable — for instance, through policies for reintegration or skills transfer. Here again, the right to strike underpins the strength of those workers' organizations. It gives unions leverage to negotiate better terms for participants and to hold governments accountable in managing these programmes.

6. Mr President, distinguished judges, the examples I have given share a common theme. In each context — climate transition, sustainable development and labour mobility — the right to strike serves as a guardian of justice. It ensures that workers have not just a theoretical voice, but a real and forceful one when it counts most. This right is exercised responsibly by workers and unions around the world to correct injustices, to press for dialogue when other channels fail. It is no coincidence that the ILO's very Constitution speaks of "conditions of labour exist involving . . . injustice, hardship and privation" as causes of unrest, and recognizes the principle of freedom of association as central to lasting peace. The right to strike is an indispensable tool to remedy those very injustices and hardships in the labour arena.

7. Denying that the right to strike is protected by Convention No. 87 would send a destabilizing message. It would signal to workers everywhere that one of their most cherished tools for progress is legally insecure. It would risk undermining the "normative framework for international cooperation to achieve a just transition and sustainable development" that all States have pledged to uphold. Conversely, a clear affirmation from this Court that the right to strike is inherent in Convention No. 87 will bolster efforts to ensure transitions — whether economic, environmental or social — are navigated fairly and inclusively. It will reinforce the idea that "leaving no one behind" includes leaving no worker behind.

8. Vanuatu urges the Court to weigh these lived realities. Protecting the right to strike is essential to the just, sustainable future we all seek. I thank you and yield the floor to Solicitor General Samuel.

The PRESIDENT: I thank Ms Meltenoven for her presentation. I now call upon Ms Florence Samuel to take the floor.

Ms WILLIAMS SAMUEL:

**III. LEGAL INTERPRETATION OF ILO CONVENTION NO. 87 WITH  
RESPECT TO THE RIGHT TO STRIKE**

1. Mr President, distinguished Members of the Court: it is an honour to follow the Attorney General and the Commissioner of Labour and to present the final part of Vanuatu's oral statement. My submissions will focus on the *legal interpretation* of ILO Convention No. 87 with respect to the right to strike and the relevant authorities underpinning that interpretation. In essence, we submit that by applying the customary rules of treaty interpretation — as reflected in Articles 31 and 32 of the VCLT — one reaches the clear conclusion that the right to strike is protected under Convention No. 87. The conclusion is reinforced by subsequent practice, the jurisprudence of international supervisory bodies, and the broader corpus of international law, including human rights law. I will address these points in turn and then conclude with Vanuatu's respectful request to the Court.

2. First: text, context and purpose of Convention No. 87. Interpreted in good faith, in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose, Convention No. 87 encompasses the right to strike. Several provisions of the Convention, read together, lead inexorably to this point. Article 3 guarantees that workers' and employers' organizations may organize their activities and formulate their programmes freely; Article 10 defines such organizations as those furthering and defending workers' or employers' interests. By their ordinary meaning, these provisions cover collective industrial action. Excluding strikes because the word is not explicit would hollow out freedom of association. The Convention's purpose — to secure social justice through freedom of association — confirms that strike protection is an indispensable corollary of the freedoms guaranteed.

3. Second: subsequent practice and authoritative interpretations. The practice of States and the assessments of competent international bodies over the decades overwhelmingly support the view that Convention No. 87 protects the right to strike. The ILO's supervisory mechanisms have consistently and unambiguously interpreted Convention No. 87 this way for nearly half a century. States parties have been well aware of this interpretation. Significantly, not a single State moved to denounce or amend Convention No. 87 in protest of this interpretation — on the contrary, dozens of States chose to *ratify* Convention No. 87 in the years after the right to strike interpretation was firmly

established. Vanuatu itself ratified Convention No. 87 in 2006, at a time when the understanding that it protected the right to strike was already long standing and widely accepted. By ratifying, Vanuatu (like many others) endorsed that prevailing interpretation. This constitutes powerful subsequent practice indicating agreement on the treaty's meaning.

4. Third: the wider international legal landscape and its interpretative relevance. Article 31 (3) (c) of the VCLT instructs the interpreter to take into account “[a]ny relevant rules of international law applicable in the relations between the parties”. The “relevant rules” landscape comprises three interlocking elements:

- First, customary international law and general principles of law, which apply by their nature to all States and therefore, by definition, are “applicable in the relations between the parties”. The long-standing characterization — across ILO practice and comparative jurisprudence — of strike action as an intrinsic element of trade union freedom forms part of that background.
- Second, other treaty commitments binding on many parties to Convention No. 87, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), which expressly protects “the right to strike” and contains a savings clause that presupposes at least equal protection under Convention No. 87; the International Covenant on Civil and Political Rights (ICCPR), whose Article 22 protects freedom of association and cross-references ILO guarantees; and regional instruments whose courts and organs have read freedom of association to encompass strike action.
- Third, the Charter of the United Nations and the ILO Constitution, which commit States to promote universal respect for human rights and fundamental principles and rights at work — commitments that inform, rather than amend, the understanding of the scope of Convention No. 87.

5. An objection has been raised that Article 31 (3) (c) sets a “demanding” threshold and that — because not every party to Convention No. 87 is also a party to the ICESCR, in particular, including Vanuatu — the Covenant cannot be used in interpreting the Convention. With respect, that objection conflates two distinct points and overstates the threshold in both. First, Vanuatu’s conclusion does not depend on importing the right to strike from external treaties. It follows from Convention No. 87 itself — its ordinary meaning, read in context and in light of its object and purpose — before one

ever looks beyond the instrument. In this sense, the wider legal landscape is confirmatory, not constitutive. Second, systemic integration does not require that every single State party to Convention No. 87 be bound by every other rule considered. Customary norms and general principles are, by their nature, applicable to all. And when the interpreter considers other treaties, those rules are not being used to amend Convention No. 87, but to confirm the reading that best fits its terms and purpose and to evidence a widespread, cross-regional understanding of the right at issue. The absence of a regional instrument in one geographical area does not detract from this cross-regional convergence, nor from the Charter-based commitments that all United Nations Members share to promote universal respect for fundamental rights.

6. Fourth: *travaux préparatoires*. Article 32 of the VCLT permits recourse to preparatory work only if the primary interpretation leaves the meaning ambiguous or leads to an absurd result — which is not the case here. Nonetheless, even the *travaux préparatoires* of Convention No. 87, when carefully examined, do not negate the right to strike. Contemporary records indicate that the drafters were aware of the right to strike issue and largely assumed it was implicit in freedom of association. This is corroborated by the approach taken in subsequent ILO instruments (such as Convention No. 98 on collective bargaining) and by statements from many participants in these proceedings.

7. Mr President, distinguished Members of the Court: in a world grappling with interlocking challenges of economic inequality, climate change, migration and technological disruption, meaningful social dialogue and co-operation are indispensable. Upholding the right to strike globally will strengthen the hand of those striving to ensure that transitions are carried out with fairness and respect for human dignity. It will also reinvigorate the ILO's century-old promise to workers that their rights are upheld in the quest for social justice, consistent with the 2030 Agenda and the Paris Agreement's call to consider the needs of the workforce. Failing to acknowledge the right to strike would undermine the normative framework of international co-operation on just transition and the Sustainable Development Goals. By contrast, a clear affirmation by this Court will safeguard a key element of that framework.

8. For all the reasons we have outlined, the Republic of Vanuatu respectfully requests the Court to declare that the right to strike of workers and their organizations is protected under Convention No. 87. Such an advisory opinion will not only reflect the correct legal interpretation of Convention

No. 87 but will also strengthen the foundations of a just transition, sustainable development and human dignity that are at the heart of the ILO's mandate and the United Nations Charter.

9. Thank you, Mr President and Members of the Court, for your attention. This concludes Vanuatu's oral submissions.

The PRESIDENT: I thank the representatives of Vanuatu for their presentation. I now give the floor to the delegation of the International Cooperative Alliance and I invite Mr Santosh Kumar Padmanabhan to the podium. Sir, you have the floor.

Mr KUMAR PADMANABHAN:

**ORAL STATEMENT ON BEHALF OF THE INTERNATIONAL COOPERATIVE ALLIANCE**

1. Mr President, distinguished Members of the Court, it is my greatest honour to appear before you in the matter concerning *Right to Strike under ILO Convention No. 87*.

2. From their earliest days, formally and informally organized co-operatives through their national and eventually international structures have stood at the forefront of movements advancing social justice for their members and their communities. They have been, and remain, steadfast participants in the pursuit of equity, dignity and shared prosperity. Even today, they continue to be deeply invested in, and profoundly affected by, the challenges and aspirations of their members and communities — whether at the local and national levels, or beyond.

3. Recognizing this enduring commitment, the United Nations General Assembly has proclaimed the year 2025 as the International Year of Cooperatives after first proclaiming it in the year 2012. In doing so, the international community has acknowledged the economic, social and cultural value and contribution of co-operatives to humanity's collective well-being. It is fitting, too, that this same period is being marked as both the International Year of Glaciers' Preservation and the International Year of Peace and Trust — themes that remind us of our shared responsibility towards the planet and towards one another.

4. It is within this broader context that I have the distinct privilege of representing before this Court the International Cooperative Alliance — an institution that since 1895 has striven to safeguard the co-operative identity and practices of nearly one billion co-operators worldwide today, who are

engaged as producers, workers or users, and essential stakeholders of approximately three million co-operative enterprises worldwide, most of which, but not all, are micro, small and medium in nature. On their behalf, and in the spirit of solidarity and justice that has guided this movement for over a century, I thank the Court for the opportunity to be heard.

5. The question — whether a strike action, that is, the collective withdrawal of labour in defence of workers’ interests, is one of the “activities” that workers are entitled to, under Article 3 (1) read with Article 10 of the ILO Convention No. 87 — has been answered in the negative only by a minority of the participants.

6. Having said that, the real concern of some participants does not appear to be *whether* the right to strike is protected under Convention No. 87 at all, but *where* the line is drawn and — importantly — *who* draws the contours of this right. Additionally, these participants appear concerned about the *competence* of the supervisory bodies of the ILO.

7. Mr President, Members of the Court, the matter before you requires no leap of interpretation, only a recognition of balance. Articles 3 and 8 envisage a harmony between national regulation and international principles, as States may define and limit the right, provided they do not impair the guarantees provided by Article 8 (2) of the Convention.

8. In affirming protection of the right to strike, the Court would give coherence to practice, restore clarity to doctrine and uphold international law and the legitimate prerogatives of States. Such a conclusion would preserve the diversity of national labour systems and reject the notion that freedom of association could only exist as an abstraction.

9. Though co-operatives might not appear in the first instance as being on the frontlines of the disagreements on the right to strike, they do benefit, at a fundamental and foundational level, from all the rights that are related to the freedom of association — which, as other basic freedoms, are a *bundle of rights*. Co-operatives are also viewed, by law and the principles guiding them, as being stewards for advancing these basic freedoms and the associated rights for their members and their communities.

10. Determining that the freedom of association under Convention No. 87 excludes the right to strike would risk the capacity of co-operatives to cater for social justice for their members and

their communities, and this will be further articulated by Professor Hagen Henry, the chairperson of the ICA Global Cooperative Law Committee.

11. I therefore respectfully request you, Mr President, to kindly invite Professor Henry to take the floor.

12. I thank you, distinguished Members of the Court and Mr President, for your kind attention.

The PRESIDENT: I thank Mr Padmanabhan for his presentation. I now call upon Mr Hagen Henry to take the floor.

Mr HENRY:

1. Thank you, Mr President, for allowing me to address this Court. It is indeed an honour for me. Esteemed Members of the Court, the International Cooperative Alliance (ICA) has submitted a written contribution on 14 May 2024 and it commented in writing on contributions by other parties in September 2024.

2. In these written contributions, the ICA opines mainly that a negative answer to the question whether ILO Convention No. 87 protects the right to strike would also negatively affect co-operatives and co-operative law and, through this, limit the means to cater for social justice.

3. While maintaining its opinion, the ICA would like to avail itself today of the opportunity to deepen some of its arguments and to draw again the attention of the Court to the effects the Court's opinion will have far beyond the immediate issue under consideration. For the purpose of this presentation, the ICA uses the terms "social justice" and "social needs satisfaction" in an interchangeable way.

4. The ICA represents the majority of co-operative enterprises worldwide. According to ICA data, some three million with a membership equalling more than 12 per cent of humanity<sup>63</sup>. It is the oldest and largest international non-governmental organization.

5. The ICA is the guardian of the so-called co-operative identity as laid down in its 1995 Statement on the co-operative identity (the ICA Statement)<sup>64</sup>. This Statement reflects the current

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<sup>63</sup> Available at <https://ica.coop/en/cooperatives/facts-and-figures> (visited 19 Sept. 2025).

<sup>64</sup> Available at <https://ica.coop/en/cooperatives/cooperative-identity> (visited 19 Sept. 2025).

result of an ongoing process of reciprocal theory and practice building that has lasted for close to two centuries. As such it is a unique case in the world of enterprises.

6. The ICA Statement contains a definition of co-operatives, besides a list of ethical values of the members a list of values on which co-operatives are based and a list of principles that are to put these values into practice. Together, these elements compose what is referred to as the “cooperative identity”. The definition sets the objective of co-operatives as well as the cornerstones of the means that potentially allow for the pursuit of this objective. According to the definition, the objective of co-operatives is to meet the members’ common needs in three respects — economic, social and cultural; the means to pursue this objective is a jointly owned and democratically controlled enterprise.

7. By being affiliated to the ICA, the mentioned three million co-operatives and their members oblige themselves to respect the ICA Statement as this is annexed to the Articles of Association of the ICA, and the ICA is an association under Belgian law<sup>65</sup>. Hence, these co-operatives commit themselves to meeting besides economic and cultural needs also the social needs of their members.

8. This binding self-identification is recognized heteronomously by a great number of national laws on co-operatives, such as, for example, the laws on co-operatives of Argentina, India, Madagascar, Norway, Portugal, Spain (Basque Country), Spain (Canary Islands), Tanzania (Zanzibar), Uruguay and Viet Nam; it is recognized by all the existing regional uniform laws on co-operatives, that is the 2003 European Council Regulation (EC) on the Statute for a European Cooperative Society (SCE), the 2010 Acte uniforme relatif aux sociétés coopératives de l’Organisation pour l’harmonisation en Afrique du droit des affaires and the 2014 East African Community Cooperative Societies Bill; it is recognized by regional model laws on co-operatives, that is the 2008 Framework Law for Cooperatives in Latin America and the 2024 African Union Model Law on Cooperatives for Africa; it is recognized by legally relevant international instruments, such as ILO Promotion of Cooperatives Recommendation (No. 193), the 2001 United Nations Draft guidelines aimed at creating a supportive environment for the development of cooperatives and the 2021, 2023 and 2025 biannual reports of the Secretary-General of the United Nations on

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<sup>65</sup> See Article 12 (2) of the Articles of Association of the ICA in connection with Annex A, available at <https://ica.coop/en/media/library/governance-materials/ica-articles-association> (visited 19 Sept. 2025).

Cooperatives in social development<sup>66</sup>; and it is also recognized by public international law: Article 12 (2) of the Articles of Association of the ICA in connection with Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and the legal principle of the prohibition of contradictory behaviour by States leads to conclude that legislators have a legal obligation to translate the co-operative identity into law.

9. By providing a legal framework that is in line with the identity of co-operatives and by providing the legal justification for the claim to have co-operative adequate legislation, these laws and texts concretize the legal principle of equal treatment recognized as a source of law by all national laws and by Article 38 of the Statute of the Court.

10. Under Article 10 (2) (b) of the Constitution of the ILO, the International Labour Office shall “accord to governments at their request all appropriate assistance within its power in connection with the framing of laws and regulations on the basis of the decisions of the Conference and the improvement of administrative practices and systems of inspection”. Among those “decisions of the Conference” is ILO Recommendation No. 193. This recommendation specifies in its paragraph 10 (1) how “governments [should frame] laws and regulations on the basis of [ILO Recommendation No. 193]”, namely by adopting “specific legislation and regulations on cooperatives, which are guided by the cooperative values and principles set out in Paragraph 3, and revise such legislation and regulations when appropriate”. With modifications that are not relevant

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<sup>66</sup> Examples of national laws on co-operatives: Argentina, Article 2 of Ley N° 20.337, Ley de cooperativas de 1973; India, Article 3 of the Multi-State Co-operative Societies Act, 2002; Madagascar, Article 3 of the Projet de loi n° 007/2023 du 3 mai 2023 Régissant les Sociétés Coopératives à Madagascar; Norway (English, non-official language version available at [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=88380](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=88380)); Portugal, Article 3 of Código Cooperativo português; Spain, Basque Country, Article 1 of Ley 11/2019, de 20 de diciembre, de Cooperativas de Euskadi; Spain, Canary Islands, Article 2 of Ley 4/2022, de 31 de octubre [de 2022], de Sociedades Cooperativas de Canarias; Tanzania, Zanzibar, Article 3 of Zanzibar Cooperatives Societies Act 2018; Uruguay, Article 7 of Ley N° 18.407 de fecha 24/10/2008, Ley de cooperativas; Vietnam: Amendments to the law on cooperatives adopted on June 20, 2023, in force since 1 July 2024.

Regional uniform laws on co-operatives: European Council Regulation (EC) No. 1435/2003 on the Statute for a European Cooperative Society (SCE), Recitals (6) to (10); the Acte uniforme relatif aux sociétés coopératives de l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA) of 2010, Articles 6 and 18; and the East African Community Cooperative Societies Bill 2014, Article 4.

Regional model laws on co-operatives: the Ley marco para las cooperativas de América Latina de 2008, Article 4; and the 2024 African Union Model Law on Cooperatives for Africa, Article 7.

Legally relevant international instruments, especially the ILO Promotion of Cooperatives Recommendation, 2002 [No. 193] and the 2001 United Nations Draft guidelines aimed at creating a supportive environment for the development of cooperatives, Annex to the 2001 Report of the Secretary-General of the United Nations titled “Cooperatives in social development” (A/56/73-E/2001/68), para. 11; and the 2021 (UN docs. A/RES/76/135 and A/76/209), 2023 (UN docs. A/RES/78/175 and A/78/187) and the 2025 biannual reports of the Secretary-General of the United Nations on cooperatives in social development, UN doc. A/80/168, respectively Chap. III; Part A; and para. 71 (a).

here, paragraph 3 of ILO Recommendation No. 193 contains the values and principles enshrined in the ICA Statement. As paragraph 2 of ILO Recommendation No. 193 defines co-operatives in exactly the same words as does the ICA Statement, it is clear that “such legislation and regulations” must ensure that co-operatives also meet the social aspect of the needs of their members.

11. The capacity of the International Labour Office to assist governments in this task is to a large extent determined by the information and knowledge provided to it through the reporting mechanisms of Article 19 of the Constitution of the ILO in respect of conventions and recommendations, as well as through the work of the Committee of Experts on the Application of Conventions and Recommendations.

12. Limiting the mandate of the Committee of Experts on the Application of Conventions and Recommendations to scrutinizing the implementation of these instruments without interpreting them, as suggested by some of those actors who opine that the right to strike is not protected by ILO Convention No. 87, constitutes an impossibility. Interpreting is inherent in scrutinizing the implementation. Furthermore, such limitation of the scope of the scrutiny would then also have to apply to the scope of the obligations to report under Article 19 of the Constitution of the ILO. Both these limitations would create a precedent for other ILO instruments, ILO’s Recommendation No. 193 (ILO R193) included. The capacity of the International Labour Office to assist governments to having a co-operative identity adequate legislation according to paragraph 10 (1) of ILO R193 would be reduced.

13. This, in turn, would risk affecting the capacity of co-operatives to cater for social justice in two respects and it would void the sense of the right to associate.

14. As concerns social justice, the reason is the following: to the extent the right to strike diminishes the capacity of workers to cater for social justice, the burden of co-operatives to do so increases. At the same time, the capacity of co-operatives to bear this increased burden is put at risk by weakening the International Labour Office’s capacity to influence governments to have co-operative law in line with ILO R193, i.e. law that ensures that co-operatives meet also the social needs of their members through the specific form of their enterprise as concerns its financing, governing, auditing, etc.

While all enterprise types are increasingly subject to social and societal obligations and while the number of laws on the promotion of social and/or solidarity economy actors is rising, co-operatives remain so far the only enterprise type that, by its objective and consequently by its form, has to address the social justice concerns of its members and, according to one of the co-operative principles, those of the wider community in which they are active. In times when the prospects of maintaining or creating effective welfare State systems are diminishing, this capacity of co-operatives must be maintained and promoted.

15. As concerns the right to associate, protected under Article 22 of the ICCPR, it must include the right to choose the objective to be pursued through the association and the right of those associated to employ any peaceful means they think best to pursue the objective for which they came together, independently of whether this means is effective — and all the more when it has proven effective like the exercise of the right to strike has in countless circumstances in terms of social justice.

Again, a negative answer to the question whether ILO Convention No. 87 protects the right to strike would affect this right of co-operatives and their members as the mentioned diminished power of the International Labour Office to influence co-operative law-making would heighten the risk of maintaining existing restrictions concerning activities of co-operatives, such as for example the prohibition of being active in the financial sector that many countries have, as well as heightening the risk of continued “companization” of co-operatives through law, i.e. the approximation of their features with those of capital-centered enterprises and by applying to them laws that do not take the co-operative identity into account, such as accounting standards, labour laws, etc.

16. Finally, aware of the Court’s recent Advisory Opinion on the climate change obligations of States of 23 July 2025, which deepens the notion of sustainable development — and in addition to what the ICA invoked already in its written contribution concerning the link between social justice and sustainable development, the ICA would like to draw the Court’s attention to the link between the capacity of co-operatives to cater for social justice and Articles 55 and 56 of the Charter of the United Nations Organization, as well as the International Covenant on Economic Social and Cultural Rights (ICESCR). This covenant is a necessary complement to the ICCPR and it addresses economic, social and cultural rights as does the mentioned definition of co-operatives.

17. To conclude, the ICA expresses again its gratitude for having the opportunity to be part of this procedure. And I myself thank you, Mr President, and the esteemed Members of the Court, for your attention. Thank you.

The PRESIDENT: I thank the representatives of the International Cooperative Alliance for their presentation. I now invite the delegation of Business Africa to address the Court and I call Mr Kaizer Moyane to the podium. Sir, you have the floor.

Mr MOYANE:

### INTRODUCTION

1. Mr President, Madam Vice-President, Members of the Court, it is an honour and a great responsibility to appear before you on behalf of Business Africa. I sincerely thank the Court for organizing these proceedings on the ILO's request for an advisory opinion. I also extend Business Africa's appreciation to all of the participants in this process.

2. Business Africa seeks to influence policy by enhancing the African business voice in international, continental and regional bodies such as the International Labour Organization, the United Nations Economic and Social Council, the African Union Commission, the African Development Bank, the European Union, the Regional Economic Communities in Africa and other continental bodies. We work for the promotion of industrial peace in all enterprises in Africa by the development of sound industrial relations and personnel management practices. We do so by advocating for a conducive business environment that facilitates sustainable enterprises and employment for socio-economic development in Africa through our network of national employers and business organizations.

3. This role provides a vital perspective on the question before the Court, because our mandate affords insight into the circumstances and needs of employers, workers and governments. And it does so in a continent facing a position of relative economic disadvantage in comparison with many of the non-African States which have made submissions to you, and the membership of the ILO more broadly.

4. It would be quite wrong to ignore the fact that it is upon commercial activity that the livelihoods and prospects of workers, and the economic development of nations, depend. Businesses in Africa are among the most exposed to the risks that a reduction in commercial activity entails. Calls by some — mostly Western, industrialized — economies to impose a homogenous model on the right to strike will shrink the policy space available to developing economies. Earlier industrializers benefited from having choice over policy space and, with it, choice about how to sequence labour institutions with local economic needs. Historically, now rich countries built industrial capacity under protective policies and only later codified the full range of complex social protections that now exist in those countries. The imposition of a single model in respect of the right to strike would invert that sequence. It is difficult not to see it as the result of an effort by more economically powerful countries to “pull up the drawbridge” once they had attained economic prosperity. It would undermine the ability of developing economies to tailor strike laws in a manner that serves their most pressing economic need: the struggle to lift hundreds of millions of people out of poverty. This is as important a goal — and one that weighs on the social conscience of those of us living in and working in relatively economically disadvantaged regions. How this can be done is best determined by governments, employers and workers — not international judges, and certainly not by retrofitting a boilerplate into a historic instrument that was never intended for it.

5. I cannot emphasize strongly enough the importance to commerce in Africa of the ILO’s unique structure, which brings together, on an *equal* footing, employer, worker and government representatives from all of its 187 Member States<sup>67</sup>. Tripartism is one of the ILO’s four fundamental principles, and it is the lynchpin to ensuring interaction and co-operation so as to arrive at decisions which respect the equal status of workers, employers and governments.

6. The tripartite nature of the Organization has been widely considered to provide the ILO with a “unique advantage”<sup>68</sup> and to provide its actions (and in particular, the international labour standards that it sets and supervises) with legitimacy<sup>69</sup>. It is only through the standard-setting procedures that

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<sup>67</sup> Declaration of Philadelphia, 1944, Art. 1 (*d*) [ILO Dossier Document No. 118].

<sup>68</sup> ILO, “ILO Declaration on Social Justice for a Fair Globalization”, 2008 (amended 2022) [ILO Dossier Document No. 129].

<sup>69</sup> Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing, 2013), p. 7.

there is a guarantee, as envisaged by the ILO Constitution, that all ILO constituents can participate in the design of these rules. Moreover, it is only through the application of the ILO's proper standard-setting procedures that any codification of the right to strike will be able to take into account the diverse industrial relations systems and specificities of all Member States.

7. Mr President, Members of the Court, Business Africa reaffirms its unwavering commitment to the rule of international law, which must finally prevail. I will be followed today by Mr Paul Clark on behalf of Business Africa, who will address the nature of the question before the Court and the principles of treaty interpretation.

8. I thank you for the honour of addressing you. And now I request, Mr President, that the Court calls on Mr Clark. Thank you.

The PRESIDENT: I thank Mr Moyane for his presentation. I now call upon Mr Paul Clark to take the floor.

Mr CLARK:

1. Mr President, Madam Vice-President, distinguished Members of the Court. It is truly an honour to appear before you and, although it is said frequently, I mean it wholeheartedly when I say that it is a privilege to advance the arguments of Business Africa, on a question which is of such significance for socio-economic development in Africa.

2. I hope that you will forgive me for beginning the way that so many have, with the terms of the request for an advisory opinion. It requires the Court to determine whether or not the right to strike is protected by Convention No. 87. I will spend the larger part of my time on the nature of the question before you, because it is only on that basis that the task of treaty interpretation under the Vienna Convention can be approached with real precision. Having done so, I will be in a position to address the question of interpretation briefly, not least as I have the benefit of having heard the cogent submissions on behalf of the IOE, which Business Africa adopts.

#### **I. THE QUESTION BEFORE THE COURT**

3. The decision for the Court to make — as to whether Convention No. 87 protects the right to strike — does *not* raise the question of whether workers should be excluded from strike action.

Their ability to do so, and the regulation of it, is rooted elsewhere — in domestic law, in some regional human rights conventions, and otherwise. There is *nothing* to exclude their ability to use strike action in the eventuality that Convention No. 87 does not protect the right to strike. The ITUC wrongly implied the contrary throughout their submissions, such as when it was argued on Monday that there is no reason to exclude strikes from what workers can do to protect themselves<sup>70</sup>. Business Africa agrees entirely with that statement on its own terms, but it is simply of no consequence to the matter before you. Somalia wrongly said these proceedings concern “the existence of a right to strike”. The exclusion of strike action is not at stake in these advisory opinion proceedings. Indeed, you have heard many references to sources of a right to strike action which exist regardless of the content of Convention No. 87.

4. That being so, the proposition that Convention No. 87 protects the right to strike requires that Convention No. 87 has something to say about the parameters of strike action, and *not* whether the possibility of strike action should be excluded. Indeed, those — including Business Africa — who argue that the question before the Court must be answered negatively, expressly recognize that workers do have a right to strike.

#### **A. The inherent need for calibration: conceptual and practical**

5. Interpreting the question requires clarity about its object: what *is* a right to strike — what is the thing to which the question relates? No one suggests that it is absolute — that is a point that has been made repeatedly: it is a qualified right wherever it exists, and so it brings with it nuance and calibration.

6. Unlike freedom of association in general and unlike many of the other steps that workers may take in seeking to advance and protect their interests, a strike is a relatively extreme measure — often viewed only as a matter of last resort. Its exercise *necessarily* has economic and social consequences, which impact upon the rights and interests of others. This only serves to emphasize the inherent need for limitation.

7. So, from where does the calibration come?

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<sup>70</sup> CR 2025/16, p. 36, para. 12 (Danquah).

## **B. The possible sources of calibration**

8. Four possibilities emerge from the submissions that you have heard. I will suggest that one is a red herring, and that there are only three, of which none are compatible with the proposition that Convention No. 87 protects the right to strike. I should emphasize at the outset that none of these options involve suggesting that it should be this Court which provides the requisite calibration: as I will contend, it is absolutely imperative that *if* Convention No. 87 were to be considered to contain a right to strike (which Business Africa maintains it does not), but if it does, the means of calibration must emerge through the ILO's tripartite principle.

9. The first source of calibration is what might be called "the legal elsewhere". It is not Convention No. 87, it is those aspects of domestic law and regional or international law which do speak to the possibility of strike action or to the right to strike. This means that Convention No. 87 simply does not get involved in the protection or the regulation and calibration of the right to strike because that is being done elsewhere in the legal landscape.

10. The second possibility — to which the ITUC referred in their submissions before you on Monday — is the content of Convention No. 87 itself. In submissions on Monday on behalf of the ITUC, in this regard reference was made, in particular, to limits being imposed by "the law of the land" in Article 8 (1), the reference to "lawful" in Article 3 (2) and Article 9, which the ITUC noted allows States to exclude the police and the armed forces from the scope of the Convention's application<sup>71</sup>. Even if the text of Convention No. 87 relates to activities other than internal ordering, the reference to "the law of the land" — if applied to the possibility of strike action — says simply that a calibrated right to strike is to be found in domestic law. The reference to "lawful" in Article 3 (2) adds nothing to "the law of the land" other than, perhaps, to acknowledge the possibility that a State's domestic law incorporates the content of regional human rights conventions. The only real indication of a limit is the possibility of excluding the police and the armed forces, but Article 9 (1) simply refers to domestic law in this regard when it says "shall be determined by national laws or regulations". In any event, mere reference to the specificity of the armed forces and the police is plainly insufficient calibration, not least as it says nothing about the limits and modalities

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<sup>71</sup> CR 2025/16, pp. 43-44, para. 14 (Okowa).

of strike action by anyone other than the police and the armed forces. There is no real limitation or qualification to a purported right to strike in Convention No. 87: it is a red herring.

11. The third possibility is the views of the Committee of Experts and the CFA. But this is a unilaterally devised conglomerate of rules on scope, conditions and limits of workers' resort to strike action; in so doing, the Committee of Experts has acted outside its competence and mandate. Here I emphasize strongly the distinction between *ex ante* standard-setting and *ex post* supervision<sup>72</sup>. To allow the views of the Committee of Experts to determine the content of an ILO Convention would stand in the starkest of contrast to the proper tripartite process under the Constitution of the ILO. Our submission — and that of the employers and some governments — is that, in doing so, the Committee of Experts has acted outside its competence and its mandate. But even leaving that aside, it is self-evident that the comments and observations of the Committee of Experts are not arrived at through the constitutionally enshrined procedure for standard-setting. To accept its comments and observations as determinative of the content of the Treaty would subvert tripartism, causing further instability within the carefully calibrated ILO system. I will return to the relevance of this when I turn to the task of treaty interpretation.

12. The fourth possible source of calibration is that of a distinct ILO instrument on the right to strike. Such a convention, crucially, would be arrived at through tripartism and the processes mandated by the constitution of the ILO. Through its tripartite International Labour Conference, the ILO could have adopted a convention on the right to strike — which would necessarily include the question of its scope, its limits and its conditions and which provides a proper constitutionally sound basis for supervision of a right to strike. And it still could do so without further delay. It is worth noting that this is what the Employers' Group, as well as many governments, have repeatedly attempted to put on the agenda of the International Labour Organization<sup>73</sup>. Even though the Government Group of the ILO Governing Body indicated its readiness to discuss the existence of a "right to strike" back in 2015, such substantive discussion has simply not taken place at the

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<sup>72</sup> See Written Statement of Switzerland, paras. 63-65; (withdrawn) Written Statement of the United Kingdom, para. 11; Written Comments of Bangladesh, paras. 34 and 39.

<sup>73</sup> See, for example, Letter signed by 14 regular Employer members of the ILO Governing Body to the Chairperson of the Governing Body, dated 12 September 2023 [ILO Dossier Document No. 16].

Governing Body or at the International Labour Conference to date due to the refusals by the Workers' Group to participate in such a process.

13. I have sought to persuade you of two things so far: first, the requirement of calibration inheres in the very concept of a right to strike and in any effort to protect it, and, among the possible sources of such calibration, serious and significant problems arise if the source of calibration of a right to strike emanating from Convention No. 87 is in the views of the Committee of Experts or the CFA.

14. I hope that clarity as to the meaning of the question of whether Convention No. 87 protects the right to strike will allow real precision in the application of the principles of treaty interpretation.

## II. INTERPRETATION UNDER THE VIENNA CONVENTION

15. The ITUC and others argue that the bare text of Convention No. 87 includes the right to strike because it is included in the word "activities". I have tried to show why a choice to include striking as only one example among many brings with it a need for calibration and specification, and that Convention No. 87 is an inappropriate vehicle for that. The absence of treatment in the text of the *inherent* need for calibration underscores that point further.

16. As to "context", its role in interpretation is by reference not only to the structure of Convention No. 87 but also to any agreement made between the parties in connection with the treaty's conclusion, or any instrument made by one or more parties in connection with the treaty's conclusion and accepted by the other parties as such<sup>74</sup>. As the Workers' Group themselves acknowledged, the references to freedom to organize in Convention No. 87 "must be understood in the context of the relevant provisions of the preamble to the ILO Constitution and of the Declaration of Philadelphia"<sup>75</sup>. The proper process of standard setting is constitutionally entrenched in the ILO. A finding that Convention No. 87 contains that which the Committee of Experts considers to be "the" right to strike would give the imprimatur of this honourable Court *ex post facto* to a form of unsanctioned, illegitimate unilateralism.

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<sup>74</sup> VCLT, Article 31 (2); Gardiner, *Treaty Interpretation* (2nd ed, 2015), p. 197.

<sup>75</sup> ILO, The dispute on the interpretation of Convention No. 87 in relation to the right to strike – Background report, GB.349bis/INS/1/1, 2023, p. 12, para. 4; p. 16, para. 18.

17. As to the argument asserting a purported need for consistency with human rights law, it would be absurd to deny that certain international and regional instruments explicitly or implicitly refer to a right to strike<sup>76</sup>. However, across these examples, the right has a very different scope, set of conditions and limits. The application of human rights law is able to refer to a right to strike, without it collapsing under the weight of variation and national specificity, because of the application of subsidiarity and the invocation of a broad margin of appreciation when it refers to the right to strike. This institutional context in which the ILO applies Convention No. 87 is entirely different and lacks these features.

18. But it is the question of object and purpose which is the beating heart of the argument advanced by those who contend that Convention No. 87 does include a right to strike. The ITUC made the argument on Monday that strike action should be included in Convention No. 87 in order to facilitate the effectiveness of trade unions. But it was perhaps in the assertion that a ruling that Convention No. 87 does not protect the right to strike “could be used to destabilize industrial relations, and to deny the very existence of worker rights in countries hostile to those rights”<sup>77</sup> that this teleological line of argument revealed its true colours. This, like the other less extreme teleological arguments that you have heard over the last two and a half days, of course, is contingent upon a particular interpretation of the question before the Court: whether to exclude strike action from the measures available to workers, or whether a right to strike exists at all. This interpretation is simply wrong. The extreme language of the ITUC was misplaced and misconceived. The ITUC effectively asks you to somehow take action to prevent what would already be internationally unlawful acts and, in so doing, mistakes a question of interpretation for a question of enforcement. It is straightforwardly a category error; a disorientated teleology.

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<sup>76</sup> Universal Declaration of Human Rights, 1948, Art 20 [ILO dossier Document No. 283]; International Covenant on Economic, Social and Cultural Rights, 1966, art 8 [ILO dossier Document No. 284]; International Covenant on Civil and Political Rights, 1966, Art 22 [ILO dossier Document No. 285]; Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Art 11 [ILO dossier Document No. 286]; European Social Charter (Revised), 1996, Art 6 [ILO dossier Document No. 287]; Charter of Fundamental Rights of the European Union, 2000, Art 28 [ILO dossier Document No. 288]; American Convention on Human Rights, 1969, Art 16 [ILO dossier Document No. 289]; Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, 1988, Art 8 [ILO dossier Document No. 290]; African Charter on Human and Peoples’ Rights, 1981, Art 15 [ILO dossier Document No. 291]; Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 2010, para 59 [ILO dossier Document No. 292]; Arab Charter on Human Rights, 2004, Art 35 [Document No. 293]; Charter of Fundamental Social Rights in the Southern African Development Community, 2003, Art 4 [ILO dossier Document No. 294].

<sup>77</sup> CR 2025/16, p. 54, para. 5 (Koh).

19. I have neither the time nor the need to address the remaining issues under the Vienna Convention. The United Kingdom convincingly dismantled the proposition that customary international law militates in favour of a finding that Convention No. 87 protects the right to strike. The IOE and Switzerland have shown convincingly the absence of subsequent agreement or subsequent practice for the purposes of Article 31 (3).

20. The repeated characterization of Business Africa's position, as that of a minority view, seeks to distract from the principles of treaty interpretation, which are certainly not driven by majoritarianism. I note in passing that this characterization is also wrong on the facts. Many governments support the view that the right to strike is not protected by Convention No. 87 and many governments, which form part of the ILO, do not explicitly support the workers' views. Indeed, during the Governing Body's discussion to submit this question to the Court, around half of the room supported the approach of the employers<sup>78</sup>.

### III. CONCLUSION AND IMPLICATIONS

21. Professor Klein for the ITUC sought to persuade you that the right to strike is the right to strike, regardless of its origins, by using a metaphor: as being wet is a corollary of being immersed in water, you will be wet in any event, it does not matter whether you swim in the Scheveningen sea or relax in your bathtub; so, by analogy, you were encouraged to interpret the right to strike into Convention No. 87, since such a right is linked to free association elsewhere. But, Mr President, I say that the source of your soaking *does* matter. Yes, in both the bath and in the sea, one will get wet — but it is only in the sea, with its riptides and currents, that there is a real chance of drowning. And so it is within the international labour system — and in particular the question of the right to strike; the *source* of a legal right can be of great significance.

22. That is why we say that here, the right to strike needs to be accompanied by appropriate limits and clear modalities determined, and I emphasize this, by the ILO's tripartite process. This is necessary in order to uphold workers' rights; and to ensure the protection of the public at large with respect to minimum service requirements for essential services.

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<sup>78</sup> Draft Minutes of the 349th *bis* (Special) Session of the Governing Body, November 2023 [Document No. 31], paras 28-68.

23. The importance of the source of the legal right, in this context, goes beyond even these critical matters. To grant the imprimatur of this honourable Court *ex post facto* to the unsanctioned, illegitimate unilateralism of the Committee of Experts' views as to the right to strike would destabilize the unique balance of the ILO's tripartite system. As Panama rightly observed in their submissions to you yesterday, if we rewrite a convention in this way, then every contentious topic would become susceptible to recodification, thus eroding the rule of law in the ILO.

24. Tripartism is also the means by which the equality of workers, employers, and governments is maintained and respected in the ILO system. There is an unfortunate irony in the fact that the workers' own efforts to win a long running dispute in the ILO would undermine the very structures which give them, as well as the employers, agency in the ILO's law-making and standard-setting processes. The real wider implications of the question before the Court does not involve excluding workers from strike action or diminishing the effectiveness of trade unions — or even encouraging abuse of their human rights through the media or otherwise. What is really at stake is upholding the propriety of the ILO's tripartite processes pursuant to the ILO constitution.

25. Not only does proper process through tripartism underpin the rule of law within the ILO, it is a rare example of practice which encourages what Professor Balakrishnan Rajagopal calls “international law from below” — giving voice to those who have historically been silenced within the institutions of international law. It affords agency in decision-making to those who are directly involved in the commercial activity upon which the livelihoods and prospects of workers, and the economic development of nations, depends. In line with Mr. Moyane's comments at the outset, this makes the tripartite processes vital to socio-economic development in Africa.

26. Mr President, Madam Vice-President, distinguished Members of the Court, I thank you for the honour of addressing you and for your patient attention.

The PRESIDENT: I thank the representatives of Business Africa for their presentation.

This presentation concludes the oral statements by all of the participants who have expressed a wish to take part in the present oral proceedings.

I note that the hearings are now closed on the request for an advisory opinion submitted to the Court by the Governing Body of the International Labour Organization on the question of the *Right to Strike under ILO Convention No. 87*. I would like to convey the Court's thanks to all the delegations who have addressed the Bench over these last three days, as well as to the participants in the written proceedings. I would also ask the representatives of all participants to remain at the disposal of the Court in case it should require any further information or explanations from them.

The Court will now retire for deliberation. The Registrar will in due course inform the Director-General of the International Labour Organization and all of the participants in these advisory proceedings of the date and time when the Court is to render its opinion.

As the Court has no other business before it today, I declare this sitting closed.

*The Court rose at 12.55 p.m.*

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