DISSENTING OPINION OF JUDGE XUE

Based on a good faith interpretation of Convention No. 87 in accordance with the rules as reflected in Article 31, paragraph 1, of the VCLT, the right to strike is not protected under Convention No. 87; the term "activities" under Article 3, paragraph 1, of Convention No. 87 is often used with two possible meanings; one refers to an industrial action, the other means a labour right — What the Court is requested to determine is whether strike as a labour right is protected under Convention No. 87; not strike as an industrial action — Article 8 of the ICESCR and Article 22 of the ICCPR do not constitute the "relevant rules of international law applicable in the relations between the parties" within the meaning of Article 31, paragraph 3 (c), *of the VCLT; pronouncements of human rights treaty monitoring bodies as well as those of the ILO supervisory bodies cannot modify or change the terms of Convention No. 87 — There is no "common understanding" among States parties that the protection of the right to strike is encompassed in the protection of freedom of association guaranteed under Convention No. 87 — The preparatory work of Convention No. 87 and the circumstances of its conclusion confirm the interpretation that Convention No. 87 does not cover the right to strike — The standard-setting process of the ILO is relevant for the consideration of the present request; the practice of an organization may inform the interpretation of treaties concluded within that organization — The Court's recourse either to the preparatory work of Convention No. 87, or to the subsequent practice in its application, does not adequately take account of the positions of the tripartite constituents on the question of the right to strike — The relation between Convention No. 87 and the right to strike is a continuing unresolved issue in the ILO; the tripartite constituents agree that the right to strike is not an absolute right and that its scope and conditions are presently regulated at the national level; international standards governing the right to strike have yet to be developed — Given the importance of international labour standards, the question whether the right to strike is protected under Convention No. 87 directly concerns States parties' obligations and responsibilities for the implementation and observance of labour standards — It is imperative to maintain the stability of labour standards under Convention No. 87 for the sustainable economic and social progress and the overall well-being of the populations of States parties — A general reply on the right to strike without indicating its scope, conditions and limits is not a proper answer that would facilitate the resolution of the long-standing disagreement among the tripartite constituents.*

1. I have voted against paragraph 142 (3), of the Advisory Opinion for the following reasons.

2. The right to strike of workers and their organizations is governed by labour law as well as by international human rights law. The present request for an advisory opinion by the International Labour Organization (hereinafter "ILO"), however, is strictly limited in scope. The Court is requested solely to interpret the terms of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (hereinafter "Convention No. 87" or the "Convention"), in accordance with the established rules of treaty interpretation, in order to determine whether Convention No. 87 extends to the right to strike with the guarantees provided for therein.

3. The majority's response to the request, in my view, largely reflects an exercise of human rights advocacy rather than treaty interpretation. Instead of focusing on the text of the Convention and the intention of the drafters at the time of its conclusion, the Opinion draws its conclusions chiefly from States' undertakings under the two human rights Covenants and pronouncements of human rights treaty monitoring bodies and the ILO supervisory bodies (see Advisory Opinion, paragraphs 91-98 and 116-119). In doing so, it dilutes the specificity of Convention No. 87 as an international labour standard and blurs the boundaries between distinct treaty régimes.

4. Convention No. 87 was adopted at a time when the right to strike was hardly recognized in the national laws of most States and remained an extremely sensitive and contentious issue among the tripartite constituents of the ILO. Although it was generally acknowledged that a close relationship existed between freedom of association and the right to strike, the historical records demonstrate that the ILO consciously chose to address these two rights separately in the process of labour standard setting.

5. The long-standing disagreement within the ILO over the question whether the right to strike is protected under Convention No. 87 is not purely a matter of treaty interpretation. More fundamentally, it raises serious concerns relating to the principle of tripartism and the proper functioning of the ILO supervisory bodies, both of which lie at the heart of international labour governance. It is regrettable that the Advisory Opinion has devoted little attention to these crucial institutional dimensions, despite their central relevance to the legitimacy and authority of the ILO's normative framework.

I. Interpretation of Convention No. 87 — terms, context, and object and purpose of the Convention

6. The Court has on many occasions affirmed that Articles 31 to 33 of the Vienna Convention on the Law of Treaties (hereinafter the "VCLT") reflect customary international law on treaty interpretation. According to Article 31, paragraph 1, a treaty must 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 the treaty's object and purpose. These rules equally apply to the interpretation of Convention No. 87.

7. In the present proceedings, the ILO is not requesting the Court to determine whether a trade union has the right to organize strikes under international law, but rather whether the right to strike, as an international labour standard, is protected under Convention No. 87 and, if so, how Convention No. 87 is able to regulate that right in terms of its scope, conditions and limits. Answering that question requires a close and careful examination of the provisions of Convention No. 87. The Court has repeatedly held that "[i]nterpretation must be based above all upon the text of the treaty" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 41; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 98, para. 81).

8. Convention No. 87 contains no express provision on the right to strike, nor does the term "strike" appear anywhere in the treaty. Although this absence does not necessarily mean that the right to strike is excluded from Convention No. 87, any affirmative conclusion upholding this right under Convention No. 87 must be based on a rigorous exercise of interpretation of the terms of the Convention in their context and in the light of the object and purpose of the treaty as well as the preparatory work. Unlike the cases referred to by the Court in the Advisory Opinion (see paragraph 68), in the present proceedings the Court is not concerned with the connotation of a particular term or the scope of a provision, but rather with a distinct right that is highly sensitive and controversial among the tripartite constituents at the time of the conclusion of Convention No. 87. Unless the documents submitted to the Court disclose a clear intention of the drafters to include the right to strike in Convention No. 87, an obligation to protect such a right should not be presumed to arise under that Convention.

9. Convention No. 87 was concluded to recognize the freedom of association and the right to organize with a view to improving labour conditions, establishing peace and achieving sustained progress. In the two substantive parts of Convention No. 87 — Part I on freedom of association and Part II on protection of the right to organize — States parties undertake to give effect to these rights for workers and employers and their respective organizations. Governments may not dissolve or suspend their organizations, nor may they enact regulations that impair the guarantees provided for in the Convention. It is evident from the title, the preamble and the terms of the Convention that the objective of Convention No. 87 is to recognize freedom of association and the right to organize as an international labour standard and to impose corresponding obligations on States parties.

10. Under Articles 2 and 3 of Convention No. 87, workers and employers have the right to establish and join organizations of their own choosing, and have the right, without undue interference by the public authorities, to draw up their constitutions and rules, and to organize their administration and activities and to formulate their programmes. In determining whether the right to strike is protected under Convention No. 87, submissions of the participants in the present proceedings focus on the meaning of the term "activities" under Article 3, paragraph 1. It is argued that, since strike action is the most effective means of promoting and defending the interests of workers, activities within the meaning of Article 3, paragraph 1, must include strike action and that, therefore, the right to strike falls within the protection of the Convention. Otherwise, it is contended, workers and their organizations will not be able to effectively further and defend those interests, contrary to the terms of Article 10 of the Convention.

11. The issue whether the term "activities" under Article 3, paragraph 1, includes or excludes strike action, in my view, is not so decisive for answering the question before the Court. Admittedly, the term "activities" in Article 3, paragraph 1, is broad and unqualified, suggesting that workers' organizations may engage in whatever forms of industrial action they deem necessary to promote and protect workers' interests, including possible strike action, provided such activities are not contrary to national laws. By the time Convention No. 87 was drafted and adopted, only a few States had recognized the right to strike in their domestic legal systems. In those States, of course, trade unions could accordingly organize strike action as a means of defending workers' interests. In contrast, in most other States, where strike action was not permitted, either in law or in practice, activities contemplated under Article 3, paragraph 1, would not have included strike action. This interpretation is consistent with Article 8 of Convention No. 87. In other words, the issue whether trade unions may organize strike actions cannot be determined by the terms of Article 3, paragraph 1; the issue was left aside to be determined by each State party in practice.

12. In the present proceedings, the word "strike" is often used by the participants with two possible meanings; one refers to an industrial action, while the other entails a labour right. As said above, strike action may be included in the activities organized by trade unions as provided for under Article 3, paragraph 1, so long as it is permitted by national laws. That, however, is not what the Court is requested to answer. What the present proceedings are concerned about is whether strike as a labour right is protected under Convention No. 87.

13. Articles 4 to 7 of the Convention provide the guarantees for the freedom of association of workers' and employers' organizations in terms of their relationship with administrative authority, federations and confederations. According to Articles 4 and 5, workers' and employers' organizations shall not be liable to be dissolved or suspended by administrative authority and shall have the right to establish and join federations and confederations, which shall have the right to associate with international organizations of workers and employers. Pursuant to Article 6, federations and confederations are equally entitled to the protection as provided for to the workers' and employers' organizations under the Convention. Finally, pursuant to Article 7, these

organizations shall acquire legal personality without any restrictions on their right to organize. These provisions, in addition to Articles 2 and 3, lay down specific guarantees to workers' and employers' organizations.

14. Articles 8 and 9 set out certain conditions and limits on the right of association. Read together with the guarantees established by the Convention, these provisions do limit the scope of the rights protected under Convention No. 87, contrary to the interpretation given by the Court in the Advisory Opinion (see paragraph 71).

15. Under Article 8, workers and employers and their respective organizations, are required, in exercising their rights provided for in the Convention, to respect national laws, while States parties undertake not to adopt or apply such laws in a manner that would impair those guarantees. The phrase in Article 8 "rights provided for in this Convention" can only encompass the rights explicitly set out in the Convention's provisions. The requirement that the exercise of the right to organize "shall respect the law of the land" indicates that the scope of such activities is subject to national laws and regulations; the Convention itself does not define which activities workers' or employers' organizations may undertake for the purpose of furthering and defending their interests.

16. Article 9 is particularly instructive in respect of the scope of the Convention. It grants States parties discretion to restrict the freedom of association of members of armed forces and of the police through national laws or regulations. These restrictions directly limit the scope of the freedom of association and the right to organize. Although such restrictions do not involve the right to strike, incidentally they may virtually deprive the right of those members to strike. As shown in the preparatory work of Convention No. 87, the question of freedom of association of public officials was raised precisely because of its potential implications on the right of public officials to strike. The decision of the International Labour Conference to abandon the proposal concerning public officials left unresolved the question whether such officials enjoy a right to strike. No general conclusion that the right to strike is protected under Convention No. 87 can be drawn from that outcome; the issue is simply not addressed by the Convention.

17. Article 10 is frequently invoked by some participants in the present proceedings to support the view that the Convention protects the right to strike on the ground that strike action is the most effective, and perhaps indispensable, means of protecting workers' interests in the collective bargaining process. This argument, in my opinion, rests on a misinterpretation of Article 10.

18. Article 10 provides, "[i]n this Convention the term 'organisation' means any organisation of workers or of employers for furthering and defending the interests of workers or of employers".

19. Apparently, this is a definitional provision. It defines the type of the organizations that falls within the scope of the Convention. It does not specify what kind of activities may be undertaken to further or defend the interests of workers or of employers. The preparatory work shows that during negotiations, different views were expressed as to whether the guarantee of freedom of association should be limited to relations between employers and workers or specifically to the defence of social and economic interests of the two parties and, more importantly, whether Convention No. 87 should extend to the right of workers or employers to join political organizations and to take part in political activities. The final wording of Article 10, as is recorded, is a compromise outcome among the tripartite constituents[1]. The phrase "for furthering and defending the interests of workers or of

[1] International Labour Conference, 31st Session, 1948, Record of Proceedings, pp. 475-476.

employers" is to define the character of the organizations covered by Convention No. 87. This phrase, like the term "activities" in Article 3, paragraph 1, may imply that strike actions could be resorted to, but it does not determine whether each and every workers' organization must have the right to strike; that issue is left to be decided by national legal systems.

20. The second part of Convention No. 87 on the right to organize comprises one single article, Article 11, which reads: "Each 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." By the ordinary meaning of its terms, Article 11 only refers to the right to organize and does not extend to the right to strike. As a follow-up, this provision was elaborated upon in the Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (hereinafter "Convention No. 98"), which was adopted in 1949, one year after the conclusion of Convention No. 87. This subsequent development sheds further light on the issue before the Court.

21. The object and purpose of Convention No. 98 is primarily to provide workers with adequate protection against acts of anti-union discrimination and interference from the employers or their organizations (Articles 1 and 2). It obligates States parties to establish mechanisms "appropriate to national conditions" to ensure respect for the right to organize and take measures, as appropriate, to encourage voluntary negotiation between workers and employers with a view to reaching collective agreements on terms and conditions of employment (Articles 3 and 4). For the purposes of the present proceedings, it is significant to note that the Convention does not address strike but instead focuses exclusively on union membership of workers and on union activities carried out outside working hours, or within working hours with the employer's consent. Article 1 states:

> "1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
>
> 2. Such protection shall apply more particularly in respect of acts calculated to
>
> *(a)* make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
>
> *(b)* cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities *outside working hours or, with the consent of the employer, within working hours*." (Emphasis added.)

22. It is clear from Article 1, paragraph 2 *(b)*, of Convention No. 98 that such acts do not encompass strikes, because strikes must be carried out during working hours against the will of the employer in order to be effective. The content of Convention No. 98 thus further supports the interpretation of Article 11 of Convention No. 87 that the right to organize does not extend to the right to strike under Convention No. 87.

23. While none of the provisions of Convention No. 87, as analysed above, can be reasonably interpreted as covering the right to strike, the title and the preamble of Convention No. 87 likewise refer exclusively to freedom of association and the right to organize. Although, admittedly, there is a close relationship between freedom of association and the right to strike, this relationship is not such that it compels an expansive interpretation of the scope of Convention No. 87 to include the right to strike. Freedom of association and the right to strike have been treated as distinct rights not

just in the field of international labour law, but also in international human rights law, a point to be discussed in Part II below.

24. In conclusion, based on a good faith interpretation of Convention No. 87 in accordance with the rules as reflected in Article 31, paragraph 1, of the VCLT, I am of the view that the right to strike is not covered under Convention No. 87.

II. TREATY INTERPRETATION UNDER ARTICLE 31, PARAGRAPH 3 *(C)*, OF THE VCLT

25. In interpreting Convention No. 87, the Court considers that Article 8 of the International Covenant on Economic, Social and Cultural Rights (hereinafter the "ICESCR") and Article 22 of the International Covenant on Civil and Political Rights (hereinafter the "ICCPR") should be taken into account, as they both contain rules concerning freedom of association and its relationship with the right to strike, and could thus be taken as "relevant rules of international law" for treaty interpretation under Article 31, paragraph 3 *(c),* of the VCLT. The Court further emphasizes that both provisions make explicit reference to Convention No. 87. To justify the application of these provisions in interpreting Convention No. 87, the Court states that

> "a high degree of overlap between the States bound by the treaty under interpretation and those bound by the relevant rules of international law may indicate the existence of a common understanding of the parties regarding certain provisions of the treaty under interpretation. Such a common understanding may be presumed when rules contained in another treaty have been so widely adopted that they can be considered implicitly accepted by all parties to the treaty being interpreted." (Advisory Opinion, para. 92).

This line of reasoning raises a number of issues concerning treaty interpretation.

26. In order to maintain a systemic and integrated approach to treaty interpretation, Article 31, paragraph 3 *(c)*, of the VCLT provides that any relevant rules of international law that are applicable in the relations between the parties shall be taken into account, together with the context. In the *Oil Platform* case, the Court held that the application of Article XX, paragraph 1 *(d)*, of the 1955 Treaty between the Islamic Republic of Iran and United States of America necessarily involved customary international law on the prohibition of use of force and the right of self-defence. The Court considered that Article XX, paragraph 1 *(d),* could not have been intended to operate wholly independently of those relevant customary rules. Accordingly, it undertook a detailed interpretation of the treaty term "measures" in light of the applicable rules on the use of force, in conformity with Article 31, paragraph 3 *(c)*, of the VCLT (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 181-182, paras. 40-41; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 46, para. 65; *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, pp. 36-37, para. 89).

27. The right to strike was first recognized at international level in Article 8, paragraph 1 *(d)*, of the ICESCR, in connection with trade union rights. By contrast, the ICCPR provides only guarantees to freedom of association without referring to the right to strike. Formally, the right to strike, along with other trade union rights, is classified as an economic and social right, while freedom of association is treated as a civil and political right. This distinction between freedom of association and the right to strike was explicitly recognized by the Human Rights Committee in its decision in the *J.B. et al.* v. *Canada* case in 1986[2]. In interpreting the scope of Article 22 of the ICCPR, the

[2] Human Rights Committee, *J.B. et al.* v. *Canada*, Communication No. 118/1982, 18 July 1986, para. 6.4.

Human Rights Committee, having examined the ordinary meaning of each element of the Article in its context and in the light of its object and purpose, had recourse to the *travaux préparatoires* of the two Covenants. It concluded that it could not deduce from the preparatory work that the drafters of the ICCPR intended to guarantee the right to strike under the treaty. The Committee further found that this conclusion was corroborated by a comparative analysis of the two Covenants, where it was observed that

> "Article 8, paragraph 1 *(d)*, of the International Covenant on Economic, Social and Cultural Rights recognizes the right to strike, in addition to the right of everyone to form and join trade unions for the promotion and protection of his economic and social interests, thereby making it clear that the right to strike cannot be considered as an implicit component of the right to form and join trade unions. Consequently, the fact that the International Covenant on Civil and Political Rights does not similarly provide expressly for the right to strike in [A]rticle 22, paragraph 1, shows that this right is not included in the scope of this article, which it enjoys protection under the procedure and mechanisms of the International Covenant on Economic, Social and Cultural Rights subject to the specific restrictions mentioned in [A]rticle 8 of that instrument."[3]

28. Although not directly relevant to the present proceedings, the above passage reflects a general understanding of the scope of Article 22 of the ICCPR and the relationship between this Article and Article 8 of the ICESCR in respect of the right to strike; this position was held by the Human Rights Committee at the least until the late 1980s.

29. Since the mid-1990s, the Human Rights Committee gradually changed its position, as noted in the Advisory Opinion (see paragraph 91), and came to consider the right to strike in conjunction with freedom of association. The Court, nevertheless, only highlights that the Human Rights Committee has held this position in the past 25 years by now but fails to explain on what legal basis the Committee has shifted its position and how such shifted position should affect the interpretation of Convention No. 87.

30. Undoubtedly, recognition of the right to strike under Article 8 of the ICESCR has had a significant impact on labour law relating to freedom of association and the right of trade unions to organize strikes. This impact is reflected, first and foremost, in national laws and practices, as Article 8 requires the right to strike to be exercised in conformity with the laws of the particular country. Regional human rights instruments have likewise widely embraced the protection of the right to strike. In the present proceedings, no participant disputes that the right to strike is recognized and protected under international law. That, however, is not what the Court is requested to determine by the ILO.

31. In applying Article 31, paragraph 3 *(c)*, the Court, instead of specifying what the relevant rules are to be taken into account in interpreting Convention No. 87, relies on a presumed "common understanding" of the States parties concerning the interpretation of Convention No. 87. On the basis of that presumed common understanding, the Court concludes that the right to strike is encompassed in the protection of freedom of association guaranteed under Convention No. 87. With due respect, this is a questionable application of Article 31, paragraph 3 *(c)*.

32. First, it is doubtful that Article 8 of the ICESCR and Article 22 of the ICCPR can be qualified as the "relevant rules" applicable *in the relations between the parties* for the interpretation

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[3] *Ibid*.

of Convention No. 87. Article 8 and Article 22 are conventional provisions applicable only to the States parties to the Covenants. Moreover, as said above, Article 22 does not include the right to strike.

33. The ICESCR and Convention No. 87 differ in subject-matter and pursue distinct objects and purposes. Article 8 of the ICESCR establishes substantive individual rights within the framework of international human rights law, whereas Convention No. 87 regulates industrial relations. As the International Labour Office emphasizes, Convention No. 87 forms "part of a comprehensive system of international labour standards that operate in a specific legal and institutional framework" (Written statement of the International Labour Office, p. 35, para. 168). For ILO Member States, "the ratification of an international convention does not merely entail acceptance of the undertakings which flow expressly from its provisions; it also includes, uniformly, acceptance of the constitutional rules which concern its application and from which the text of the convention remains indissociable"[4]. In other words, the obligations embodied in Convention No. 87 are the product of negotiations within the Organization's tripartite structure, which involved governments, workers and employers and is thus a process fundamentally different from that of human rights treaty making. Even when an overwhelming majority of States parties to Convention No. 87 have also acceded to the ICESCR, the obligations under the two treaties continue to operate within their respective régimes. This is not fragmentation but normal operation of the international legal system.

34. Furthermore, Article 8 of the ICESCR does not support the presumed "common understanding". The provision sets out individual rights to form and join trade union and to strike, to be guaranteed by States parties through national laws and practices. It neither establishes a general rule governing the relationship between the right to strike and freedom of association in international law, nor determines whether the right to strike falls within the protection of freedom of association guaranteed under Convention No. 87.

35. In this context, the reference to Convention No. 87 in Article 8 of the ICESCR deserves further analysis. Article 8, paragraph 3, provides that

> "[n]othing in this Article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention".

36. This non-prejudice clause first reaffirms the guarantees provided for in Convention No. 87. The discretion accorded to States parties under Article 8, paragraph 2, of the ICESCR is broader than that accorded to States parties under Convention No. 87. Under that provision, States parties may impose lawful restrictions on the exercise of the right of association and the right to strike not only with respect to members of the armed forces and the police, but also to members of the administration of the State. Article 8, paragraph 3, makes clear that this broader discretion does not affect the guarantees laid down in Convention No. 87. More specifically, it does not authorize States parties to Convention No. 87 to adopt legislative measures or apply the law that would prejudice the guarantees afforded under that Convention to the members of the administration of the State. Properly interpreted in its context, this non-prejudice clause neither determines whether the right to strike is protected under Convention No. 87, nor alters the guarantees provided therein.

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[4] Francis Wolf, "L'interdépendance des conventions internationales du travail", *Recueil des Cours de l'Académie de La Haye*, Vol. 121, 1967, p. 133; unofficial translation provided by the International Labour Office.

37. Finally, notwithstanding their importance in the application of human rights treaties, pronouncements of treaty monitoring bodies cannot, by themselves, expand the scope or the meaning of the terms of a labour convention. Their mandates are limited to supervising the application and implementation of the treaties under which they are established and do not extend to the interpretation and modification of other treaties. Although the Court recalls its settled jurisprudence that, in the exercise of its judicial functions, it is not obliged to model its own interpretation of the ICCPR on that of the Human Rights Committee (see Advisory Opinion, paragraph 117, citing *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66; see also *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), the Court appears to rely more on the pronouncements of treaty monitoring bodies than the text of Convention No. 87 itself.

38. The Court's reliance on the pronouncements of the Human Rights Committee in reaching its conclusion that Article 8 of the ICESCR and Article 22 of the ICCPR constitute the "relevant rules" within the meaning of Article 31, paragraph 3 *(c)* stands in sharp contrast with its conclusion on the subsequent practice of States parties in the application of Convention No. 87 under Article 31, paragraph 3 *(b)*.

39. According to the settled jurisprudence of the Court, subsequent practice which establishes the agreement of the parties constitutes an authentic means of interpretation (see e.g. *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, pp. 1075-1076, paras. 49-50). In the present proceedings, the Court observes that, although the ILO supervisory bodies have progressively recognized the right to strike as being protected under Convention No. 87, their pronouncements do not, in themselves, constitute such subsequent practice. It further notes that, among States parties, a number of them have, over the years and on various occasions, challenged the view that Convention No. 87 protects the right to strike. During the present proceedings, certain States either have explicitly rejected that interpretation or expressed reservations with regard to it. The Court therefore concludes that the clear and continued opposition of a number of States parties precludes the finding that subsequent practice has established an agreement of States parties regarding the interpretation of Convention No. 87 (see Advisory Opinion, paragraphs 83-87).

40. I fully agree with the Court's conclusion on this point. It shows more persuasively that there exists no common understanding among States parties that the protection of the right to strike is encompassed in the protection of freedom of association guaranteed under Convention No. 87.

III. THE PREPARATORY WORK AND THE CIRCUMSTANCES OF THE CONCLUSION OF CONVENTION NO. 87

41. In the present proceedings, recourse to the drafting history of Convention No. 87, as a supplementary means of interpretation, is particularly warranted. The preparatory work of the Convention and the circumstances of its conclusion confirm the interpretation set out above (see *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*, pp. 95-96, para. 76; p. 100, para. 89).

42. As the Court recalls in the Advisory Opinion, at the request of the Economic and Social Council of the United Nations, the Governing Body of the ILO placed the item of freedom of association and industrial relations on the agenda of the 30th Session of the International Labour Conference (hereinafter also as the "Conference") in June 1947. The original objective was to draft

a convention addressing the freedom of association, protection of the right to organize and to bargain collectively, and collective agreements[5].

43. During the preparatory work for Convention No. 87, the International Labour Office (hereinafter the "Office") circulated a questionnaire to Member States, inviting their views on, *inter alia*, the scope and form of international regulation on freedom of association. Question 3 (c) of the questionnaire asked: "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?"[6]

44. In responding to this question, many governments supported the inclusion of such a provision and affirmed that each State should retain the discretion to regulate or prohibit the right of public officials to strike[7]. Other governments, however, argued that the freedom of association was a separate issue from the question of the right to strike, or considered that questions relating to the right to strike had not yet been taken up for the purposes of the proposed Convention[8]. Among those States, Norway's response was most explicit; it stated that "the question of the right to strike must be kept strictly apart from the question of freedom of association" and "the right to strike, not only of public officials, but of all employees, has no bearing on the question of freedom of association"[9].

45. In light of the governments' responses, the Office summarized in its report that: "Most countries, therefore, implicitly recognise the right of association of public officials without prejudice to the question of the right to strike, which latter question, many countries point out, *is not relevant to the present proposed Convention*."[10]

46. Moreover, the Office observed that

> "the 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 prejudge 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*.

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[5] See generally International Labour Conference, 30th Session, 1947, Report VII: Freedom of Association and Industrial Relations.

[6] International Labour Conference, 31st Session, 1948, Report VII: Freedom of Association and Protection of the Right to Organise, p. 15.

[7] These States include Austria, Bolivia, Canada, Chile, Cuba, Ecuador, France, Greece, Iceland, India, Luxembourg, Pakistan, Poland, South Africa, Switzerland, the United States. See *ibid*., pp. 17-19, 22-24; International Labour Conference, 31st Session, 1948, Report VII (Supplement): Freedom of Association and Protection of the Right to Organise, pp. 8-12.

[8] Among these States are Italy, the Netherlands, Norway, Sweden and the United Kingdom. See International Labour Conference, 31st Session, 1948, Report VII: Freedom of Association and Protection of the Right to Organise, pp. 19-20, 23; Report VII (Supplement): Freedom of Association and Protection of the Right to Organise, pp. 11-12.

[9] International Labour Conference, 31st Session, 1948, Report VII (Supplement): Freedom of Association and Protection of the Right to Organise, p. 11.

[10] International Labour Conference, 31st Session, 1948, Report VII: Freedom of Association and Protection of the Right to Organise, p. 67 (emphasis added).

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.*"[11]

47. There is no material before the Court suggesting that the Office's proposal was rejected by the tripartite constituents. The Conference's decision in 1948 to adopt a convention on freedom of association without simultaneously regulating a right to strike demonstrates that the latter was consciously excluded from the scope of Convention No. 87 and left to be addressed under item VIII on conciliation and arbitration, which was a different agenda item before the Conference[12].

48. The passage cited above is also quoted in the Advisory Opinion (para. 108). The Court's analysis, however, points to the opposite direction. It concludes that the abandonment of the proposed provision concerning the public officials does not affect the right to strike in general. I find this conclusion inconsistent with the actual intention of the drafters.

49. The question posed by the Office, even though limited to public officials, clearly treated the right to strike as a distinct right, separable from freedom of association. The term "prejudge" indicates that recognition of the right of public officials to associate would not influence subsequent consideration of whether such officials should enjoy a right to strike. The right to strike is thus considered detached from the subject-matter of Convention No. 87. This understanding coincides with the position taken by many States at that time, on the basis that the question of the right of public officials to strike should be left to be settled by the authorities and legislation of each country[13]. This confirms that recognition of the right of association was not considered to predicate, or even to affect, how States parties are to regulate the right to strike in their national laws.

50. The position that the proposed Convention should exclude the question of the right to strike altogether appears to have ultimately prevailed at the Conference. As the Court itself observes, the question of the right to strike was left open (see Advisory Opinion, paragraph 111). The preparatory work thus confirms the meaning of the terms of Convention No. 87 as interpreted above.

IV. ILO'S CONSTITUTIONAL PROCEDURE FOR STANDARD-SETTING AND STABILITY OF TREATY OBLIGATIONS

51. According to Article 5 of the VCLT, any treaty adopted within an international organization shall be interpreted in accordance with the rules reflected in Articles 31 to 33 without prejudice to any relevant rules of the organization. Convention No. 87 falls within this category of treaties.

52. The standard-setting process of the ILO is shaped by the Organization's unique institutional structure. Tripartism is one of the four fundamental principles of the ILO, enshrined in its Constitution and the Declaration of Philadelphia, and deeply embedded in its institutional framework. Pursuant to Article 3, paragraph 1, and Article 7, of the ILO Constitution, both the Conference, the principal standard-setting organ of the ILO, and the Governing Body, the executive

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[11] *Ibid*., p. 87 (emphasis added).

[12] *ibid*., p. 88.

[13] See e.g. International Labour Conference, 31st Session, 1948, Report VII (Supplement): Freedom of Association and Protection of the Right to Organise, p. 10 (Greece); see also Ecuador's and France's responses, International Labour Conference, 31st Session, 1948, Report VII: Freedom of Association and Protection of the Right to Organise, pp. 18-19.

arm of the Organization, are composed of delegates of governments, employers and workers from Member States, ensuring that the interests of all three constituents are reflected in the formulation of the ILO's labour standards, agenda and policies. In accordance with Article 19 of the ILO Constitution, the adoption, revision and application of conventions and recommendations must involve the active participation of all tripartite constituents in the Conference and the Governing Body. Therefore, tripartism is central to international labour governance at the ILO. As Wilfred Jenks, former Director-General of the ILO, observed, the principle of tripartism permeates all aspects of the ILO's work, which include standard-setting, supervision of the application of international labour Conventions, and interpretation of Conventions adopted within the tripartite framework[14].

53. Documents show that after the adoption of Convention No. 87, discussion of strike action within the International Labour Conference, initially, was very limited. Such discussions, even when raised, focused primarily on national laws and practices concerning the right to strike, as well as on specific incidents of domestic strikes. While general statements were made about the importance of the right to strike as a particular aspect of freedom of association protected by the ILO, those discussions did not take place in the context of Convention No. 87. At the same time, the position within the ILO was also clear that the right to strike was not covered by Convention No. 87. For example, in 1956, a proposal was submitted to add two questions — national legislation restricting the right to strike and application of freedom of association for public employees — to the reporting form used for monitoring the application of Convention No. 87. The Committee on Standing Orders and the Application of Conventions and Recommendations of the Governing Body observed that "the Freedom of Association and Protection of the Right to Organise Convention does not cover the right to strike" and considered that "it would not be advisable to include in the form of annual report a question which would go beyond the obligations accepted by ratifying States"[15].

54. During the late 1950s, as noted by the Court, the ILO supervisory bodies began to examine prohibitions on the use of strikes as a means of action under Article 8, paragraph 2, of Convention No. 87. Thereafter, the Committee of Experts on the Application of Conventions and Recommendations (hereinafter the "Committee of Experts") repeatedly affirmed the relationship between the right to strike and Convention No. 87 in its General Surveys. In the 1994 General Survey, the Committee of Experts stated that, in its view, "the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87"[16]. This formulation was subsequently reiterated and consolidated in later pronouncements of the ILO supervisory bodies.

55. Meanwhile, the positions of the tripartite constituents with respect to the right to strike under Convention No. 87, and their responses to the pronouncements of the supervisory bodies, remained divergent and contentious.

56. Up till the early 1970s, workers' delegates occasionally noted that no ILO instrument dealt with the right to strike and urged the ILO to consider adopting standards on this subject for the protection of workers' economic and social interests[17]. In 1973, some workers' delegate in the tripartite discussions at the Conference argued, for the first time, that the right to strike was

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[14] See C. Wilfred Jenks, "The Significance for International Law of the Tripartite Character of the International Labour Organisation", *Transactions of the Grotius Society*, Vol. 22, 1936, pp. 58-60 and 64-67.

[15] Minutes of the 131st Session of the Governing Body, March 1956, Appendix XXII, p. 188, para. 6.

[16] International Labour Conference, 81st Session, 1994, Report III (Part 4B): Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, p. 66, para. 151.

[17] See e.g. International Labour Conference, 55th Session, 1970, Record of Proceedings, p. 580, para. 12; *ibid*., p. 583, para. 25.

"implicitly guaranteed" in Convention No. 87[18]. Some workers' members asserted that "[a] general prohibition on the right to strike would constitute a limitation on right of workers to organise their activities"; they invoked the opinions of the Committee of Experts in support of the proposition that the right to strike formed part of freedom of association protected under Convention No. 87[19].

57. Employers' delegates, by contrast, have consistently rejected the view that the right to strike is covered by Convention No. 87 or by any other ILO instrument. They challenged the competence of the supervisory bodies to interpret Convention No. 87 and objected to some of their pronouncements which they regarded as stipulative determinations of the scope and limits of the right to strike. In their view, such determinations "amounted to a codification of a very sensitive and contentious area of labour law outside the ILO's constitutional tripartite procedure for standard setting" (see e.g. Written Statement of the International Organisation of Employers, p. 6, para. 9).

58. Although most States parties have gradually recognized the right to strike in their own national legal systems, the positions of their governments within the ILO on the question whether the right to strike is specifically protected under Convention No. 87 continued to diverge. On the issue of the right to strike by public officials, governments generally and consistently took a negative view.

59. In 2012, as the disagreement between employers' and workers' representatives in the Committee on the Application of Standards became irreconcilable, the Committee ceased entirely to address the issue of the right to strike during its sessions.

60. In the Advisory Opinion, the Court refers to a statement issued by the Government Group on 23 February 2015 in relation to the right to strike and the modalities and practices of strike action at national level, made during the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (hereinafter "the 2015 Tripartite Meeting"). The Court, however, only cites paragraph 4 of the statement to support its interpretation of Convention No. 87, thus taking it out of the context of the statement (Advisory Opinion, para. 114). In order to better appreciate the position of the Government Group, the whole substantive part of this statement is reproduced below:

> "3. . . . the Government Group had the opportunity to thoroughly ponder on the question that is posed to us all, namely the relation between Convention No. 87 on Freedom of Association and the right to strike.
>
> 4. The Government Group recognizes that the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO. The Government Group specifically recognizes that without protecting a right to strike, Freedom of Association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized.
>
> 5. *However, we also note that the right to strike, albeit part of the fundamental principles and rights at work of the ILO, is not an absolute right. The scope and conditions of this right are regulated at the national level.* The document presented by the Office describes the multi-faceted regulations that States have adopted to frame the right to strike.

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[18] See e.g. International Labour Conference, 58th Session, 1973, Record of Proceedings, p. 544, para. 26.

[19] *Ibid*., para. 30.

6. *We are ready,* right from this Tripartite Meeting, *to consider discussing*, in the forms and framework that will be considered suitable, *the exercise of the right to strike*. We believe that the complex body of recommendations and observations developed in the past 65 years of application of Convention No. 87 by the various components of the ILO supervisory system constitutes *a valuable resource for such discussions*, which will also be informed by the multi-faceted regulations that States and some regions have adopted to frame the right to strike."[20]

61. It is clear from this statement that the relation between Convention No. 87 and the right to strike is a continuing unresolved issue in the ILO. States have agreed, as a general principle, that the right to strike is linked to freedom of association, which is a fundamental principle and right at work of the ILO. They have also agreed that, notwithstanding its importance for promoting and protecting workers' interests, the right to strike is not an absolute right and that its scope and conditions are regulated at the national level. International standards governing the right to strike have yet to be developed. In that regard, recommendations and observations of the supervisory bodies constitute a valuable resource for further consideration of the topic. This statement of the Government Group shows that, at the least as of 2015, the tripartite constituents had not yet reached agreement on the issue whether the right to strike is protected under Convention No. 87.

62. In the Advisory Opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court held that an organization's constituent instrument should be "interpreted in accordance with [its] ordinary meaning, in [its] context and in the light of the object and purpose of the . . . Constitution, *as well as of the practice followed by the Organization*" (*Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 76, para. 21; emphasis added). If the practice of an organization may inform the interpretation of its constitution, it should likewise inform the interpretation of treaties concluded within that organization.

63. Within the ILO, standard setting from inception to adoption is a tripartite function and responsibility. International labour standards are negotiated and adopted by the International Labour Conference, in which each of the ILO Member States is represented by a tripartite delegation. This distinctive process is directly relevant to determining the nature and scope of international labour conventions. Yet this feature is scarcely reflected in the Advisory Opinion. The Court's recourse either to the preparatory work of Convention No. 87, or to the subsequent practice in its application, does not adequately take account of the positions of the tripartite constituents on the question of the right to strike.

64. By contrast, the Court ascribes "great weight" to the pronouncements of the ILO supervisory bodies, regional human rights instruments and related pronouncements of regional courts and other bodies, as relevant supplementary means of interpretation of Convention No. 87 (Advisory Opinion, paras. 120-137). In doing so, the Court not just unduly expands the applicable scope of Article 32 of the VCLT, but also overlooks or, perhaps for a teleological interpretation, ignores a critical aspect of the long-standing disagreement among the tripartite constituents, namely mandates of the supervisory bodies and legal effects of their pronouncements on the interpretation of Convention No. 87.

65. The question put to the Court is one of treaty interpretation. In considering the role of those supervisory bodies, the Court needs only to determine whether those bodies have the competence, or

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[20] Governing Body, 323rd Session, 2015, GB.323/INS/5/Appendix I, Annex II, Government Group Statement (23 February 2015).

not, to define the scope of Convention No. 87 and whether their pronouncements on the scope and conditions of the right to strike are binding on States parties in the application of the Convention. As discussed above, under the ILO Constitution and established practice, international labour standards must undergo a rigorous tripartite process of negotiation and acceptance. This is because such standards bear on the rights and interests of both workers and employers and, more importantly, on the sustainable economic and social progress and the overall well-being of the populations of States parties.

66. In monitoring the application of labour conventions, the supervisory bodies have no mandate to modify or change the terms of those treaties through interpretation. This understanding is best illustrated by the defined mandate of the Committee of Experts contained in the Joint Statement of Workers' and Employers' Groups issued at the 2015 Tripartite Meeting and endorsed by the Government Group, which reads:

> "The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are *applied in law and practice by member States*, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. *Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities*."[21]

67. As States parties themselves noted in the second statement issued at the 2015 Tripartite Meeting, the question whether the right to strike is protected under Convention No. 87 is "an extremely complex issue"[22]. Whether such a right is established as a labour standard in conjunction with freedom of association under Convention No. 87 directly affects States parties' international obligations and responsibilities for the effective implementation and observance of labour standards. If such a right is to be recognized, States parties must have a clear understanding of its scope, conditions and limits under international labour law, given that the right to strike is not absolute. A general reply as stated in the Advisory Opinion, without indicating the scope, conditions and limits of the right to strike (para. 140), in my view, is not a proper answer that would facilitate the resolution of the long-standing disagreement among the tripartite constituents of the Organization.

68. Security and stability of labour conventions, like that of treaties generally, rest on the fundamental principles of free consent and good faith and the rule of *pacta sunt servanda*. A good faith interpretation of Convention No. 87 requires due recognition of the historical development of international labour standards and of the proper role of the supervisory system established under the constitutional framework of the ILO. States parties, as acknowledged, have a high interest in the well-functioning of that supervisory system[23]. The Court has a responsibility to preserve the legal scope of Convention No. 87 as adopted by States parties, through a good faith interpretation conducted in accordance with the rules of treaty law reflected in Articles 31 and 32 of the VCLT. This is imperative for the stability of the legal institution of the ILO as well as for the international legal order.

(Signed) XUE Hanqin.

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[21] Governing Body, 323rd Session, 2015, GB.323/INS/5/Appendix I, Annex I, The ILO Standards Initiative – Joint Statement of Workers' & Employers' Groups (23 February 2015) (emphasis added).

[22] *Ibid*., Annex III, para. 2.

[23] *Ibid*. para. 5.