

DISSENTING OPINION OF JUDGE ABRAHAM

[Translation]

Disagreement with the finding that the right to strike is protected by Convention No. 87 — No subsequent agreement between the Parties and no relevant rules of international law that affect that opinion — Travaux préparatoires confirm the position that the right to strike is not covered by Convention No. 87 — Interpretation of ILO bodies lacks sound legal basis.

1. In answer to the question put to it by the Governing Body of the International Labour Organization (ILO), namely whether “the right to strike of workers and their organizations [is] protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)”, the Court, in the present Advisory Opinion, concludes that it is protected.

I hold the opposite view. I consider that the reasoning developed by the Court in reaching its conclusion suffers from serious and numerous shortcomings.

2. I agree, however, with the Court’s general approach to the applicable rules for the interpretation of Convention No. 87. The provisions on treaty interpretation in the Vienna Convention on the Law of Treaties, namely Articles 31 to 33, cannot be applied directly, since the Convention under interpretation predates the entry into force of the Vienna Convention. But the Court has clearly stated, on several occasions, that the Vienna Convention reflects customary law on treaty interpretation, such that the substance of Articles 31 to 33, inasmuch as they express customary rules, is applicable. Moreover, the Court has previously applied such rules to treaties old enough to be broadly contemporary with Convention No. 87, which means that the rules in question were already applicable on the date of adoption of the Convention under interpretation. This is stated in paragraph 62 of the Opinion.

3. Furthermore, I agree with the Opinion in considering that there is no call to refer to Article 5 of the Vienna Convention, according to which the Convention “applies to any treaty . . . adopted within an international organization without prejudice to any relevant rules of the organization”. Apart from the fact that it is uncertain whether this provision adds anything at all to the general rules that would apply even in its absence, it is not established, in any event, that the ILO has its own rule or rules which, for the purpose of interpreting a convention adopted within that Organization, would justify departing from the rules set out in Articles 31 to 33 of the Vienna Convention.

In particular, while some participants argued that the *travaux préparatoires* should be given special consideration, in view of a practice of the Organization in interpreting conventions adopted within its framework, a practice derived from the tripartite structure of the ILO (governments — employers — workers), the Court indicates — in my view, rightly — that it is not persuaded that there is “a relevant rule of the organization” that would confer particular weight to the *travaux préparatoires* (Opinion, paragraph 64).

Similarly, I am no more persuaded by an observation made by the International Labour Office in its written statement submitted to the Court in these proceedings, whereby subsequent agreements between the parties to a treaty regarding its interpretation, which are referred to in Article 31, paragraph 3 (a) and (b), of the Vienna Convention, “would not be permissible in respect of international labour Conventions unless the Convention concerned provides for such agreements” (Written Statement of the International Labour Office, para. 260). According to the International Labour Office, this position is justified by the tripartite structure of the Organization, which means that, even if they agree among themselves, States cannot impose an interpretation that has not been

accepted by the other two components (employers and workers) that participated in the adoption of the Convention and participate in monitoring its application. But such a point of view, in support of which the International Labour Office cites the opinion of just one academic, is too poorly substantiated to be accepted. Without downplaying the importance of the tripartite structure in the functioning of the Organization, ILO conventions are nevertheless treaties concluded between States, and I can see no convincing reason not to apply Article 31, paragraph 3 (a) and (b), if the agreement between the parties that is mentioned in those provisions is established with regard to such a convention (which, in any event, is not the case here according to the Opinion, with which I completely agree in this respect).

4. In sum, I agree with the conclusion of the Court that Convention No. 87 should be interpreted simply by application of the customary rules reflected in Articles 31 to 33 of the Vienna Convention, and that no overriding rule applies.

It is on the manner in which these customary rules are to be applied in this case that I strongly disagree with the majority of my colleagues.

**I. THE ORDINARY MEANING TO BE GIVEN TO THE TERMS OF CONVENTION NO. 87
IN THEIR CONTEXT AND IN THE LIGHT OF ITS OBJECT AND PURPOSE:
ARTICLE 31, PARAGRAPH 1, OF THE VIENNA CONVENTION**

5. Unlike the Court, I believe that the implementation of the first rule of interpretation, the rule set out in Article 31, paragraph 1, steers clearly towards a negative answer to the question posed.

A. The terms of the Convention

6. The Convention is entitled “Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise”. The first part of the Convention is entitled “Freedom of Association” (“Liberté syndicale” in French) and the second part “Protection of the Right to Organise” (“Protection du droit syndical” in French). The third part (“Miscellaneous Provisions”) mainly concerns the territorial application of the Convention, and the fourth (“Final Provisions”) contains provisions on the ratification, entry into force and revision of the Convention.

Given that the second part (“Protection of the Right to Organise”) comprises only one article, which provides that “[e]ach Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise”, a provision from which nothing can be inferred with regard to the question submitted to the Court, it is therefore in Part I (“Freedom of Association”) that we must look for most of the elements required to answer the question posed.

The purpose of the nine substantive articles in Part I (Articles 2 to 10) is to provide details of the components of the “freedom of association” that is to be protected.

Article 2 protects the freedom of employers and workers to establish and to join organizations, without prior authorization.

Article 3 recognizes the right of the organizations thus established to draw up their constitutions and rules, to elect their representatives, “to organise their administration and activities and to formulate their programmes”, without interference from public authorities. I shall return to this in more detail, given the importance the Opinion attaches to it.

Article 4 prohibits the administrative dissolution of the organizations concerned.

Article 5 recognizes the right of trade union organizations to affiliate with international organizations of workers and employers.

Article 6 renders the above-mentioned Articles 2, 3 and 4 applicable to federations of trade unions (as they are to the trade unions themselves).

Article 7 protects the acquisition of legal personality by workers' and employers' organizations.

Article 8 affirms the obligation of workers, employers and their organizations to respect the law of the land, and the necessity for national laws not to impair the guarantees provided for in the Convention.

Article 9 permits national lawmakers to define the extent to which the guarantees provided for in the Convention will apply to the armed forces and the police.

Finally, Article 10 defines the term "organisation" under the Convention as any organization of workers or employers "for furthering and defending the interests of workers or of employers".

7. None of these provisions makes the least reference to the right to strike. Nor is such a right mentioned in the preamble to the Convention. The latter refers to the preamble to the Constitution of the ILO, which declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour (fourth paragraph). It also recalls the 1944 Declaration of Philadelphia, which provides that "freedom of expression and of association are essential to sustained progress" (fifth paragraph).

8. The Court is of course right to recall that the absence, in a given convention, of an express provision governing a matter does not necessarily mean that it is excluded from the scope of the treaty concerned.

9. However, there must be serious reasons to consider that certain rules that are not set out in a treaty must be inferred from those that are expressly articulated therein, because the former are implicit in the latter or for any other reason arising from a rigorous implementation of the methods of interpretation. This is especially true, in my view, for a question as fundamental and clearly identified as that of the right to strike, in respect of which it can hardly be assumed that the drafters of the ILO Convention failed to mention it when they had intended to include it. There would therefore have to be sound reasons to reverse the presumption that if the right to strike is not mentioned at all in Convention No. 87, it is because the drafters of the Convention did not intend to include it among the rights that it protects.

10. Yet no such reasons have been convincingly demonstrated.

Three categories of arguments in support of an affirmative answer to the question posed have been put forward by some of the participants in the advisory proceedings and by the Court itself in its Opinion: the ordinary meaning of the term freedom of association ("liberté syndicale" in French), which is said to naturally encompass the right to strike; the principle of "*effet utile*", the consequence of which in this case is that the right to strike should be included, otherwise freedom of association would have no practical effect; lastly, arguments of an exegetical nature based on an analysis of certain provisions of Convention No. 87.

1. The ordinary meaning of the term freedom of association

11. It cannot be said that, on the date of adoption of Convention No. 87 (nor in the years following its adoption), the term freedom of association was ordinarily understood as encompassing the right to strike. On the contrary, everything indicates that the concepts of freedom of association and the right to strike were clearly distinguished.

There is no doubt that there is a link between the two concepts, as the Court rightly notes. For workers, the right to establish trade unions and the right to strike both contribute to the defence of their interests; they are therefore directed towards the same general end. The right to strike and the threat of exercising that right are among the most effective means available to employees and their organizations to put pressure on employers to achieve their demands.

But the fact that there is a close link between two concepts has never been sufficient to conclude that one is included in the other.

An examination of national laws and constitutions relating to the right to strike reveals that the two concepts are clearly distinguished in the vast majority of cases; an examination of international practice with regard to treaties regulating the right to strike leads to exactly the same conclusions.

12. An interesting ILO study in the case file on how freedom of association and the right to strike are protected by national laws, in particular at the constitutional level, reveals the following elements. In the vast majority of ILO Member States where the right to strike has constitutional protection (at least 97), it is guaranteed by specific and explicit provisions alongside, and not conflated with, those protecting freedom of association. In a minority of States, the right to strike is not explicitly protected by the constitution, but freedom of association is, in provisions that vary and are more or less open to interpretation (for example, in that some of them also protect a right to collective bargaining). In these latter States, the supreme or constitutional courts have sometimes held that the right to strike is constitutionally protected as it flows from the right to organize and the right to collective bargaining (for example, in Germany), and sometimes that it is not (for example, in India) (GB.323/INS/5/Appendix III, The Standards Initiative, Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised) (Geneva, 23-25 February 2015), March 2015).

Overall, the picture is mixed, but general practice, in national legislation, clearly indicates that the concepts of freedom of association and the right to strike are considered distinct and that the one (the right to strike) is not included in the other (freedom of association).

It must therefore be presumed that the drafters of Convention No. 87 had this distinction in mind.

13. More importantly, international normative practice as reflected in the wording of relevant international instruments confirms the distinct character of the two concepts under consideration.

Several international instruments other than Convention No. 87 protect the freedom to establish trade unions (or associations in general) or the right to strike, or both at the same time. The Court considers them in its Opinion as “relevant rules of international law” under Article 31, paragraph 3 (c), of the Vienna Convention or as “supplementary means of interpretation” under Article 32. I shall return to them in this regard later in this opinion.

But at this stage of the reasoning, I believe I must take them into account in so far as they shed light on the ordinary meaning of the concept of “freedom of association” as used in Convention No. 87.

These other international instruments fall into two categories.

Some protect only freedom of association without mentioning the right to strike. This is the case of the International Covenant on Civil and Political Rights (ICCPR) at the universal level (Article 22) and of various regional instruments, such as the European Convention on Human Rights (ECHR) (Article 11) and the African Charter on Human and Peoples’ Rights (Article 10). Nothing can be inferred from the wording of these instruments, neither for nor against the interpretation adopted by the Court. Since they protect the freedom of association without explicitly mentioning the right to strike, they in fact raise the same question of interpretation as Convention No. 87, without in any way helping to resolve it. It is the jurisprudence of some monitoring bodies that has tended — not without some initial hesitation — to include protection of the right to strike; but that is another matter, which concerns the need for the Court to take into consideration the jurisprudence of other international bodies, to which I shall return later.

International instruments that explicitly protect the right to strike are, however, in my view, directly relevant to shed light on the “ordinary meaning” of the terms. Many of these instruments indeed also protect freedom of association in separate provisions. One is bound to note that if the right to strike was a component of freedom of association, it would not need to be protected by specific provisions in an instrument that elsewhere guarantees freedom of association. The International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Social Charter and the Additional Protocol to the American Convention on Human Rights (ACHR) in the Area of Economic, Social and Cultural Rights, among others, protect both freedom of association and the right to strike in separate and successive provisions: the ICESCR protects freedom of association in Article 8.1 (*a*) and the right to strike in Article 8.1 (*d*); the European Social Charter protects the right to organize in Article 5 and the right to strike in Article 6.4; the Additional Protocol to the ACHR protects freedom of association in Article 8.1 (*a*) and the right to strike in Article 8.1 (*b*).

The only international instrument that presents the right to strike as a component of freedom of association is the Charter of the Organization of American States, Article 45 (*c*) of which provides that “[e]mployers and workers . . . have the right to associate themselves freely for the defense . . . of their interests, including the right to collective bargaining and the . . . right to strike”. But this is an isolated example, which runs counter to widely prevailing practice.

In my view, this analysis largely undermines the argument that the right to strike is an ordinary component of freedom of association, or a constituent element thereof whose existence is implied.

2. The principle of “*effet utile*”

14. An argument that is different to, though partly overlaps with, the previous one is that based on the principle of “*effet utile*”. It consists in the contention that, without the right to strike, freedom of association is deprived of any practical effect, such that an interpretation of Convention No. 87 that refuses to consider that it protects the right to strike would prevent it from achieving its purpose, namely to protect freedom of association, which is nothing, or very little, without the right to strike.

This is one of the most frequent arguments put to the Court by the participants that concluded that the answer to the question posed should be affirmative. Approximately two thirds of the written or oral statements that came to this conclusion put forward this argument in one form or another.

15. This line of argument can be linked both to consideration of the object and purpose of the treaty, under Article 31, paragraph 1, of the Vienna Convention, and to the “*effet utile*” method of interpretation, according to which an interpretation that would deprive the text to be interpreted of any real or practical effect should be avoided wherever possible.

16. The Court does not adopt this line of reasoning in its Opinion, and I fully agree with it on this point.

17. I am not contesting the “*effet utile*” method of interpretation in principle. While the Vienna Convention does not mention “*effet utile*”, it features prominently in the Court’s jurisprudence as an interpretation technique. In its 2011 Judgment in the case concerning the application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), between Georgia and Russia, the Court recalled “the well-established principle in treaty interpretation that words ought to be given appropriate effect [‘un effet utile’, in the French text]” and referred to a precedent dating back to the time of the Permanent Court of International Justice (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 125, para. 133, citing *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13). Any interpretation that would deprive a treaty as a whole, or the essential provisions thereof, of any *effet utile* must, *a fortiori*, be ruled out.

There can be no doubt that a right may well be guaranteed by a treaty without being mentioned explicitly: it is sufficient that a right is guaranteed for all the other rights whose existence is a condition for the exercise of that right to also be considered guaranteed.

18. I am nonetheless persuaded that the argument based on “*effet utile*” is without merit in this case. The assertion that the right to strike is a necessary condition for the effective exercise of freedom of association, in other words that without the right to strike freedom of association is deprived of any practical effect, in my view, quite simply fails to stand up to a reasonable and unbiased examination of the facts.

19. That there is a close link between freedom of association and the right to strike is self-evident. As I stated above, they both contribute to the defence of workers’ interests, and the right to strike is a powerful lever enabling trade unions to establish a favourable balance of power in negotiations with employers. Trade union action is thus more effective, in general, if workers have the right to strike than if they do not.

20. But that is not what is at issue. The principle of “*effet utile*” must be interpreted as meaning that a provision may not be deprived of any practical effect. It rests on the simple presumption that the drafters of a text intended to give any provision they placed in it an effective — rather than a purely theoretical — scope. It cannot lead to the systematic interpretation that a provision (or an entire treaty) should be given the broadest possible effect. “*Effet utile*” is not “maximum effect”. Making such a conflation risks overlooking the limits which the drafters of a treaty intended to place on it — and which a court should not disregard — or the balance that was sought within the treaty itself.

21. If we consider the principle of “*effet utile*” in its real meaning, rather than in an unduly broad sense, it has to be said that even without the right to strike much still remains of freedom of association. Striking, when permitted by law, is just one means of action that a trade union can use. Even in occupational sectors where the right to strike is not recognized (notably in certain public

service sectors), trade unions and other professional associations can have an effective existence and take useful action for workers (which they often do). At the very least they still exercise an advisory, support and representative function and convey workers' collective needs. They can, in particular, advise and assist workers in instituting legal action, or even act on their behalf when domestic law so allows. They have an irreplaceable role supporting staff complaints with employers or management within a company or administration, for example.

22. It is noteworthy in this regard that the European Court of Human Rights recently held that in order to determine whether a prohibition on strikes affects an “essential element of trade-union freedom”, as protected in Article 11 of the ECHR, “an assessment of all the circumstances of the case is required”, in particular of the alternative means available to workers who do not have the right to strike to defend their interests with the support of their trade unions. In examining the applications of German civil servants who had been disciplined for striking when, under German law, civil servants are denied the right to strike, the court concluded that the application of this legislation had not, in that instance, affected an essential element of freedom of association and had thus not violated Article 11, because of the many guarantees available to German civil servants and their trade unions to defend the occupational interests at issue. The applications were rejected. (European Court of Human Rights (Grand Chamber), *Humpert and others v. Germany (Applications Nos. 59433/18, 59477/18, 59481/18 and 59494/18)*, Judgment, 14 December 2023, see paragraphs 109 and 146 in particular).

23. It is by no means my intention to underestimate the importance of the right to strike. I simply find it impossible to conclude that without strike action, freedom of association would be just an “empty shell”, even after reading and hearing the argument set out many times by the participants before the Court. Repeating an argument ad nauseam does not make it right. Incidentally, it is not the one relied on by the Court.

3. Arguments of an exegetical nature

24. The main line of argument on which the Court rests its conclusion with regard to the “ordinary meaning of the terms” of the Convention is exegetical in nature. It is based on a literal analysis of a combination of various provisions of the Convention, from which, according to the Court, it ensues that the Convention protects the right to strike even though it does not mention it. It is mainly Article 3, paragraph 1, and Article 10 that are relied on to that end. I regret to say that, in this respect, the reasoning in the Opinion is anything but convincing and is in fact based on a rewriting of the Convention.

25. Article 3, paragraph 1, provides that

“[w]orkers’ 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 [in the plural in English and in the singular — ‘activité’ — in the French version; the nuance is perhaps not insignificant], and to formulate their programmes.”

As for Article 10, it defines the purpose of an “organisation” under the Convention as “furthering and defending the interests of workers or of employers”.

26. According to the Opinion, since a strike is an “activit[y]” within the meaning of Article 3, and since it falls within the scope of Article 10 inasmuch as it aims to “[further] and [defend] the interests of workers”, it is protected by these provisions, in particular by the right afforded to trade

unions under Article 3 “to organise their . . . activities” and “to formulate their programmes” (Opinion, paragraphs 69 and 70). I note in passing that such a reading is better suited to the English plural “activities” than to the French singular “activité”. But I shall not labour this point, because, in my view, the Court’s interpretation of Articles 3 and 10, regardless of which language version is referred to, distorts the meaning of the provisions concerned, especially that of Article 3.

27. I readily acknowledge that a strike is an “activit[y]” and that it can be part of a “programme”. The Court defines the term “activities” as encompassing “any action taken to pursue an objective” and the term “programmes” as “a set of planned actions pursued to achieve a result”. Given the very general nature of these concepts, it is not surprising that the Court concludes that “strike action is capable of falling within the ordinary meaning of the term ‘activities’”, regardless of the precise definition of strike action, which is debatable (Opinion, paragraph 70).

Nor is there any doubt that a strike is conducted “for furthering and defending the interests of workers” (to use the terms of Article 10), at least as a general rule.

28. The weakness of the Opinion’s reasoning is, to my mind, that it focuses on the term “activities/activité” in Article 3, whereas it is the preceding words that give this provision its essential meaning: “the right . . . to organise”. In other words, the object of this provision is not to protect or guarantee a given activity in particular, but to affirm that a trade union is free to organize its activity or activities as it sees fit, without external interference (in this regard, the singular French is more enlightening, but the plural English does not change the meaning).

This is, if necessary, amply confirmed by Article 3, paragraph 2, which provides that “[t]he public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof”.

29. The Court in fact rewrites Article 3. It reads it as if it were drafted as follows: “organisations shall have the right to draw up their constitutions . . ., to elect their representatives in full freedom, to organise their administration and undertake any activities of their choosing for furthering and defending the interests of workers”. Worded thus, Article 3 would readily lend itself to the interpretation that it implicitly guarantees the right to strike. But that is not how it is worded.

In my view, the exegetical interpretation made by the Court is based on a misreading.

B. The object and purpose; the context

30. I broached the question of the object and purpose of Convention No. 87 above, in connection with the “*effet utile*” argument. The object and purpose of the Convention is to guarantee “freedom of association”. By itself, taking into account this “object and purpose” points to neither an affirmative nor a negative answer to the question posed. If we consider that the ordinary meaning of the terms used points to a negative answer, that answer cannot be contrary to the object and purpose of the Convention, which is to guarantee freedom of association and nothing else. If, on the other hand, we consider that the concept of freedom of association necessarily encompasses the right to strike, then an interpretation excluding the right to strike from the scope of the Convention would be contrary to its object and purpose: but that is to suppose that the problem is solved.

In fact, the argument based on the object and purpose broadly merges with the “*effet utile*” argument; the reasons why I found that argument unconvincing are set out above.

31. Although Article 31, paragraph 2, of the Vienna Convention includes in the “context” to be taken into account in order to determine the “ordinary meaning” of the terms certain agreements or instruments made “in connection with the conclusion of the treaty” and related to it, the Court, in its reasoning, does not base itself on the provisions of this paragraph. The reason being that no agreement or instrument was made “in connection with the conclusion of the treaty”, such that Article 31, paragraph 2, which must be taken together with Article 31, paragraph 1, has no role in this case.

32. My conclusion, at this stage of the reasoning, is that the rule of interpretation set out in Article 31, paragraph 1, of the Vienna Convention points clearly to a negative answer to the question put to the Court, contrary to what is stated in paragraph 74 of the Opinion.

**II. A “SUBSEQUENT AGREEMENT BETWEEN THE PARTIES” AND “RELEVANT RULES
OF INTERNATIONAL LAW” WITHIN THE MEANING OF ARTICLE 31,
PARAGRAPH 3, OF THE VIENNA CONVENTION**

33. The foregoing conclusion could be called into question by the existence of a subsequent agreement between the parties regarding the interpretation of Convention No. 87, or by taking into account the “relevant rules of international law” mentioned in Article 31, paragraph 3, of the Vienna Convention. But neither of these elements allows me to change my conclusion, for the following reasons.

**A. A subsequent agreement between the parties regarding
the interpretation of Convention No. 87**

34. Article 31, paragraph 3, distinguishes between two types of agreement between the parties to a treaty regarding its interpretation, after the treaty’s entry into force: a “subsequent [formal] agreement between the parties regarding the interpretation of the treaty or the application of its provisions” (Article 31, paragraph 3 *(a)*); a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” (Article 31, paragraph 3 *(b)*).

35. The Opinion notes — rightly — that there has been no agreement between the States parties, within the meaning of paragraph 3 *(a)* quoted above, on the question of the right to strike in connection with Convention No. 87 (Opinion, paragraph 75).

36. The Court then considers whether any subsequent practice, within the meaning of paragraph 3 *(b)*, can establish the agreement of the parties regarding the interpretation of Convention No. 87 in respect of the same question.

It recalls that, irrespective of its constituent elements, for subsequent practice to be taken into account under Article 31, paragraph 3 *(b)*, it must establish the agreement of all the parties to a treaty, and not only the agreement of some of them or even of the majority. Since it is “an authentic means of interpretation aimed at establishing the existence of a common understanding of the parties” (Opinion, paragraph 77), it presupposes the absence of conflicting positions (paragraph 86).

37. The Court notes that while it is true that a majority of States parties to Convention No. 87 have accepted the interpretation given eventually, and not without some hesitation, by the ILO supervisory bodies, namely that it also protects the right to strike, several States have formally contested that interpretation and have persisted in doing so.

The Opinion concludes that “subsequent practice [which establishes] the agreement of the parties”, within the meaning of Article 31, paragraph 3 (b), cannot be found in this case (paragraph 89).

38. I agree with the Court’s conclusion on this point.

I shall simply add two observations.

39. The first is that “subsequent practice . . . which establishes the agreement of the parties” does not necessarily imply that all the parties to a treaty have shown, through active conduct, that they agree with a certain interpretation. Indeed, “[s]ilence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction”, as the International Law Commission rightly states in conclusion 10 of its “draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties” adopted in 2018.

Although the Opinion does not mention this last point, the reasoning of the Court in no way contradicts it.

40. My second observation is that the Court did not need, in the context of the present case, to discuss the difficult question of whether subsequent practice, within the meaning of Article 31, paragraph 3 (b), can have the effect of not only interpreting the treaty but also modifying it.

As there is no more need to discuss this point in my reasoning than in that of the Court, I shall refrain from doing so.

I shall simply note that in practice it is very difficult to make the distinction between “interpret” and “modify”, and that in at least one instance the Court has — implicitly — accepted that subsequent practice had resulted in a change to a treaty provision, by giving it a manifestly different meaning to its original one (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, pp. 21-22, paras. 20-22).

B. The “relevant rules of international law”

41. On this point, I strongly dissent from the Court’s reasoning, which — I must admit — I find rather difficult to follow.

42. Article 31, paragraph 3 (c), of the Vienna Convention provides that, in interpreting a treaty, account must also be taken of “any relevant rules of international law applicable in the relations between the parties”.

43. The Court begins by stating that such “relevant rules” may not be binding on all the parties to the treaty being interpreted. On this point, I agree. Even though subparagraph (c) quoted above mentions the “rules . . . applicable in the relations between the parties”, in the particular context of this provision, the latter wording should not be understood in too strict a sense. For example, if a rule is applicable to a significant number of parties to a treaty, it should be taken into account in considering a possible interpretation of that treaty that would be inconsistent with the rule in question (which could, in some cases, lead to the interpretation being discarded). I therefore have no quarrel

with the fact that the “relevant rules of international law” to which the Court refers in paragraphs 91 to 99 of the Opinion are not binding on all the parties to Convention No. 87.

44. However, I disagree with the reasoning of the Court in two respects.

45. First, among the “relevant rules” to which the Court refers, it includes certain positions taken by international supervisory bodies on the interpretation of treaties other than Convention No. 87. It thus mentions the jurisprudence of the Human Rights Committee relating to Article 22 of the ICCPR, which guarantees freedom of association and which the Committee interprets as also protecting the right to strike (Opinion, paragraph 91). Yet this does not, strictly speaking, concern the “rule” but rather the interpretation of the rule by a supervisory organ, an interpretation which has, moreover, varied over time. No doubt, in principle, a text and its authentic interpretation form an indissociable whole, such that the “rule” usually encompasses the manner in which the wording must be interpreted. But here, the interpretations to which the Court refers seek precisely to resolve the question (or a similar one) that has been put to the Court. To declare these “relevant rules” within the meaning of Article 31, paragraph 3 (c), results in circular reasoning, because these interpretations are relevant only if they are correct, which is precisely what the Court must determine.

In fact, the question raised by such interpretations is that of the consistency of international jurisprudence, to which I shall return in the next part of this opinion.

46. Second, a rule is “relevant” only if it provides some guidance for the interpretation of the treaty to be interpreted. However, what the Court essentially explains is that the vast majority of States parties to Convention No. 87 are bound by international instruments that protect the right to strike, in particular by the ICESCR, Article 8.1 (d) of which guarantees that right. That is all very well, but how does it give any indication that the right to strike is included in the scope of Convention No. 87? At the very most it can be concluded that such an inclusion would not put the States concerned in a position of conflicting obligations, since there is evidently no international treaty prohibiting strike action, and it would not change anything, in terms of substantive law, with regard to their international legal obligations (while widening their procedural ones). But nor would the opposite interpretation of Convention No. 87 (which I believe is the right one) put the States parties in a position of conflicting obligations. All in all, I do not see how the ICESCR (or any other treaty that protects the right to strike) constitutes a “relevant rule” for interpreting Convention No. 87; at the very least it must be considered of low relevance.

On the contrary, as I stated above, by protecting freedom of association and the right to strike separately, the ICESCR guides the “ordinary meaning” of the term “freedom of association” in a direction opposite to that of the Court’s Opinion.

47. The Opinion observes (in paragraph 95) that none of the four States which opposed the view, in the proceedings before the Court, that the right to strike is protected by Convention No. 87 (Bangladesh, Costa Rica, Japan and Switzerland) made a reservation to Article 8 of the ICESCR purporting to exclude the right to strike. It is hard to grasp the relevance of such an observation. That a State consents to being bound by an instrument imposing an explicit obligation on it (such as the right to strike protected by the ICESCR) is by no means inconsistent with the fact that the same State contests that another instrument imposes the same obligation when it does not mention it (in this instance, Convention No. 87).

48. I consider the Court's reasoning with regard to the "relevant rules of international law" to be extremely weak.

Ultimately, I see nothing in Article 31, paragraph 3, of the Vienna Convention that can induce me to call into question the provisional conclusion I have reached on the basis of the rule set out in paragraph 1.

III. SUPPLEMENTARY MEANS OF INTERPRETATION: ARTICLE 32 OF THE VIENNA CONVENTION

49. Given that the foregoing conclusion does not leave the meaning of Convention No. 87 "ambiguous or obscure", and that it does not lead to a "manifestly absurd or unreasonable" result, I do not have to seek "supplementary means of interpretation" within the meaning of Article 32 of the Vienna Convention.

I shall nevertheless consider the matter, for two reasons.

First, Article 32 allows recourse to such means "in order to confirm the meaning resulting from the application of article 31". To that end, the *travaux préparatoires* would appear to be of some help.

Second, the Court refers extensively to the jurisprudence of the ILO supervisory bodies and to that of other international judicial and non-judicial organs to support its interpretation. I believe it is necessary to explain the role I ascribe to them in my own reasoning.

A. The *travaux préparatoires* of Convention No. 87

50. The Court states that an analysis of the *travaux préparatoires* does not lead to a clear and conclusive result regarding the question put to it (Opinion, paragraph 111). I agree. I would not say that an examination of the *travaux préparatoires* confirms my conclusion beyond doubt. But it certainly does not invalidate it and would rather seem to support it.

51. There was little discussion of the right to strike during the drafting of the Convention, which is not surprising.

The question was nonetheless addressed in the context of the recognition of freedom of association for public service workers. Since it appeared that a majority of States were not in favour of limiting freedom of association to the private sector and that the draft Convention would not include a general distinction between workers in the private sector and public servants, some States were concerned about the possible consequences of public servants being thus included with regard to the right to strike in public services.

52. The International Labour Office therefore included the following question in the questionnaire that was drawn up and addressed to all the Member States with a view to preparing the 31st General Conference, which was to examine the draft Convention: "Do you consider that it would be desirable to provide that the recognition of the right of association of public officials by international regulation should in no way prejudge the question of the right of such officials to strike?"

53. Some thirty States answered this question. In sum, the responses can be grouped into three categories (with all the inevitable nuances and ambiguities). Some States simply replied in the

affirmative. Others replied that it was not indispensable to specify this point in view of the object of the Convention under preparation but that it would be better to include it. And yet others took the view that it was unnecessary to include this point, given that the Convention did not seek to guarantee the right to strike.

54. In summarizing the responses received, the International Labour Office stated the following:

“[T]he Governments were also consulted on the question whether it would be desirable to provide in the international regulations that the recognition of the right of association of public officials should in no way prejudice the question of the right of such officials to strike. Several Governments, while giving their approval to the formula, have nevertheless emphasised, *justifiably it would appear*, that the proposed Convention relates only to the freedom of association and not to the right to strike, a question which will be considered in connection with Item VIII (conciliation and arbitration) on the agenda of the Conference.

In these circumstances, it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association.” (ILC, 31st Session, 1948, Report VII, *Freedom of Association and Protection of the Right to Organise*) (emphasis added).

55. In my view, it is fairly clear the *travaux préparatoires* support the position that the right to strike is not covered by Convention No. 87.

B. The positions of the ILO supervisory bodies and other international bodies

56. This is, to my mind, one of the major difficulties in this case.

We cannot disregard the fact that the ILO supervisory bodies adopted a position in favour of including the right to strike in the scope of Convention No. 87.

Nor can we disregard the fact that other international bodies responsible for monitoring the application of conventions that protect freedom of association, without explicitly mentioning the right to strike, have interpreted the provisions concerned as also covering the right to strike. This is notably the case of the United Nations Human Rights Committee in interpreting Article 22 of the ICCPR and the European Court of Human Rights, with some nuances, in interpreting Article 11 of the ECHR.

57. The Court no doubt took heed of these various positions, which all pointed in the same direction.

It was right to heed them, but it was wrong, in my view, to accord them decisive importance.

58. The positions adopted by other international bodies on questions of interpretation identical or similar to those the Court is called upon to determine have to be taken into consideration. It matters little whether they are considered in connection with “supplementary means of interpretation” under Article 32 of the Vienna Convention or whether they are taken into account under another legal basis. It also matters little whether the Court is called upon to determine a question of interpretation in the

exercise of its contentious function or, as here, in the context of its advisory function: the need to do so is the same in both cases.

59. The Court formed its doctrine in this area in its Judgment on the merits in the *Diallo* case. Called upon to apply certain provisions of the ICCPR in that case, the Court stated, with regard to the United Nations Human Rights Committee, that it “believe[d] that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty” (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010 (II), p. 664, para. 66).

This statement applies, *mutatis mutandis*, to the positions adopted by the Committee of Experts and the Committee on Freedom of Association (CFA), responsible for supervising the application of Convention No. 87 in particular and necessarily having to interpret it to that end.

In that same Judgment, the Court also took into account the decisions and opinions of judicial and non-judicial bodies responsible for applying other treaties whose provisions are substantially similar to those the Court had to interpret itself. It thus referred to the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights regarding provisions of the ECHR and the ACHR similar in substance to the provision of the ICCPR that it had to interpret, in order to support its interpretation (*ibid.*, para. 68).

It is therefore justified to take into account the positions adopted by, for example, the United Nations Human Rights Committee and the European Court of Human Rights with regard to Article 22 of the ICCPR and Article 11 of the ECHR.

60. I shall make three observations, however, limiting the scope of these positions vis-à-vis the Court, the third observation being the most important.

61. First, it is not without hesitation that these various bodies gradually affirmed their interpretation that the right to strike is a component of freedom of association. As stated in the Opinion (paragraph 81), the CFA initially took the view that Convention No. 87 did not cover the right to strike. It was not until the 1970s that it came to fully share the different position of the Committee of Experts, which was itself first set out in 1959.

The Human Rights Committee, for its part, at first considered that Article 22 of the ICCPR did not guarantee the right to strike (Human Rights Committee, *J.B. et al. v. Canada*, No. 118/1982, 18 July 1986), before changing its position, without offering any particular explanation, in the early 2000s.

62. Second, the Court must always exercise a certain amount of caution when considering the jurisprudence on the interpretation of treaties other than the one before it, even if the provisions of those instruments appear similar in substance. A nuance in the wording or a difference in the context is sometimes sufficient to lead to interpretations that are different but fully justified.

63. Lastly and most importantly, the Court clearly recalled in the *Diallo* Judgment that it was “in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant [by extension, of a treaty] on that of the Committee [by extension, of the body responsible for monitoring the application of the treaty]” (Judgment cited above, para. 66).

64. Such a reminder is not purely theoretical. In the case concerning the application of CERD between Qatar and the United Arab Emirates, the Court, in full awareness, adopted an interpretation contrary to that of the CERD Committee on the very important question whether the phrase “national origin” within the meaning of Article 1, paragraph 1, of that Convention encompassed current nationality. The Court noted that it had “carefully considered the position taken by the CERD Committee . . . on the issue of discrimination based on nationality” and added that it had nevertheless reached a different conclusion “[b]y applying, as it is required to do . . . , the relevant customary rules on treaty interpretation” (*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).

65. In my view, the approach established by the Court is clear. It must carefully examine the interpretation adopted previously by the oversight bodies responsible for supervising the application of the treaty it has to interpret. But it need only follow that interpretation if it considers it to be convincing.

66. For all the foregoing reasons, I am unable to accept the interpretation of the ILO bodies, which, in my view, has no sound legal basis. It is my opinion that the Court should have answered the question put to it in the negative, even if, in so doing, it ran the risk of being criticized for jeopardizing the harmony of international jurisprudence. Legal rigour takes precedence over any other consideration.

(Signed) Ronny ABRAHAM.
