DISSENTING OPINION OF JUDGE TOMKA

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1. I cannot agree with the majority. Contrary to its view (Advisory Opinion, para. 68), "the text of all the provisions concerned, their context and the object and purpose of the treaty" do, in fact, "point to" a conclusion that the right to strike falls outside the scope of Convention No. 87. The historical record leaves little doubt that a right to strike was not intended by the treaty's drafters or by its trade-union proponents to be included in the Convention. The Convention responded to a specific problem: interference with the formation and autonomy of trade unions. On the single occasion when a right to strike briefly surfaced during the negotiations, it was deemed tangential to Convention No. 87 and deferred for possible consideration in a future instrument. Moreover, since 1948, a number of States parties have consistently objected to any attempt to read such a right into the Convention. The Opinion glosses over these elements, cherry-picking those that suit its conclusion. I will examine each in full, as required by the customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties (VCLT).

I. NO ROLE FOR TELEOLOGY IN TREATY INTERPRETATION UNDER THE VCLT

2. The Opinion relies on several manoeuvres which are not consistent with proper methods of treaty interpretation. First and foremost, the majority invokes an outcome-driven notion of "effectiveness", overlooking key aspects of the Convention's text, context, and object and purpose in favour of an overtly teleological effort to "read in" an additional right — the right to strike — which was deliberately left outside the scope of the Convention. This turn to teleology permeates, and subverts, the entire interpretive exercise.

3. The practice of the Court has not, so far at least, been to resort to teleological interpretation[1]. Indeed, such an effort is inconsistent with the modern rules of treaty interpretation and it conspicuously departs from the balance struck in 1968-1969 by the delegates at the Hofburg, who

[1] See e.g. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 229: "The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions . . . a meaning which . . . would be contrary to their letter and spirit."

anchored interpretation under the Vienna Convention on the Law of Treaties in the primacy of the text and in the intentions of the drafters, rather than in free-floating teleology.

4. It may be instructive to consult the history underlying this masterful codification of the principles of treaty interpretation. The general rule of treaty interpretation settled a decades-long controversy between textualists and teleologists. Earlier codification efforts, including the Harvard Draft Convention of 1935, conceived of interpretation as a search for the treaty's "general purpose," treating the text as merely one indicator of that purpose. The Institut de droit international, after much debate in the 1950s, abandoned this approach. Its resolution adopted at Granada affirmed that the "natural and ordinary meaning" of the text should form the basis of interpretation[2], with object and purpose still playing a role, but only a secondary one. The International Law Commission (ILC), under Sir Humphrey Waldock as Special Rapporteur, drew a similar conclusion. His Third Report made plain that it is the text which is "the authentic expression of the intentions of the parties"[3] and the Commission rejected a separate article on effectiveness, lest it open the door to purely teleological constructions[4]. The Vienna Conference approved this orientation, notably disagreeing with a proposal of the US delegate, Myres McDougal, which would have replaced the primacy of the text with an open catalogue of "relevant factors".

5. In consequence, the general rule in Article 31 stands in marked contrast to the doctrine that was once associated with the maxim *ut res magis valeat quam pereat*, which treated textual gaps as an invitation to legislate. The general rule does not contemplate an unbendingly "literalist"[5] approach, but it does demand that the search for the parties' intent begin with, and remain anchored to, the ordinary meaning of the text.

6. With this background in mind, if reliance is to be placed upon the principle of "effectiveness", it should be understood that this concept, under the modern law of treaties, finds its

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[2] "De l'interprétation des traités", 46 *Annuaire* Inst. Droit Int'l, 1956, pp. 348-349.

[3] *Yearbook of the International Law Commission*, 1964, Vol. II, p. 56, para. 13.

[4] See *Yearbook of the International Law Commission*, 1964, Vol. II, p. 288, para. 73 (Castrén), para. 86 (de Luna), paras. 92, 107 (Rosenne), para. 95 (Ruda), paras. 99, 106 (Ago), para. 109 (Verdross), para. 115 (Briggs). See generally C. Miles, "Implied Terms in Treaties", *American Journal of International Law*, Vol. 57, 2025, particularly at pp. 75-83.

[5] Compare G. Nolte, "Hersch Lauterpacht and Language in the International Law of Treaty Interpretation", *Cambridge International Law Journal*, Vol. 12, No. 2, 2023, p. 161 ("There were those who pursued literalist approaches, divorcing the written form of a rule from its historical and political contexts. And there were those who emphasised the interests that the rule and its authors pursued.") with D. Peat, *Comparative Reasoning in International Courts and Tribunals*, Cambridge University Press, 2019, p. 22 ("Jurists identified with the textualist school of interpretation, such as Sir Gerald Fitzmaurice and Sir Humphrey Waldock, never adopted literal interpretation as their sole interpretative methodology nor did those labelled subjectivists, such as Sir Hersch Lauterpacht, suggest that the text should be ignored in a free-ranging search for the intentions of the parties.").

expression in the doctrine of *effet utile*: provisions are to be construed so as not to deprive them of effect[6] — not, as some seek to suggest, so as to confer upon them the *greatest possible* effect[7].

7. In this regard, I emphasize that whether there is a "relationship" between the right to strike and the rights guaranteed under Convention No. 87 is not the question that has been posed to the Court. The question for the Court is not whether strikes are, in a sociological or political sense, related to unions' freedom of association — clearly they are — but rather whether Convention No. 87 specifically protects a right to strike.

II. APPLICATION OF THE GENERAL RULE OF TREATY INTERPRETATION

8. As is well known, the general rule of interpretation provides:

> "(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> *(a)* [a]ny agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> *(b)* [a]ny instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> (3) There shall be taken into account, together with the context:
>
> *(a)* [a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> *(b)* [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> *(c)* [a]ny relevant rules of international law applicable in the relations between the parties.
>
> (4) A special meaning shall be given to a term if it is established that the parties so intended."

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[6] In instances where the Court has arguably relied on the principle of effectiveness, it has done so in this limited sense, i.e. it has chosen, between two plausible interpretations, the one that preserves the operative effect of the treaty's provisions. See e.g. *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 23, para. 47 ("The fact that Article 3 of the Treaty specifies that the frontiers recognized are 'those that result from the international instruments' defined in Annex 1 means that all the frontiers result from those instruments. Any other construction would be contrary to the actual terms of Article 3 *and would render completely ineffective* the reference to one or other of those instruments in Annex 1.") (Emphasis added.)

[7] See *Yearbook of the International Law Commission*, 1964, Vol. II, p. 201 ("When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty.").

9. The general rule is called "general" for a reason. It is not an exercise in selectivity. Interpretation is a single combined operation in which "[a]ll the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation"[8].

10. The word "strike" is not one of the terms in Convention No. 87. Since a right to strike is not explicitly mentioned in the treaty, its advocates instead rely on its Articles 2, 3, 8, 10, and 11. The majority emphasizes, in particular, the guarantee in Article 3 of a "right [of workers' and employers' organisations] to . . . organise their administration and activities and to formulate their programmes", reasoning that this must incorporate strikes by implication. It also engages in teleological arguments regarding the "freedom of association" generally (by identifying alleged corollaries of that freedom).

11. Accordingly, I turn first to the ordinary meaning of the text in Convention No. 87, and specifically its Article 3. In my view, the ordinary meaning of "association" does not necessarily require (or even necessarily contemplate) strike actions. The two are, of course, related — strikes undoubtedly further the *effectiveness* of unions, once formed — but they are also distinct. The French version of the Convention, which uses "*liberté syndicale*" and "*droit syndical*" for both the freedom of *association* and the right to *organize*, varies from the English, but does not seem to suggest a different conclusion[9].

12. Turning to the ordinary meaning of "activities", this is more challenging. Strike actions could be reasonably understood as an "activity". The context in which Article 3 appears, on the other hand, would seem to undermine the argument that Article 3's reference to "activities" necessarily encompasses a right to strike. Considering Article 3, paragraph 1 in its entirety, one cannot overlook the fact that "activities" do not appear in isolation; rather, these are presented as part of a list featuring numerous, rather specific items: "Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes." The primary focus of this provision, it seems, is centred on internal matters, such as the drawing up of constitutions, the election of representatives in full freedom, and other activities of "administration".

13. Similarly, if one focuses on the words "to organise their . . . activities" — on the premise that this might encompass the organization of strikes — the same difficulty arises: the other activities "organised" under Article 3, paragraph 1, are uniformly internal and administrative in character. The French version is instructive in this regard. It refers to the right of trade unions to "organiser leur . . . activité". As my distinguished colleague, Judge Abraham, notes in his dissenting opinion, Article 3, paragraph 1, thus protects the freedom to *organize* their *activity* (in the singular)[10], suggesting that the provision's concern is with the internal functioning of trade unions rather than with particular forms of external action. The majority's reading, by contrast, detaches *activité* from the governing verb *organiser*, thus treating activities (plural) as a free-standing guarantee under the Convention.

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[8] *Yearbook of the International Law Commission*, 1966, Vol. II, pp. 219-220, para. 8.

[9] "Liberté syndicale" seems no more likely than its somewhat inexact English-language counterpart to inherently include strikes; the term seems to relate primarily to the formation and existence of unions, rather than to the execution of specific collective activities such as strikes. See e.g. *Collins Robert French Dictionary*, 4th ed., 1995, p. 794: *syndiquer*: "to unionize . . . to form a trade union"; s*yndicalisme*: "trade unionism"; *syndicalisation*: "union membership".

[10] Dissenting opinion of Judge Abraham, paras. 25-29.

14. The meaning of the terms must also account for the treaty's object and purpose. For that, one might start with the title of the Convention itself, namely the "Freedom of Association and Protection of the Right to Organise Convention", underscoring that the treaty is concerned not with an open-ended catalogue of "activities", but with association and organization as such. One next encounters the preamble, which notes, *inter alia*, that a convention was needed to adopt "certain proposals concerning freedom of association and protection of the right to organise". To appreciate the significance of this reference, however, one must have recourse to the actual conditions and circumstances in which the Convention was adopted.

15. In this regard, I regret that the Opinion does not take proper account of the context which formed the actual impetus for the convention being drafted. The oversight is all the more remarkable given that the ordinary meaning of the Convention's terms as I have described above just so happens to align exactly with the positions taken by the principal trade-union actors whose urging led the Economic and Social Council to request the International Labour Organization to negotiate a convention on the freedom of association in 1947. These workers' organizations recognized a distinction between internal union autonomy and external economic action. They focused on the need to secure freedoms to guarantee unions' *formation* and their ability to conduct their internal affairs without interference — not to guarantee the right to strike.

16. The question of freedom of association initially came before the ILO as a result of a request of the Economic and Social Council (ECOSOC), applying the provisions of the Agreement between the United Nations and the International Labour Organization[11]. According to records of the International Labour Conference, immediately after the close of its 30th Session, it transmitted to the ECOSOC a report concerning the freedom of association, which formed the subject of discussion during the latter's fifth session. At the close of its discussion, the ECOSOC resolved as follows:

> "Having received the report transmitted by the International Labour Organisation in pursuance of the Council's request at its fourth session that the memoranda on the subject of trade union rights submitted to the Council by the World Federation of Trade Unions and the American Federation of Labor might be placed on the agenda of the International Labour Organisation at its next session and that a report might be sent for the consideration of the Economic and Social Council at its next meeting,
>
> Takes note of the report and observes with satisfaction the action taken and proposed by the International Labour Organisation within its recognized competence,
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> Decides
>
> *(a)* to recognize the principles proclaimed by the International Labour Conference;
>
> *(b)* to request the International Labour Organisation to continue its efforts in order that one or several international Conventions may be quickly adopted;
>
> *(c)* to transmit the report to the General Assembly"[12].

[11] International Labour Conference, 31st Session (1948), Report VII, Agenda Item No. 7 (Freedom of Association and Protection of the Right to Organise), p. 2.

[12] ECOSOC resolution 84 (V), UN doc. E/RES/84 (V) (1947). Following the transmission of the ILO report to the General Assembly, the Assembly, at its Second Ordinary Session in 1947, approved the ECOSOC resolution and lauded trade unions' freedom of association as "inalienable". UNGA res. 128 (II), UN doc. A/RES/128 (II) (1947).

Given the evident influence of the submissions of the World Federation of Trade Unions (WFTU) and the American Federation of Labor (AFL) in the process that ultimately yielded Convention No. 87, their contemporaneous memoranda merit particular attention.

17. The WFTU, the successor organization to the International Federation of Trade Unions after the Second World War, had this to say on the need to protect the freedom of association through an ILO convention:

> "1. Ever since the end of the second world war, certain interventions have tended, in various countries, to destroy the very foundations of trade union rights. *The means employed to hinder the progress of the trade union movement are principally as follows*:
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> > the large-scale dismissal of trade unionist workers, the arrest of active trade unionist and trade union leaders, the occupation of trade union premises, the revocation by the government of bodies democratically chosen by the trade unions, the nomination of trade union leaders by the government, the prohibition of all coloured or native workers against forming occupational organizations, the prohibition on occupational organizations against forming any federal occupational or inter-occupational organizations, whether locally, nationally or internationally, etc.
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> > . . . . . .
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> > 7. [T]he State should not obtain a hold over the trade unions and over the workers' movement by means such as: the nomination of administrative bodies and leaders by the public authorities, or the interference of the latter on any other score in the running of trade unions.
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> > 8. Furthermore, any attempt to hinder the federation of trade union organizations on the occupational and inter-occupational level, locally, nationally and internationally, constitutes a very serious infringement of trade union liberty. In fact, the idea of organization is at the very basis of [the] trade union movement which, by its very nature, tends to integrate into ever-widening entities"[13].

18. The word "strike", or even the idea of one, does not appear in the WFTU memorandum. Rather, the memorandum deems interference with unions' ability to form and to self-govern as the principal threats to trade-union liberty. It is notable that one of the largest associations of trade unions at the time did not have in mind the protection of strikes when it urged action by the international community, and the ILO specifically, to protect trade unions' rights of association.

19. The accompanying memorandum of the American Federation of Labor, in turn, argued that "[g]enuine freedom means the right of association and organization into various . . . trade union organizations, without fear of the threat of direct or indirect control and compulsion by governmental

[13] UN doc. A/374 (1947), Annex I, Draft Resolution Submitted by the World Federation of Trade Unions to the Economic and Social Council on Guarantees for the Exercise and Development of Trade Union Rights, p. 4 (emphasis added).

or any other agencies"[14]. The organization's official monthly magazine, the *American Federationist*, described the AFL's contribution to the upcoming negotiation of Convention No. 87 as follows:

> "The I.L.O. meets in San Francisco next month. At this meeting, the thirty-first in the series of annual International Labor Conferences, the delegates representing governments, workers and employers will be called upon to take action on a proposed world convention (treaty) guaranteeing freedom of association and the rights of both workers and employers to organize. The question of *an international guarantee of the right of workers in every country to form free trade unions* was referred to the I.L.O. by the United Nations Economic and Social Council after a strong memorandum on the subject was submitted to the latter body by the American Federation of Labor."[15]

20. These materials command attention. They reflect what the freedom of association was understood by leading actors in the trade-union movement to require — and, just as importantly, what it did not. If even the self-styled vanguard of the international labour movement did not understand freedom of association necessarily to encompass a right to strike, the Opinion's abstractions to the contrary become rather difficult to sustain.

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21. Instead of engaging with this context, the Opinion states simply that strikes are not "explicitly excluded" (para.71) from the treaty. This reverses the Court's task, which is to determine whether a treaty confers or recognizes a right — not whether the evidence is such as to merit "the inference that . . . the right to strike [is] excluded".

22. This unorthodox contention is, in any event, wrong on the facts. At this stage, it may perhaps be useful to examine the context surrounding the negotiation of the treaty itself. In this regard, consultation of the Convention's preparatory works can assist in ascertaining the real intentions the drafters wished to convey through the terms they used[16].

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[14] *Ibid.* at Annex II, Memorandum and Draft Resolution Submitted by the American Federation of Labor to the Economic and Social Council on Guarantee for the Exercise and Development of Trade Union Rights, p. 10. As far as this document is concerned, the Opinion accords decisive weight to a single question proposed by the AFL, which, as part of its draft resolution, suggested that the ILO address the following: "H. To what extent is the right of workers and of their organizations to resort to strikes recognized and protected"? This is hardly the smoking gun the majority seems to believe it is. The AFL's proposed questions touch on issues governed by numerous instruments, not just a convention on the freedom of association, for example: "I. To what extent are workers and their trade unions free to resort to voluntary arbitration . . . in order to settle their differences with their employers?" Others were not addressed to unions at all: "L. To what extent are workers free to accept employment, to stay on the job or to abandon it, in accordance with their own decision, without governmental coercion or interference"? The Opinion's highlighting of one proposed question about how States regulate strikes at the domestic level, while disregarding the most relevant item of all — the AFL's indication of what it understood by the "right of association and organization", that is, the key issue in these proceedings — is unconvincing. Viewed as a whole, the document tells a different story.

[15] "Labor Highlights," *The American Federationist*, Vol. 55, No. 5, 18 May 1948, p. 2 (emphasis added).

[16] See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, dissenting opinion of Vice-President Schwebel, pp. 30-32. See also Stephen M. Schwebel, "May preparatory work be used to correct rather than confirm the 'clear' meaning of a treaty provision?", in *Justice in International Law: Further Selected Writings*, 2011, p. 289.

23. The *travaux* largely centre on a 1948 questionnaire circulated by the International Labour Office, which sought input on whether Convention No. 87 should specify that the freedom of association, specifically of public officials, "should in no way prejudge the question of the right of such officials to strike". The responses received from 19 governments are divided, but they reveal that several States believed that the Convention did not cover the right to strike: notably the Netherlands and Sweden, who "consider that this Convention should not be concerned with questions relating to the right to strike". The United States, for its part, stated "that it would be undesirable to attempt to resolve this problem under this Convention". In its conclusions, the ILO's permanent secretariat (the International Labour Office) noted that these States believed, "justifiably it would appear, that the proposed Convention relates only to the freedom of association and not the right to strike, a question which will be considered in connection with Item VIII (conciliation and arbitration) on the agenda of the Conference"[17]. In short, the question of a right to strike was taken off of the negotiating table for Convention No. 87.

24. Incidentally, in 1949 the right to strike was similarly left outside the scope of the Right to Organise and Collective Bargaining Convention (No. 98). During the drafting of that Convention, a proposal was made to include an explicit guarantee of the right to strike; the Chairman of the conference noted that the issue fell outside the scope of the draft text. As with Convention No. 87, it was determined that the issue would instead be addressed under a separate agenda item concerning conciliation and arbitration[18]. The preparatory works of both Convention No. 87 and Convention No. 98 thus suggest that States viewed the right to strike as relating more closely to the domain of industrial dispute settlement, rather than the freedom of association as such.

25. Taken as a whole, the *travaux* do not merely fail to support the proposition that Convention No. 87 provides a right to strike. If anything, they indicate that no such protection was intended to be included in that Convention.

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26. The record up to and including 1948 thus indicates a collective recognition that the treaty's object and purpose — and the concept of freedom of association — concerned other priorities of the trade-union movement, distinct from strike action. In other words, a right to strike was understood to fall outside the remit of Convention No. 87. How does the Opinion, then, manage its way to the diametrically opposite conclusion?

27. The majority asserts that Article 3 "includes . . . also broader powers . . . in both internal and external contexts" (Opinion, para. 69). That conclusion is neither grounded in the text nor reconcilable with the context set out above. It is also, it would seem, entirely unbounded, since the Opinion offers no principled explanation of what qualifies as an "external context", or where the limits of such a concept might lie.

28. The Court muses that certain matters are theoretically "capable of falling within the meaning of the term 'activities'" (Opinion, para. 70). The issue, however, is not abstract capacity,

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[17] International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise, p. 87.

[18] International Labour Conference, 32nd Session, Record of Proceedings, 1949, p. 468.

but actual meaning. Treaty interpretation does not ask whether something could, in the abstract, be *capable* of falling within a term, but whether it *in fact does so*, when determined through the combined operation of text, context, and object and purpose. The same deficiency attends the Opinion's reliance on a preambular reference to "sustained progress" (para. 72): progress toward *what*?

29. When the text of Convention No. 87 is read in context and in the light of the treaty's object and purpose, the result is sufficiently clear. The terms "activities", "programmes" and "organise" are capable of producing significant effects without addressing strikes, and this was also the understanding at the time. The historical record up to 1948, including the role of the trade-union movement in instigating the Convention, as well as the deliberations of the drafters and the positions articulated by States, points to a deliberate settlement as to the Convention's scope, one that embraced its guarantee of freedom of association as a substantial and deliberate form of progress and deferred the regulation of strikes to another instrument. Properly applied, the general rule of interpretation is therefore sufficient to resolve the question before the Court. There is no lacuna requiring supplementation, still less "correction", through supplementary means.

III. SUBSEQUENT AGREEMENT AND SUBSEQUENT PRACTICE

30. What follows is the Opinion's attempted second act: a turn to supplementary means of interpretation under Article 32, into which the majority seeks to channel arguments based on subsequent agreement and practice that it could not sustain under Article 31 (3). As will be seen, this turn adds little and changes nothing. If anything, the record in the decades following 1948 reinforces the conclusion already compelled by applying the general rule on the interpretation of treaties.

31. The starting-point must be whether the basic preconditions for reliance on subsequent agreement or subsequent practice are met. On that threshold question, I agree that there has been no "subsequent agreement" between the parties, since the concept necessarily presupposes a common understanding among all parties. The record contains no evidence of formal agreements or any other documented practices that would reflect such a common understanding. The Opinion concedes this as far as Article 31 (3) *(a)* of the VCLT is concerned. The Opinion likewise concedes that there is no subsequent practice establishing the agreement of *the* parties (i.e. all of them) within the meaning of Article 31 (3) *(b)*.

32. Those concessions are of little consequence, however, since, having acknowledged the absence of any subsequent agreement or unanimity among the parties within the framework of Article 31, the Opinion then steps outside that framework. It suggests that what cannot be established under the general rule may nevertheless be supplied by recasting the practice of some, though not all, parties as "supplementary means" under Article 32. In support of this move, the Opinion invokes a purported "distinction" (para. 77), according to which subsequent practice, when relied upon as a supplementary means of interpretation, no longer requires evidence of "the common understanding of all the parties". It is alleged that this "distinction" finds support in the annals of the ILC, specifically in its 1964 Draft Articles on the Law of Treaties (adopted in the first reading).

33. The allegation is mistaken, being based on a misunderstanding of the Commission's work. In the first place, the 1964 reference to the practice of "individual States" is confined to a draft version of the commentary to what was then Article 27 (now Article 31 of the VCLT) and, I note, does not appear in the final version. Even taken on its own terms, however, the passage does not bear the weight the majority places upon it. The quotation appears in reference to the *Status of South West Africa* Advisory Opinion, which was relied on by the ILC for the proposition that the "practice of an

individual State may, it is true, have special relevance when it relates to the performance of an obligation which particularly concerns that State". The remainder of the statement however makes clear: "[b]ut, in general, the practice of an individual party or of only some parties as an element of interpretation is on a *quite different plane* from a concordant practice embracing all the parties"[19]. In other words, far from conflating subsequent practice that evidences the common understanding of all the parties with non-universal practice of individual States, the ILC was acknowledging that the (non-universal) subsequent practice of individual States may be relevant in showing how that State understands its own obligations under a treaty, in a context where that State is specially affected by the treaty. This is a different, and more limited, point than that ascribed to the ILC by the majority.

34. Perhaps the Opinion might have spared a thought for the subsequent practice of the ILC itself, since, just two years later, in his Sixth Report on the Law of Treaties in 1966, Special Rapporteur Sir Humphrey Waldock confirmed:

> "Under [what became Article 31], it is only subsequent practice which clearly establishes the understanding of *all the parties* regarding the meaning of the treaty which is recognized as equivalent to an interpretative agreement and the reason is, of course, that two parties or *even a group of parties cannot, by their interpretation of the treaty, bind the other parties as to its correct interpretation.*"[20]

Accordingly, whatever terminology is employed — "agreement of the parties", "common understanding", "common intention", "common will", or any other permutation — the requirement is the same. For the purposes of treaty interpretation, an understanding that is not shared by all the parties is no understanding at all.

A. Practice of the States

35. Only the universal practice of States constitutes "subsequent" practice capable, in 2026, of reading into Convention No. 87 a right that was deliberately left out in 1948. No such practice exists. Nor can consensus be inferred from the silence of certain States, even if such an inference were principled (on which I have doubts), particularly where several States have expressly objected to implying a right to strike into the Convention.

36. At least 15 States (Algeria, Bangladesh, Belarus, Colombia, Costa Rica, Ethiopia, the German Democratic Republic, Ireland, Japan, Nigeria, Switzerland, Tunisia, Turkey, Uruguay, and the Union of Soviet Socialist Republics) have at one time or another expressed either clear opposition to, or scepticism of, the interpretation advanced by the Committee of Experts. The majority makes no mention of most of these States, noting only (Opinion, para. 85) that "a number" of States parties "have, over the years, occasionally challenged" the interpretation that Convention No. 87 protects the right to strike. Quite.

37. The majority does spare a brief word for the four States in the list above (Bangladesh, Costa Rica, Japan, Switzerland) that are participating[21] in the present proceedings, but only with respect to their position on Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (which I consider in further detail in Section IV). It does not engage with their

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[19] *Yearbook of the International Law Commission*, 1964, Vol. II, p. 204, Article 69, paragraph 13 of the commentary (emphasis added).

[20] Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 90 (emphasis added).

[21] Uruguay also participated but appears to have evolved in its position since its objection in 1982.

positions regarding Convention No. 87. Nor does the majority examine the positions of any of the remaining States with respect to Convention No. 87. That silence is emblematic of a broader approach that sidelines the objections of States that do not align with the asserted majority view.

38. The reader is presented, instead, with the 2015 statement of the Government Group, on which such reliance has been placed in these proceedings. In it, 28 State representatives, having "had the opportunity to thoroughly ponder on the question that is posed to us all", say "that the right to strike is linked to freedom of association" and that "without protecting a right to strike, Freedom of Association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized"[22]. The statement does not speak for all 158 parties, having never been adopted by the International Labour Conference or Governing Body, nor voted on by all Member States. At any rate, it says rather less than the majority would have it say. The statement recognizes a "link" between strike action and freedom of association and adds that its "scope and conditions are regulated at the national level". Considering that the Government Group in 2015 included Japan, a well-known objector State, it is unsurprising that this language carefully avoids the direct assertion of a right to strike under the Convention. It instead resembles much of the inchoate discourse of the supervisory bodies in the decades after the Convention's conclusion.

B. Practice of the ILO supervisory bodies

39. The pronouncements of supervisory bodies cannot by themselves constitute subsequent practice of the parties under the rule codified in Article 31 (3) *(b)* (i.e. without adoption or endorsement by States parties), and the silence of States in response to such pronouncements is not to be taken as acquiescence[23].

40. In any case, the practice of States and ILO supervisory bodies since 1948 is not sufficiently consistent or compelling to warrant reading a protection of the right to strike into the Convention. Indeed, although the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association now regard the right to strike as an "intrinsic corollary" of freedom of association, the historical record indicates that this understanding did not exist in 1948 and only evolved gradually, over several decades. The interpretation developed from initial scepticism about whether Convention No. 87 covered the right to strike (a "restrictive" phase, as it were), to a growing acknowledgment that restrictions on strikes *may* implicate the Convention (an "expansive interpretation" phase), and eventually to the current formulation linking the right to strike directly to freedom of association (an "integrative" approach). To the extent that one can identify a date at which the "intrinsic corollary" interpretation crystallized, it appears to have occurred in the mid-1990s — nearly five decades after the Convention's adoption.

1. Detailed examination of their practice

41. The historical examples of supervisory body practice which the Opinion highlights are often pressed beyond the limits of what they establish, even taken on their own terms. Moreover, they are selective, with the Opinion overlooking other, less supportive practice.

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[22] Government Group Statement, 23 February 2015, GB.323/INS/5/Appendix I, Annex II, paras. 3-4

[23] See ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 113, para. 19 ("[I]t cannot usually be expected that States parties take a position with respect to every pronouncement by an expert treaty body, be it addressed to another State or to all States generally[.]"). See also *ibid.*, p. 110, Conclusion 13 ("Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 *(b)*, accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.").

42. The Opinion first cites (para. 80) the 1959 General Survey, which states that "there is a possibility" that a strike prohibition "may run counter" to Article 8 (2) of the Convention. While the CEACR's 1959 General Survey is frequently invoked as the first instance in which the Committee recognized the right to strike under Convention No. 87, the text itself does not say this. It merely observes that restrictions on the right to strike "may sometimes constitute a considerable restriction" of the activities of trade unions, without affirming that the right to strike in general is protected by Convention No. 87. In the subsequent discussion on this General Survey in the Conference Committee on the Application of Standards, a right to strike under the Convention was not mentioned by any delegate.

43. Notably, the 1959 General Survey contrasts with a litany of other 1950s-era materials, notably from the Committee on Freedom of Association. That Committee, in 1952[24], 1953[25], 1954[26], 1955[27] and 1956 had the opportunity to opine on whether the right to strike was covered by the Convention; it either demurred or outright denied this to be the case. The same is true of the ILO Governing Body of 1956, which stated: "The Committee noted that the Association and Protection of the Right to Organise Convention does not cover the right to strike."

44. In other words, at this stage, both the CEACR and the Committee on Freedom of Association, and other ILO bodies, too, took the view that Convention No. 87 did not cover the right to strike.

45. The Opinion glosses over the preceding material — and essentially skips over the 1960s, with the exception of a single Committee on Freedom of Association statement (para. 81) which merely reiterated the CEACR's 1959 observation that prohibitions of strikes "may constitute a considerable restriction of the potential activities of trade unions". The Opinion's next historical piece of evidence is a statement of the CEACR the following decade. In the 1973 General Survey, the CEACR stated that a general prohibition of strikes constitutes "a considerable restriction of the opportunities open to" trade unions, namely opportunities "for furthering and defending the interests of their members" and "to organise their activities". This statement, however, does not assert that a right to strike is included in Convention No. 87.

46. A fuller examination of the 1970s complicates the account offered by the Opinion. While the ability to strike was often described as important, no material from this decade unambiguously situated a legal right to strike within Convention No. 87 itself. This includes a 1972 International Labour Conference resolution[28] which was cited by some participants in these proceedings. That resolution referred to the right to strike as a "basic trade union right[]", but it did not locate that right within Convention No. 87. On the contrary, the resolution listed the right to strike separately from the right to "set up free and democratic trade unions and to join them" and "the right of assembly".

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[24] Case No. 28 (Jamaica), Second Report of the Committee on Freedom of Association, 1952, para. 68.

[25] Case No. 50 (Turkey), Sixth Report of the Committee on Freedom of Association, 1953, para. 830 (noting that "admittedly, Convention No. 87 does not deal with the right to strike").

[26] Case No. 60 (Japan), Twelfth Report of the Committee on Freedom of Association, 1954, para. 53 (observing that the CFA was "not called upon to give an opinion on the question as to how far the right to strike in general - *a right which is not specifically dealt with* in [Convention No. 87 or 98] - should be regarded as constituting a trade union right").

[27] Case No. 102 (South Africa), Fifteenth Report of the Committee on Freedom of Association, 1955, para. 154.

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

The resolution thus draws the same conceptual distinction identified above, confirming that freedom of association and the right to strike were understood as distinct matters, serving different functions.

47. By the 1970s, it appears that there was increasing recognition of the importance of strikes to trade unions accomplishing their full effectiveness; yet at the same time, there was little recognition that a right to strike was legally guaranteed in Convention No. 87 specifically.

48. Rather, the record suggests awareness that the right to strike was *not* covered by the Convention, raising alarm in some quarters. In this regard, it is particularly revealing that both Governments and Workers' delegations recognized the need for a separate convention to deal with the question of a right to strike. In 1973, the same year as the aforementioned General Survey, the record of proceedings of the International Labour Conference indicates the following: "With regard to the right to strike in general, the Workers' members considered that this weapon must be available to workers and be expressly recognised in a Convention."[29]

49. Many States, for their part, expressed their doubts or outright objected to any suggestion that Convention No. 87 incorporated a right to strike, including Japan from 1961 onward[30], several States during the 54th Session of the ILC in 1970[31], Switzerland (albeit as a non-party) in 1973[32], the Soviet Union in 1978[33] and Ireland in 1979.[34]

50. The Opinion next cites the 1983 General Survey, which states that a "general ban on strikes seriously limits the means at the disposal of trade unions to further and defend the interests of their members . . . and their right to organise their activities . . . and is, therefore, not compatible with the principles of freedom of association". This General Survey is the first in the Opinion which provides support for an interpretation by a supervisory body that the right to strike does not merely "relate" to the matters governed by the Convention. Even here, however, the CEACR did not allege that a prohibition on strikes is incompatible with Convention No. 87 as such; rather it made a policy-based argument, noting the tensions between trade unions achieving their maximum effectiveness, on the one hand, and "principles" of freedom of association, on the other.

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[29] International Labour Conference, 58th Session, Record of Proceedings, 1973, p. 544, para. 25.

[30] Case No. 179 (Japan), Interim Report — Report No. 54 of the Committee on Freedom of Association, 1961, para. 86 (in which Japan stated, in a communication to the CFA concerning an ongoing case related to alleged restrictions on trade-union membership, elections of officers and strike actions, that "the prohibition of strikes does not contravene [Convention No. 87] or [Convention No. 98] . . . because these Conventions do not deal with the right to strike").

[31] International Labour Conference, 54th Session, Record of Proceedings, 1970, Seventh Item on the Agenda, paras. 12 and 25 ("Various members pointed out that, while the right to strike was provided for in certain instruments adopted by other international organisations — such as the Covenant on Economic, Social and Cultural Rights and the European Social Charter — no ILO instrument dealt with this right and the adoption of standards on this subject should be considered by the ILO.").

[32] International Labour Conference, 58th Session, Record of Proceedings, 1973, p. 544, para. 27 ("[U]nder Convention No. 87 public servants were guaranteed the right to organize but that the right to strike was not covered[.]").

[33] International Labour Conference, 64th Session, Report of the Committee on the Application of Standards (Ethiopia), 1978, p. 29/29 ("[I]t was doubtful whether ILO standards dealt with the right to strike, and if they did not it was in any event impossible for the Committee of Experts to find divergence between the Ethiopian legislation and Convention No. 87[.]").

[34] International Labour Conference, 65th Session, Report of the Committee on the Application of Standards (Ireland), p. 35 ("The Workers' member of Ireland was disturbed that the Government had called into question the interpretation of this Convention by the Committee of Experts . . . *The Government had stated that Articles 3, 8 and 10 did not provide for the right to strike*.") (emphasis added).

51. Once again, when the materials from the 1980s are considered as a whole, the picture becomes more complex. In 1981, the CEACR noted that the right to strike is one of the "essential means" available to workers and organizations to further and defend their interests, but evidently took care to distinguish between the right to strike and "other points", including "the right of trade unions to organise their internal administration and activities" — thereby reaffirming that these were legally and conceptually distinct sets of rights[35]. At the same time, the experts displayed a growing aversion to restrictions on strike action, at least outside of services they regarded as suitably "essential". In 1980, adopting language typical of the period, the Committee noted that a general prohibition on striking "should not last longer than is strictly necessary" and that such a prohibition "considerably restricts the possibilities" for unions to advance their interests[36]. In 1981, it observed that provisions rendering strikes "practically impossible" would "considerably limit" such possibilities[37]. Similarly, in relation to Liberia, the Committee suggested that an outright prohibition of strikes "in all the economic activities of the country constitutes a considerable limitation" of such possibilities and that "such a limitation is not compatible with the principles of freedom of association generally admitted"[38]. Prohibitions on strikes, the Committee noted in its comments on the Philippines, "should be confined to services that are essential in the strict sense of the term"[39]. Reacting to penal sanctions against trade-union leaders in Japan's public sector, the Committee remarked that "the development of occupational relations might be compromised by an inflexible attitude in the application of penalties in connection with strikes"[40].

52. In 1985, the CEACR repeated its stance that a strike is an "essential means" — that is, one among several[41] — for advancing occupational claims[42], though it appears to have rather overstated its own record by suggesting that this position "has always been considered by the supervisory bodies"[43], a claim not borne out by the facts. What the preceding examples instead reveal is a slow process of normative expansion. Concern with strike restrictions coagulated into resistance to them; resistance into general disapproval; and disapproval, in time, into so-called "principles of association" with which strike restrictions were said to be irreconcilable.

53. The reader is told that the Commissions of Inquiry, have, "since 1971, . . . considered that the right to strike is protected under Convention No. 87". In truth, they tell much the same tale. Of the five Commissions of Inquiry listed by the majority, the first three (from 1971, 1984 and 1987) were no less tentative than the CEACR, treating strikes as an important means for trade unions to advance their interests, or viewing restrictions on them as potentially giving rise to a violation of

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[35] International Labour Conference, 67th Session, 1981, Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 104.

[36] International Labour Conference, 66th Session, 1980, Report of the Committee of Experts on the Application of Conventions and Recommendations, pp. 112-113.

[37] International Labour Conference, 67th Session, 1981, Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 106.

[38] *Ibid.*, p. 112.

[39] *Ibid.*, p. 119.

[40] International Labour Conference, 66th Session, 1980, Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 115.

[41] In a report to the ILC regarding the German Democratic Republic's labour practices, the Committee stated: "[U]nder Article 3 of the Convention workers' organisations should have *a number of means* of furthering and defending their economic and social interests and that the right to strike is an essential one of these means." International Labour Conference, 71st Session, 1985, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 148 (emphasis added).

[42] *Ibid.*, p. 133.

[43] As for the 1992 Observations (Opinion, para. 80), the same can be said of these, which came three years after the Employers' Group formally expressed its opposition to the inclusion of the right to strike in the Convention in 1989.

Convention No. 87, without grounding a right in the Convention itself[44]. The Commissions of Inquiry in 1971 and 1984, for their part, acknowledged that "Convention No. 87 contains no specific guarantee of the right to strike"[45]. What is striking is not what these bodies said, but how much the majority must read into their statements to make them support its position.

54. What of States' reactions to these pronouncements? Throughout the 1980s, States continued to object even to these, rather qualified, statements of ILO supervisory bodies. This included Uruguay and Venezuela in 1982 (the latter of which noted the need for "an international instrument on the right to strike"), Tunisia in 1983 (which noted the same need), Ethiopia in 1985 (which noted "no Convention or Recommendation dealing directly with strikes"), and the German Democratic Republic in 1986.

55. In 1994 the CEACR for the first time stated, in a pronouncement upon which the majority has placed considerable reliance, that the right to strike is "an activity of workers' organizations within the meaning of Article 3" of the Convention:

> "In the view of the Committee, the right to strike is an *intrinsic corollary* of the right of association protected by Convention No. 87. This right is not, however, absolute and may be restricted in exceptional circumstances or even prohibited for certain categories of workers, in particular certain public servants or for essential services." (Emphasis added.)

The reasoning of the CEACR is based on the notion that the right of association contains a right to strike as an "intrinsic corollary." The CEACR, joined by the Committee on Freedom of Association, has maintained this position since 1994[46]. They were joined in 2010 by the Commission of Inquiry for Zimbabwe, which "confirmed that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87"[47].

56. Yet, even in the 1990s, States continued to object to the suggestion that Convention No. 87 specifically dealt with a right to strike, including Colombia in 1991 (noting that, as concerns a right to strike, "72 years after [the ILO's] establishment, no Convention of this kind has been adopted"); and Colombia, Morocco, Japan, and Venezuela in 1992. Such scepticism has continued into this century (e.g. Belarus in 2003 and 2020, Algeria in 2014, and Bangladesh and Türkiye in 2023).

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[44] Report of the Commission of Inquiry appointed under Article 26 of the Constitution to examine the complaints concerning the observance by Greece of Conventions Nos. 87 and 98 made by a number of delegates to the 52nd Session of the International Labour Conference, *Official Bulletin*, Vol. LIV, 1971, para. 261; Report of the Commission instituted under Article 26 of the Constitution to examine the complaint on the observance by Poland of Conventions Nos. 87 and 98 presented by delegates at the 68th Session of the International Labour Conference, *Official Bulletin*, Vol. LXVII, 1984, para. 517; Report of the Commission of Inquiry appointed under Article 26 of the Constitution to examine the observance by Nicaragua of Conventions Nos. 87, 98 and 144, *Official Bulletin*, Vol. LXXIV, 1991, para. 506.

[45] Report of the Commission of Inquiry appointed under article 26 of the Constitution to examine the complaints concerning the observance by Greece of Conventions Nos. 87 and 98 made by a number of delegates to the 52nd Session of the International Labour Conference, *Official Bulletin*, Vol. LIV, 1971, para. 261; Report of the Commission instituted under article 26 of the Constitution to examine the complaint on the observance by Poland of Conventions Nos. 87 and 98 presented by delegates at the 68th Session of the International Labour Conference, *Official Bulletin*, Vol. LXVII, 1984, para. 517.

[46] See e.g. International Labour Conference, 101st Session, 2012, Report III (Part 1B), *Giving globalization a human face*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, p.33, para. 81 and p. 34).

[47] *Truth, reconciliation and justice in Zimbabwe*, Report of the Commission of Inquiry appointed under article 26 of the Constitution to examine the observance by the Government of Zimbabwe of Conventions Nos. 87 and 98, *Official Bulletin*, Vol. XCIII, 2010, para. 575.

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57. Viewed as a whole, the historical record thus suggests a creeping linguistic shift by the supervisory bodies, beginning with a straightforward denial of the right to strike being addressed by the Convention, followed by general observations on the relevance of strike actions to trade unions' effectiveness, and finally, 46 years after the Convention was concluded, a direct assertion that a right to strike constitutes an "intrinsic corollary" of the matters included in the Convention, such that a right to strike subsists in it as a matter of law. It was clear to all, not least to the declarants of such an implied right, that this understanding fundamentally departs from the real intentions of the drafters. The CEACR acknowledges as much, observing in 2012 that, "in the absence of an express provision in Convention No. 87", various principles relating to the right to strike "were progressively developed" on the basis of Articles 3 and 10[48]. Throughout this shaky and piecemeal process, the supervisory bodies' noble efforts at progressive development met with objections. A wide range of States, which remain nameless in the Opinion but have been identified in this dissenting opinion, questioned the supervisory bodies' reasoning and objected to any legal implication of a right to strike into Convention No. 87.

2. The supervisory bodies are not owed deference

58. The chronology just reviewed resembles, not a settled legal interpretation, but rather a series of intermittent, policy-tinged remarks — often hesitant and heavily qualified — stretching into the 1990s. However, let us assume *arguendo* that, at some point decades after the Convention's finalization, the supervisory bodies lent their expert views to endorsing an unequivocal, legal position on the recognition of a right to strike under Convention No. 87. That would not justify reflexive deference to that position by this Court. As I have previously noted[49], the weight to be accorded to the interpretations of treaty bodies can only be assessed by carefully scrutinizing the interpretive reasoning on which those views rest. The Court undertakes no such inquiry. That omission is telling. A closer examination would have revealed that the bodies' pronouncements are not grounded in a rigorous application of the rules governing treaty interpretation. In fact, they do not appear to apply such rules at all. Even taken at their strongest, such pronouncements are not entitled to judicial deference.

59. The interpretive methodology of the CEACR and the Committee on Freedom of Association does not withstand close scrutiny. Although the CEACR has asserted that its pronouncements are based on the customary rules of treaty interpretation, this claim is not reflected in the pronouncements themselves, which are generally not based on a structured or transparent

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[48] International Labour Conference, 101st Session, 2012, Report III (Part 1B*), Giving globalization a human face*, General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, p. 46, para. 117 (emphasis added).

[49] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, joint declaration of Judges Tomka, Gaja and Gevorgian, p. 436, para. 5 (emphasis added):

> ("The CERD Committee has taken the view — in particular, in paragraph 4 of its General Recommendation No. XXX on discrimination against non-citizens — that the Convention should be interpreted as covering also differences of treatment on the basis of nationality. However, the CERD Committee has not stated in as many words that nationality is equivalent to national origin. It has rather identified certain conditions for the prohibition of discrimination that are specific to nationality and immigration and do not apply when the bases of discrimination listed in Article 1, paragraph 1, are in question. *It would be difficult to give weight to this view of the CERD Committee since it gives no reason for its interpretation* that different treatment based on nationality constitutes racial discrimination under CERD, albeit only to a certain extent.")

application of those rules. This is still better than the Committee on Freedom of Association, which does not appear to have ever examined or referred to the rules of treaty interpretation[50].

60. Perhaps the clearest illustration of the bodies' lack of methodological rigour is the carelessness with which they treat the text of the Convention itself. Take the CEACR's 1992 observation — relied upon by the Advisory Opinion (para. 80) — that "although it is clear that the provisions of the Convention do not specifically mention the right to strike, Article 3 of the Convention provides that workers' organisations shall have the right to organise their activities and formulate their programmes in full freedom"[51]. That, however, is not quite what Article 3 says. The provision guarantees workers' and employers' organizations the right "to elect their representatives *in full freedom*, to organise their administration and activities and to formulate their programmes". The phrase "in full freedom", on its face, is grammatically and syntactically tethered to the election of representatives. The CEACR effectively detaches and redeploys the phrase "in full freedom" elsewhere in the sentence, allowing it to qualify the organization of activities and the formulation of programmes instead. That does not so much interpret Article 3 as rewrite it.

61. The supervisory bodies' legal methodology, or rather the lack thereof, would be troubling in its own right, seen against the Court's prior jurisprudence demanding careful scrutiny of their methods. The matter is all the more problematic given that, unlike the Human Rights Committee, neither the CEACR nor the Committee on Freedom of Association is an "expert treaty body" in the proper sense. They were not established by Convention No. 87, and neither is entrusted with the legal interpretation, *stricto sensu*, of any ILO convention. They are instead creations of the ILO's institutional machinery, intended to assist with monitoring but lacking any kind of treaty interpretive power or competence[52]. The Opinion suggests (at paragraph 118) that "the fact remains that both [expert treaty bodies and the supervisory bodies of the ILO] perform a similar function", and, invoking the spirit of the Court's Judgment in the *Ahmadou Sadio Diallo* case, declares that the Court "may, *mutatis mutandis*, ascribe 'great weight'" to them. That leap is unexplained. When reciting the Court's statement in *Diallo* one might also keep in mind that, in that case, the Court's giving weight to the pronouncements of the Human Rights Committee hinged at least in part on the fact that the HRC was established "by the Covenant" itself, "specifically to supervise the application of" the ICCPR[53].

62. The International Labour Office has acknowledged that the supervisory bodies of the ILO do not possess interpretive authority over international labour Conventions. In 2009, the International Labour Standards Department warned that,

> "when considering the practice of the Committee of Experts . . . it should be borne in mind both that it does not have the formal mandate to interpret international labour Conventions and that its views on the meaning of Conventions are not the result of an open and adversarial procedure, during which all the interested parties can express their

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[50] See J. Vogt et al., *The Right to Strike in International Law,* Bloomsbury, 2020, p. 42 ("The Committee of Experts appears to be the only supervisory body in the ILO which has considered the VCLT in any detail.").

[51] International Labour Conference, 79th Session, 1992, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 208.

[52] See ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, Conclusion 13 (1) ("For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.").

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

views on the methods of interpretation that are most relevant to the question under consideration"[54].

That self-assessment should have given the Court pause before according such pronouncements "great weight".

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63. It therefore appears that the supervisory bodies did not, in practice, engage in an exercise of treaty interpretation conforming to rigorous and generally accepted principles of treaty interpretation, notwithstanding the majority's repeated assertions to the contrary. Their pronouncements evolved slowly, incrementally, and often without serious engagement with the text, context or drafting history of Convention No. 87, not to mention any account of the interpretative method purportedly being applied. Nor were their positions, in the later decades, received as authoritative by States, who repeatedly and persistently contested a significant number of them. A practice so scattered, thinly reasoned and persistently contested cannot reasonably be elevated into authoritative guidance on the meaning of Convention No. 87.

IV. OTHER "RELEVANT RULES OF INTERNATIONAL LAW"?

64. Unsatisfied with the practice of the ILO supervisory bodies alone, the majority moves ever further away from the text of Convention No. 87 itself. Having assembled a "collection" of post-1948 supervisory pronouncements, it turns still further outward, to other treaties entirely, in search of "relevant rules of international law applicable in relations between the parties" capable of reading into the Convention the right to strike.

65. There are no "relevant rules" that might inform interpretation of Convention No. 87 for the purposes of Article 31, paragraph (3) *(c)* of the Vienna Convention. Certain international and regional human rights instruments, such as the ICESCR and the Charter of the Organization of American States, provide a right to strike. No such instrument, however, is binding upon all of the States parties to Convention No. 87. Recall that the Vienna Convention does not speak of "relevant rules" in the abstract; it refers to "relevant rules applicable in the relations between *the* parties" (emphasis added).

66. The Court, however, without legal basis, suggests that the importation of a "relevant rule", as defined in the VCLT, "does not necessarily require all parties to the treaty under interpretation to be bound by the 'relevant rules of international law' in order for those rules to be taken into account" (Opinion, para. 90). A rule that does not bind all parties is an awkward vehicle for expressing what they are said to hold in common. Even accepting that such a proposition might be possible in theory, the absence of clear criteria renders the identification of a rule to which some States have not consented, but which nevertheless "expresses their common understanding regarding certain provisions of the treaty under interpretation", inherently speculative.

[54] Interpretation of international labour Conventions: Non-paper prepared by the International Labour Standards Department in consultation with the Office of the Legal Adviser for the consultation process launched by the Governing Body at its 306th Session, November 2009, para. 49.

67. The Court has applied Article 31, paragraph (3) *(c)* before, and it knows what the provision requires. Consider, for example, its reasoning in the case concerning the *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*. In that case, the Court found that UNCLOS contained "relevant rules" within the meaning of Article 31, paragraph 3 *(c)* because "both Somalia and Kenya are parties to UNCLOS, which is expressly mentioned in" the instrument subject to interpretation[55]. UNCLOS thus qualified as a "relevant rule" because it was binding on both parties — that is, all of them.

68. The drafting history of Article 31, paragraph 3 *(c)* casts additional light on the requirement that a common understanding be common to all the parties, not merely some of them.

69. Earlier versions of the article, as adopted by the ILC during the course of its work on the law of treaties, provided for the interpretation of a treaty "[i]n the light of the rules of general international law in force at the time of its conclusion"[56]. The Special Rapporteur, Sir Humphrey Waldock, suggested that this be reworded in favour of the "rules of international law" because the word "general" could be misunderstood as excluding regional rules and local customs "between the States concerned"[57]. Other members of the Commission agreed, including Mr. Jiménez de Aréchaga (later a judge and President of this Court), who observed that the new text "set out the important principle that a treaty . . . should be interpreted within the framework of other international law *in force between* [the parties]"[58].

70. These discussions led the Commission to adopt the current text of Article 31, paragraph 3*(c)*, specifying that the "relevant rules" that shall be taken into account shall be those "applicable in the relations between *the* parties"[59].

71. The Opinion's suggestion that a rule may be "applicable between the parties" if it "expresses their common understanding regarding certain provisions of the treaty under interpretation" (para. 90) thus proves irreconcilable with the purpose and drafting history of Article 31, paragraph 3 *(c)*. This history confirms that the reference to "relevant rules" was never intended to extend beyond those rules which bind all the parties *inter se*. The majority departs from this approach, and it is not hard to see why. For it, it would seem that "between the parties" simply means "close enough".

72. The majority's evident lowering of the standard for ascertaining "rules . . . applicable in the relations between the parties" is convenient: having anticipated the difficulties of imputing into Convention No. 87 a right that its drafters left out, the Court casts about elsewhere, turning to two non-ILO treaties for inspiration: the International Covenant on Economic, Social, and Cultural Rights, which sets out a right to strike in its Article 8, paragraph 8 (1) *(d)*; and the International Covenant on Civil and Political Rights (ICCPR), which does not, but provides for the right to freedom

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[55] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, pp. 36-37, para. 89.

[56] *Yearbook of the International Law Commission*, 1964, Vol. II, p. 199.

[57] *Ibid*., Vol. I, p. 316, para. 13; *Yearbook of the International Law Commission*, 1966, Vol. I, Part Two, p. 184, para. 59.

[58] *Yearbook of the International Law Commission*, 1966, Vol. I, Part Two, p. 190, para. 70 (emphasis added). See also *ibid.*, p. 188, para. 49 (Castrén), p. 190, para. 64 (Tunkin).

[59] *Yearbook of the International Law Commission*, 1966, Vol. II, pp. 217-218 (emphasis added). Formerly the provision had been numbered as Draft Article 27, paragraph 3*(c)*

of association in its Article 22. The Opinion notes that the large majority of States parties to Convention No. 87 has also ratified or acceded to these covenants.

73. The fact remains, however, that the membership of the relevant treaties does not fully coincide with that of Convention No. 87. The ICESCR has 173 States parties. This includes most, but not all, of States which are party to Convention No. 87. Specifically, it excludes Botswana, Comoros, Cuba, Kiribati, Mozambique, Saint Lucia, Samoa, and Vanuatu. These eight States are not bound by the ICESCR's obligation to "ensure . . . the right to strike". Similarly, seven of the States parties to Convention No. 87 are not parties to the ICCPR (Comoros, Cuba, Kiribati, Myanmar, Saint Kitts and Nevis, Saint Lucia and Solomon Islands).

74. How, one might ask, does a different rule, drawn from a different treaty — and binding only on some of the parties to *this* treaty — become transformed into the "common" will of parties to Convention No. 87? For the majority (Opinion, paragraph 92), it is enough to observe a "high degree of overlap". This, we are told, "may indicate the existence of a common understanding" such that a provision in the ICESCR or the ICCPR "can be considered implicitly accepted" by the States parties to Convention No. 87, too. Setting aside the obvious point that even identical parties may accept materially different obligations under different treaties, the majority does not trouble itself with whether the parties to the two treaties are the same. Instead, it is satisfied to squint at an imperfect overlap until the mismatch of States parties looks vaguely tolerable.

75. As concerns the ICCPR, the majority performs an act of double-implication: first implying a right to strike into the Covenant and then transposing that implied term into Convention No. 87 itself. Whereas the ICESCR, whatever its relevance, at least refers to a "right to strike," Article 22 of the ICCPR does not mention them. That provision, like Article 3 of Convention No. 87, mentions "only" the freedom of association. To treat a right to strike as a "relevant rule" derived from the ICCPR therefore requires yet another interpretive leap: acceptance of the Human Rights Committee's view that freedom of association encompasses a right to strike.

76. Upon closer scrutiny, *that* view is itself questionable. As the materials cited by the Opinion illustrate, the Human Rights Committee has often framed strike restrictions as raising concerns under Article 22 of the ICCPR, which protects the right to freedom of association but contains no express reference to a right to strike. Yet even at that level, that Committee's practice has not been uniform[60]. Of the four concluding observations cited by the majority for the proposition that the HRC has "consistently considered" that the protection of the right to strike is "encompassed" in Article 22, two — issued in 1999 and 2004 — do no more than indicate that certain measures restricting strikes may "raise concerns"[61] or may "amount to a violation" of Article 22. Accordingly, and even if the Human Rights Committee were owed a degree of interpretive deference, its own practice is overstated in this Opinion. The result is a chain of reasoning that moves progressively further from any demonstrable common understanding of the parties. The Court is not merely borrowing from another treaty with a partially overlapping membership but relying on an interpretation of that treaty which is itself not free from doubt, and largely the product of elaboration by a body of individuals

[60] Concluding observations on the fourth periodic report of Chile, 30 March 1999, UN doc. CCPR/C/79/Add. 104, para. 25 ("The general prohibition imposed on the right of civil servants to organize a trade union and bargain collectively, as well as their right to strike, raises serious concerns, under Article 22 of the Covenant. Therefore: The State party should review the relevant provisions of laws and decrees in order to guarantee to civil servants the rights to join trade unions and to bargain collectively, guaranteed under article 22 of the Covenant[.]").

[61] Concluding observations on the second periodic report of Lithuania, 1 April 2004, UN doc. CCPR/CO/80/LTU, para. 18 ("The Committee is concerned that the new Labour Code is too restrictive in providing, inter alia, for the prohibition of strikes in services that cannot be considered as essential and requiring a two-thirds majority to call a strike, which may amount to a violation of article 22.").

serving in their personal capacity. In this respect, the reliance on the ICCPR mirrors some of the same difficulties in the Court's seemingly reflexive deference to the CEACR.

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77. The Opinion's reasoning is also underwritten by a pervasive reliance on State silence. Both in relation to identifying "relevant rules" from other treaties and in relation to State practice vis-à-vis Convention No. 87 specifically, inaction is repeatedly elevated into affirmative consent, at least on those occasions when doing so helps to paper over discord and move the Court one step closer to proclaiming a "common understanding". Consider paragraph 95 of the Advisory Opinion concerning Kuwait's reservation to Article 8 (1) *(d)* of the ICESCR. The Court suggests that, because Kuwait has not objected to ILO supervisory bodies' interpretations of Convention No. 87, it may be taken to acquiesce to them. But Kuwait entered a reservation precisely because the ICESCR explicitly provides for a right to strike. A reservation excluding an explicit treaty obligation is a fundamentally different matter from silence in the face of non-binding pronouncements by supervisory bodies. The Court's approach would effectively require States not only to negotiate treaty texts but continuously police every purported interpretive development lest they be deemed to have accepted it.

78. On occasion, the Court's musings on what a State's actions (or silence) may or may not have meant crosses over from speculation into historical ignorance. Consider the Republic of Cuba, one of four States parties to Convention No. 87 which are party to neither of the two human rights covenants. In socialist legal systems, strikes were not traditionally conceived as autonomous rights exercisable against the State or State enterprises (that is to say, all of them), but rather as anomalous within a workers' State purportedly embodying the interests of labour[62]. Cuba's statements before the Committee on Freedom of Association (i.e. that there was no law or legal provision establishing a prohibition on the right to strike, and that its criminal legislation did not impose penalties for exercising it) are therefore more plausibly read as reflecting a socialist conception of labour relations in which strikes are neither constitutionally guaranteed nor framed as oppositional rights against the State.

79. Rather than resolving an ambiguity arising from a particular State's expressed position, or, if one were being charitable, "explaining" its silence by way of presumptions that might at least be described as reasonably tailored to that State's circumstances, the Court thus imputes to a State an understanding of the right to strike quite possibly in tension with its political and legal system[63]. For the majority, it seems hardly worth the time to examine States' underlying assumptions about labour rights, before projecting its "preferred" interpretation of the freedom of association. In so doing, it largely disregards the diversity of legal traditions, political systems and material capacities that shaped State conduct during the period in which Convention No. 87, the ICCPR and the ICESCR were negotiated. The implication is that States must object with a degree of ferocity sufficient to avoid being ignored — a striking inversion of the consensual foundations of treaty interpretation.

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[62] See e.g. C. Osakwe, *The Participation of the Soviet Union in Universal International Organizations*, 1972, pp. 54-63. In this sense, strikes may be seen as advancing the interests of the working class in capitalist countries but may be deemed unnecessary in a society organized on socialist principles. This position was reflected not only in socialist States' domestic laws, but also in international labour fora. The Soviet Union, having re-entered the ILO in 1954, was among those adverse to reading a right to strike into ILO standards, including those developed in Convention No. 87.

[63] Although what was once called the Second World encompassed, at the relevant times, more than a third of humanity, the Opinion seems unaware of those States' governments' contestations of liberal pluralist conceptions of labour rights throughout the Cold War.

V. CONCLUDING REMARKS

80. For the foregoing reasons, the text of Convention No. 87, read in its context and in the light of its object and purpose, does not sustain the majority's conclusion. Nothing in the Convention supports the implication of a free-standing right to strike, still less one derived by teleological hand-waving rather than textual (and contextual) analysis.

81. Rather than ascertaining what the States parties agreed to through the ordinary methods of treaty interpretation, the Opinion instead proceeds from a reverse presumption: that unless States expressly and repeatedly reject an expansive interpretation advanced by supervisory bodies, they may be taken to have accepted it. In this way, the Court effectively licenses such bodies (including those, like the CEACR and the Committee on Freedom of Association, which lack any formal interpretive mandate under the Convention) to run rampant over treaty interpretation through pronouncements that often display little methodological rigour or sustained engagement with the rules of treaty interpretation.

82. The same dynamic explains a final and regrettable feature. Having deferred to the interpretations of ILO supervisory bodies, the Court appears to have implicitly answered a question that was never put to it: whether the CEACR is competent to determine that a right to strike derives from Convention No. 87. In fact, as recounted in paragraph 59 of the Advisory Opinion, that question was contained in the ILO's initial draft request, before being deliberately removed from the final request submitted to the Court. The Court answers it anyway. In its evident determination to validate the desired outcome, the Opinion elevates the contested supervisory pronouncements into quasi-authoritative "supplementary means" of interpretation under Article 32 of the VCLT.

83. In the end, the Opinion offers no convincing account of how — or when — the right to strike supposedly entered Convention No. 87. The *travaux préparatoires* do not assist the majority's case. For the majority they may be inconclusive, but they more plausibly demonstrate that the question was raised, considered and rejected. In 1948, no participant believed that the Convention protected a right to strike. One has the palpable feeling that the Opinion proceeds on the intuition that the answer to the question presented must now, in the twenty-first century, be "yes", without identifying any moment capable of sustaining so significant a transformation. The sorry state of the Court's interpretative exercise is the logical outcome of such ends-oriented reasoning. There is no textual anchor, no historical turning point, no subsequent agreement. Instead, the Opinion cobbles together a dubious coterie of materials: language lifted from other treaties, deference to the inconsistent pronouncements of supervisory bodies lacking interpretative authority, and even the jurisprudence of activist treaty bodies operating under entirely different instruments. These are rebranded as "relevant rules", supplemented, occasionally, by speculative inferences of State acquiescence. Throughout the Opinion, State silence is selectively interpreted to symbolize agreement because agreement cannot be shown. In its search for an interpretive leprechaun, the Court approaches the requirement of State consent not as the foundation of treaty interpretation, but as a residual obstacle to be overcome.

84. All of this serves a single end: to avoid accepting that a treaty may have deliberately left out a right, which policy considerations now make attractive to impute. The Opinion's teleological mode of reasoning is one that neither the Vienna Convention nor Convention No. 87 warrants and which the delegates at Vienna consciously declined to enshrine as a governing principle. There is no justification for this, nor even a need for this. The right to strike is already, to a very great extent, protected elsewhere, including under the International Covenant on Economic, Social and Cultural Rights. The Opinion's attempt to seek refuge in Article 32, where it contends that the practice of some, but not all, parties may serve as a "supplementary means" of interpretation, is no more

persuasive. What follows is a pastiche of uneven State practice; vague and methodologically incoherent statements by treaty bodies that have not been adopted by the parties themselves; and a patchwork of regional instruments and jurisprudence which — by the Court's own admission — do not reflect the position of all States parties to the Convention it is purporting to interpret. If there is indeed a pot of gold at the end of this haphazard exercise, the price paid for reaching it is the discipline of treaty interpretation itself.

(Signed) Peter TOMKA.

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