

DECLARATION OF JUDGE BHANDARI

Support for inclusion of right to strike under Convention No. 87 — Ordinary meaning not reducible to dictionary definitions — Contextual interpretation under Article 31 VCLT — Cautious use of systemic integration (Article 31 (3) (c) VCLT) consistently with State consent — No special interpretative weight of preparatory work of ILO conventions — Preparatory work inconclusive but not contradictory — Limited role of regional instruments under Article 32 VCLT — Weight to be given to views of ILO supervisory bodies.

1. Striking activities and programmes constitute a vital means by which workers and their organizations defend their interests and maintain a fair balance of power in their relations with employers. In light of this, and being persuaded that Convention No. 87, properly interpreted, protects the right to strike, I have no hesitation in supporting the Court’s Advisory Opinion and the reasoning by which it reaches that conclusion. I nevertheless append this declaration to highlight certain aspects of that reasoning which, in my view, merit closer reflection.

I. DICTIONARY MEANING V. ORDINARY MEANING

2. Over the course of written and oral proceedings, various participants referred to English and French dictionaries, apparently as an authoritative basis for developing their interpretation of key terms, such as “activities” and “programmes”, mentioned under Article 3, paragraph 1, of Convention No. 87. It was suggested that the Court should admit these definitions as revealing the “ordinary meaning” of the terms at issue.

3. I find it necessary to caution that there is no autonomous or freestanding “ordinary meaning” of treaty terms that can be determined in isolation, for instance, by reference to dictionaries alone. As required under Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties (“VCLT”), 1969, the Court must determine “the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*” (emphasis added). In my view, it was rightly observed at the United Nations Conference on the Law of Treaties, 1966, that this rule does not permit one to “arbitrarily select dictionary meanings when construing treaty texts”¹.

4. We do not ascertain the ordinary meaning of a term solely by reference to its linguistic features or its dictionary meaning. Any reliable dictionary will list multiple possible meanings for most words, yet it cannot illuminate which of those constitutes the “ordinary meaning” for the purposes of a particular treaty provision. This is because a dictionary provides only a descriptive account of usage — a statistical and historical record of how words have been used — rather than a normative guide to their meaning in a given international legal context².

5. Comparative international practice confirms this point. The WTO Appellate Body — often associated with a textual and comparatively strict interpretative approach³ — has made frequent use

¹ United Nations Conference on the Law of Treaties, First session, Vienna, Austria, 26 March-24 May 1968, *Official Records*, Summary records of the plenary meetings of the Committee of the Whole, 33rd meeting, UN doc. A/CONF.39/11/Add.2, p. 177, para. 7.

² Andrea Bianchi and Fuad Zarbiyev, *Demystifying Treaty Interpretation*, Cambridge University Press (CUP), 2024, p. 92.

³ Georges Abi-Saab, “The Appellate Body and Treaty Interpretation” in Malgosia Fitzmaurice et al. (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*, Martinus Nijhoff Publishers, 2010, p. 106.

of dictionaries. Yet even there, dictionaries are regarded only as a “useful starting point” and not as dispositive of ordinary meaning⁴. The Appellate Body has emphasized that the ordinary meaning of treaty terms must be ascertained in light of the particular circumstances of each case. It follows that the ordinary meaning of a term cannot be equated purely and simply with its dictionary definition⁵.

6. It is therefore not surprising that, in its recent jurisprudence, this Court has exercised caution in relying on dictionary definitions. Such definitions are often too divergent to provide meaningful guidance and may not be consistent with the ordinary meaning that emerges when terms are read in their proper context and in light of the object and purpose of the treaty⁶. Moreover, referring to lexicographical sources could raise questions about the criteria using which the Court may prefer one dictionary over another. The Court was correct in not resorting to linguistic dictionaries. The open-textured and inherently flexible nature of the terms “activities” and “programmes” sufficiently supported the Court’s interpretation thereof.

II. SYSTEMIC INTEGRATION

7. I now turn to the consideration of other “relevant rules of international law applicable in the relations between the parties”, pursuant to Article 31, paragraph 3 (c), of the VCLT. The Court observes that this provision “does not necessarily require all parties to the treaty” to be bound by the external rules in question, for them to be taken into account in interpreting the terms of that treaty⁷. The Court then refers to Article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966, and Article 22 of the International Covenant on Civil and Political Rights, 1966, as relevant rules, for the purposes of interpreting the pertinent terms of Convention No. 87.

8. The Court’s approach is notable in that it treats an external treaty rule as “applicable in the relations between the parties”, notwithstanding the absence of express consent to that external rule by all States parties to the treaty under consideration⁸. The Court’s observation should not be understood as encouraging the unqualified importation of external rules into a treaty without the consent of certain States parties. Rather, external rules may be “applicable in the relations between the parties” where the rules were widely accepted by the parties and not objected to by the non-coinciding minority, thus reflecting a common understanding between the States parties⁹. This limitation is demonstrated through the Court’s rigorous analysis of the almost complete identity of the States parties to these different treaties, and the absence of any opposition to the right to strike from the few States that had neither signed nor ratified either of the twin human rights covenants.

⁴ See e.g. *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, Appellate Body Report, 27 September 2005, para. 175; *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, Appellate Body Report, 19 January 2010, para. 348.

⁵ Jean-Marc Sorel, Valérie Boré Eveno, “1969 Vienna Convention: Article 31” in Olivier Corten et al. (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, 2nd ed., CUP, 2025, p. 928, para. 33.

⁶ See e.g. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004 (I), p. 48, para. 84; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 241, paras. 59–61.

⁷ Advisory Opinion, para. 90.

⁸ The Court, and other forums, have not authoritatively pronounced on the scope of “applicable in the relations between the parties” for present purposes. See e.g. Sotirios-Ioannis Lekkas, Panos Merkouris and Daniel Peat, “The Interpretative Practice of the International Court of Justice”, *Max Planck Yearbook of United Nations Law*, Vol. 26, No. 1, 2023, p. 336.

⁹ See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, UN doc. A/CN.4/L.682, 13 April 2006, p. 96, para. 472; Joost Pauwelyn, *Conflict of Norms in Public International Law How WTO Law Relates to other Rules of International Law*, CUP, 2009, pp. 260-263.

Moreover, the concerned provisions of the twin covenants cross-referenced Convention No. 87, which affirmed the close connection thereof¹⁰. Thus, the Court rightly gave effect to its responsibility under Article 31, paragraph 3 (c), of the VCLT, without undercutting the fundamental principle of consent to treaties.

III. *LEX SPECIALIS* UNDER ARTICLE 5 OF THE VCLT

9. It was submitted by a few participants, including the International Labour Office, the Secretarial organ of the ILO, that there is a special rule under the organizational context of the ILO. Allegedly, owing to the ILO's tripartite character, the preparatory work of international labour conventions should be given interpretative weight exceeding their characterization as "supplementary means" under Article 32 of the VCLT. This would achieve the effect of placing the views of governments, employers and workers on the same footing. In advancing this view, the participants referred to Article 5 of the VCLT, which provides that although the Convention applies to "any treaty adopted within an international organization", it is "without prejudice to any relevant rules of the organization".

10. The Court, in my view, rightly rejected this argument¹¹. It is important, however, to elucidate further why the *lex specialis* argument did not withstand scrutiny. Firstly, the rule stated in Article 5 of the VCLT would only apply to Convention No. 87 if it reflected customary international law. However, it was not necessary for the Court to inquire into that issue for the present proceedings, because it was not convincingly shown that a relevant "rule" under the meaning of Article 5 had arisen within the ILO system. Whereas the Committee of Experts on the Application of Conventions and Recommendations has occasionally cited Article 5 of the VCLT when referring to preparatory work, it simultaneously referred to Article 32 thereof and described it as a supplementary means¹². One might reconcile this with tripartism in standard setting by observing that, when resorting to preparatory work, the views of all participating negotiators, i.e. government, employer and worker delegates involved in the drafting of the treaties should be considered. This, however, would not signify greater than supplementary interpretative weight.

11. The only evidence presented to the Court in support of a *lex specialis* norm was the opinion of the International Labour Office itself. However, a norm of such significance cannot be upheld, in the absence of sufficient support from the ILO Member States or institutional practice. Notwithstanding the institutional relevance of the principle of tripartism, it cannot, in and of itself, act as a source for international legal norms that could displace existing norms¹³, such as the customary international law norm stated under Article 32 of the VCLT.

¹⁰ The Court has previously understood cross-references between treaties as indicating their mutual relevance in interpretation, in *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 3, para. 89.

¹¹ Advisory Opinion, paras. 63-65.

¹² *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 100th Session of the International Labour Conference, 2011, Report III (Part 1A), para. 12.

¹³ As generally observed by the International Law Commission, "while international labour conventions are obviously adopted under very specific circumstances, they are nevertheless treaties between States, and the participation of non-governmental representatives in their adoption does not modify their legal nature"; see "Text of the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session", *Yearbook of the International Law Commission*, Vol. II, Part III, UN doc. A/66/10/Add.1, 2011, p. 58, commentary to Guideline 1.1.6, para. 4.

IV. PREPARATORY WORK OF CONVENTION NO. 87

12. On the substance of the preparatory work of Convention No. 87, certain participants in the proceedings contended that its drafters clearly intended to exclude the right to strike. I agree with the Court's finding that this preparatory work "leads to an inconclusive result" on the views of its drafters specifically on whether striking activities and programmes could fall within Convention No. 87¹⁴.

13. I, however, note that the preparatory work demonstrates their more general understanding that Article 3 of Convention No. 87 encompassed not just internal, but also external activities and programmes — which is one of the premises supporting the Court's conclusion¹⁵. At first, the draft of Article 3 included only a single paragraph, recognizing the right now contained in Article 3, paragraph 1. It was decided, however, to further include a requirement that public authorities must refrain from restricting or impeding the lawful exercise of this right. As to the necessity of this obligation, now contained in Article 3, paragraph 2, of Convention No. 87, the International Labour Conference Committee deliberating on the Convention stated in relevant part:

"The Committee, while unanimously recognising the need for such a guarantee, considered, however, that this object would best be realised if the right of organisations to organise their *internal and external life in full autonomy* was completed by an obligation, on the part of the public authorities, to refrain from any interference which would restrict this right or impede the organisations in the lawful exercise of this right."¹⁶

14. Therefore, it would be incorrect to consider that the preparatory work of Convention No. 87 is inconsistent with the Court's findings. Rather, having reached an unambiguous and sound result on the basis of the general rule of interpretation under Article 31 of the VCLT, confirmed by other supplementary means under Article 32 of the VCLT, the Court decided that it was not necessary to refer to the preparatory work as a supplementary means of interpretation to confirm that result — a matter on which it enjoys considerable discretion¹⁷.

V. REGIONAL INSTRUMENTS AND JURISPRUDENCE

15. In my view, it was not necessary for the Court to refer, at such length, to "regional instruments and jurisprudence" as a supplementary means of interpretation under Article 32 of the VCLT¹⁸. In the contemporary international legal landscape, the Asian region does not possess regional legal institutions or instruments comparable to those existing in Africa, Europe and the Inter-American system. Consequently, recourse to regional sources may result in States outside the Asian

¹⁴ Advisory Opinion, paras. 111 and 138.

¹⁵ Advisory Opinion, paras. 69-70.

¹⁶ International Labour Conference, 31st Session, 1948, Questionnaire, Freedom of Association and Protection of the Right to Organise, pp. 8-9 (emphasis added).

¹⁷ See generally *LaGrand (Germany v. United States of America), Judgment*, I.C.J. Reports 2001, pp. 503-504, para. 104 (where the Court noted that "the preparatory work of the Statute does not preclude the conclusion that orders under Article 41 have binding force"); *Lotus*, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 16 (observing that there is "no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself"). By contrast, 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, p. 100, para. 89 (where the Court, despite finding it "need not resort to supplementary means", decided to do so since the parties had based their arguments on a detailed analysis of the preparatory work). Thus, the Court retains a measure of discretion as to whether, and to what extent, it considers it appropriate to resort to preparatory work.

¹⁸ Advisory Opinion, paras. 120-137.

region exerting disproportionate influence on the Court's interpretative exercise through such citations.

16. Moreover, the central issue before the Court was not the general scope of "freedom of association" (which regional sources may elucidate), but rather whether striking falls within the meaning of "activities" and "programmes" under Article 3, paragraph 2, of Convention No. 87. The answer to this question is, in my view, sufficiently clear from the interpretative framework set out in Article 31 of the VCLT and confirmed by other admissible supplementary means of interpretation under Article 32 thereof. In these circumstances, extensive reliance on regional freedom of association provisions and jurisprudence was not necessary.

VI. THE WEIGHT TO BE ACCORDED TO THE PRONOUNCEMENTS OF ILO SUPERVISORY BODIES

17. The Court recalled its jurisprudence according to which it may ascribe "great weight" to the interpretations adopted by supervisory bodies established to monitor the implementation of treaties, while emphasizing that it remains "in no way obliged, in the exercise of its judicial functions, to model its own interpretation" on those bodies. The Court considered that, notwithstanding the institutional particularities of the ILO supervisory mechanisms, their pronouncements may likewise be accorded "great weight" as a supplementary means of interpretation of Convention No. 87¹⁹.

18. The terminology of "great weight" is drawn from the Court's prior jurisprudence²⁰. However, the present case may more appropriately call for the language of "due weight". Unlike the human rights treaty bodies previously considered by the Court, the supervisory bodies of the ILO operate within a distinct institutional framework characterized by tripartite representation and practices that do not necessarily reflect the same degree of judicial or quasi-judicial authority. In these circumstances, the interpretative value of their pronouncements should be assessed with appropriate regard to their institutional character, authority, expertise and the degree of consensus underlying them.

(Signed) Dalveer BHANDARI.

¹⁹ Advisory Opinion, paras. 117-118.

²⁰ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 104, para. 101.