SEPARATE OPINION OF JUDGE NOLTE

*Interpretation under Article 31 of the VCLT leaves the meaning of Convention No. 87 ambiguous — Necessity to have recourse to supplementary means of interpretation under Article 32 —*Travaux préparatoires *speak in favour of Convention No. 87 not dealing with the right to strike but are not entirely clear — Absence of a subsequent practice establishing the agreement of the parties —Relevant rules of international law applicable in the relations between the parties under Article 31, paragraph 3* (c), *and the limits resulting from the principle of consent — Subsequent practice under Article 32 of an overwhelming majority of States parties recognizes the right to strike as being protected under Convention No. 87 — Interpretative significance of pronouncements of ILO supervisory bodies — Application of Articles 31 and 32 of the VCLT by way of a "single combined operation" — Recognition of the right to strike as protected by Convention No. 87 is not based on an evolutive interpretation — Transparency and methodological discipline in treaty interpretation.*

1. I agree that "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)" (Advisory Opinion, para. 141). However, I am not persuaded by significant parts of the reasoning of the Court. In my view, the Court should have recognized that the Convention is ambiguous in several respects and that the response to the question posed by the ILO depends on developments which have taken place more recently. This conclusion results from an application of the customary rules on treaty interpretation, bearing in mind the distinction between the general rule of interpretation (Article 31 of the Vienna Convention on the Law of Treaties (VCLT)) and the rule on supplementary means of interpretation (Article 32, VCLT).

2. After offering my own interpretation of Convention No. 87 (I), I will make some general observations on the rules of treaty interpretation (II), before concluding (III).

I. INTERPRETATION OF CONVENTION NO. 87

3. I agree that the interpretation of Convention No. 87 should follow the customary rules on the interpretation of treaties as reflected in Articles 31 to 33 of the VCLT (Advisory Opinion, para. 62).

1. Application of the general rule of interpretation under Article 31 of the VCLT

4. The general rule of interpretation under Article 31 of the VCLT comprises several elements, the most relevant of which, for the present case, can be found in paragraphs 1, 3 *(b)* and 3 *(c)*. As I will show, the application of Article 31 to Convention No. 87 leads to an ambiguous result.

(a) ***Paragraph 1: ordinary meaning of the terms, context, object and purpose***

5. The Court finds that the ordinary meaning of the terms of Convention No. 87, read in good faith, in their context and in the light of the Convention's object and purpose, *indicates* that the right to strike is encompassed by the Convention (Advisory Opinion, para. 74). However, in my view, a careful consideration of these elements leaves the meaning ambiguous.

6. It is possible to read the terms of the right of workers' organizations, under Article 3 of the Convention, "to organise their administration and activities and to formulate their programmes" as encompassing strike action as "one of the main activities engaged in and tools used by workers and

their organizations to promote their interests and improve conditions of labour" (Advisory Opinion, para. 73). However, it is *equally* possible to read these terms as being limited to the internal organization, administration and formulation of programmes of workers' and employers' organizations, and as not encompassing any specific forms of external collective action. After all, the term "to organize" does not necessarily, or even usually, imply the realization of what is being organized, here the envisaged "activities". Indeed, the Court itself understands the term "programmes" to be limited to "planned actions" (Advisory Opinion, para. 70). Furthermore, a strike is not any kind of activity; it is a very specific form of activity by which employment contracts are not fulfilled; which may have very significant social consequences; and which is clearly in need of regulation. It is therefore not self-evident for the noticeably restrained and careful language of Article 3 of Convention No. 87 to be understood as guaranteeing the right to strike. Other international guarantees of the right of association (e.g. Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) mention the right to strike explicitly, to ensure that it forms part of the right of association under the ICESCR.

7. The second, more restrictive approach to the terms of Convention No. 87 finds support in both the historical understanding of the right of association at the national, regional and universal levels[1], and in early pronouncements of the Human Rights Committee and the European Court of Human Rights, which found that freedom of association does not include a right to strike, or does so only indirectly[2]. In addition, while being only supplementary means of interpretation under Article 32 of the VCLT, the *travaux préparatoires* of the Convention suggest that the ordinary meaning of that instrument's terms, as originally understood, does not necessarily encompass the right to strike (Advisory Opinion, para. 108).

8. The textual ambiguity in Article 3 is not resolved by Article 8 of the Convention. That provision does not confer additional rights, nor does it expand rights recognized elsewhere; it merely sets conditions and limitations for the exercise of a right whose source lies in another provision. The same is true of Article 10, which defines the purpose of workers' organizations and identifies the objectives which such organizations may pursue, but remains silent as to whether it encompasses the specific means by which those objectives are to be achieved.

9. Furthermore, an interpretation of Convention No. 87 in the light of its object and purpose does not, in my view, resolve the ambiguity arising from the ordinary meaning of its terms read in their context. The preamble identifies freedom of association as "a means of improving conditions of labour and of establishing peace". While these aims may be advanced by an interpretation of the Convention as including the right to strike — on the basis that such action may be effective for the realization of those aims (see Advisory Opinion, paragraph 73) — they can equally be understood as

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[1] Freedom of association first developed as a civil and political liberty in the late eighteenth and the nineteenth century. Originally a "political" rather than a "social" right, it was understood as "a civil liberty, offering the choice whether to join an organisation, be that charitable, religious, political or scientific". T. Novitz, "Freedom of association: its emergence and the case for prevention of its decline", in J. Bellace and B. ter Haar (eds.), *Research Handbook on Labour, Business and Human Rights Law*, Cheltenham, Elgar, 2009, pp. 234-235. In this sense, the right entailed "the liberty to do collectively with others that which one is at liberty to do as an individual", and its principal function was to shield associations from State interference rather than to grant specific economic rights to labour organizations, A. Bogg, "Freedom of Association", in G. Davidov, B. Langille, G. Lester (eds.), *Oxford Handbook of the Law of Work*, Oxford, Oxford University Press (OUP), 2024, pp. 425–427. In national systems, this liberty was only later applied to the labour context and extended to the protection of specific external activities, H. Dunning, "The origins of Convention No. 87 on freedom of association and the right to organize", *International Labour Review*, Vol. 137, 1998, at p. 150; see also U. Preuß, "Associative Rights (The Rights to the Freedoms of Petition, Assembly, and Association)" in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, 2012, pp. 953-958.

[2] *J.B. et al.* v. *Canada*, Communication No. 118/1982, CCPR/C/28/D/118/1982 (1986), paras. 6.2-6.5; *UNISON* v. *the United Kingdom*, 2002, Appl. No. 53574/99, ECHR 2002-I, p. 10.

supporting a more limited interpretation. The (internal) organization of activities ("planned actions", Advisory Opinion, para. 70) is undoubtedly "a" means for workers' and employers' organizations to improve conditions of labour and establish peace. Even if striking is an additional means for achieving such ends, it does not follow, as a matter of law, that every means is protected because it serves a particular end. That depends on the scope of the rights enshrined in a treaty.

10. It is not unreasonable to regard the Convention's object and purpose as ensuring that workers and employers can create and operate organizations free from undue interference and engage in collective bargaining — even without the most powerful means at their disposal. It is true that striking is often the most impactful form of associational activity and that it is widely accepted, if not guaranteed, as a labour right in many countries. However, in my view, it goes too far to say that, without the right to strike, the treaty would be deprived of any practical effect, or that the freedom of association guaranteed therein would be reduced to "collective begging"[3].

11. Rather, historical experience shows that trade unions are not without leverage if they do not have the right to strike. Indeed, trade unions have exercised different degrees of influence and power over time, through a range of non-strike-related associational activities, including self-organization, collective negotiation, holding meetings and conferences, providing member services such as welfare support, legal assistance and training, publicly advocating for causes and supportive legal frameworks, forming alliances with political groups, participating in transnational solidarity networks, representing workers in workplace governance, and conducting campaigns to recruit new members.

12. For all these reasons, I disagree with the Court's conclusion that "the terms of the Convention, in their context and in light of the object and purpose of the Convention . . . do not allow the inference that other rights, such as the right to strike, are excluded" (Advisory Opinion, para. 71).

(b) ***Paragraph 3*** **(b)*****: subsequent practice which establishes the agreement of the parties regarding the interpretation of the treaty.***

13. I agree with the Court that relevant subsequent practice of the parties under Article 31, paragraph (3) *(b)* of the VCLT, may be identified by determining whether pronouncements of supervisory bodies "give rise to, or refer to, subsequent State practice, thereby establishing the agreement of the parties within the meaning of the said provision" (Advisory Opinion, para. 83). I also agree that the "clear opposition" by a number of States parties "to the interpretation according to which Convention No. 87 protects the right to strike precludes the conclusion that there exists subsequent practice which establishes the agreement of the parties on this point within the meaning of Article 31, paragraph 3 *(b)*, of the Vienna Convention on the Law of Treaties" (Advisory Opinion, para. 87).

14. I would simply note in this regard that it is important to identify the precise content of any pronouncement which would "give rise to" any specific subsequent practice of States parties. For example, it is only if a pronouncement by an ILO supervisory body unambiguously sets forth an interpretation of Convention No. 87 as encompassing the right to strike, that subsequent practice by a State party which expresses agreement with that pronouncement may become relevant under Article 31, paragraph 3 *(b)*. In the present case, it is not clear when the view that Convention No. 87 encompasses the right to strike was expressed, with sufficient clarity, by the ILO supervisory bodies.

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[3] German Federal Labour Court (BAG), decision of 12 March 1985, 1 AZR 636/82, *Neue Zeitschrift für Arbeitsrecht* (NZA) 1985, p. 538.

Unfortunately, the Court does not take a position on this question of the critical date and merely states that "ILO supervisory bodies have progressively recognized the right to strike as being protected under Convention No. 87, a position that they now have reaffirmed for decades" (Advisory Opinion, para. 83). This may mean that the ILO supervisory bodies have held that position since 1992 (when the Committee of Experts on the Application of Conventions and Recommendations (hereinafter the "Committee of Experts") unambiguously expressed that view for the first time). However, it may also mean that they have done so since 1983 or 1973, or even since 1959, at which point the language used by those bodies became progressively less ambiguous, while not yet, in my view, providing a sufficient basis to "give rise" to relevant subsequent State practice confirming that position (Advisory Opinion, para. 80). While it was not necessary to resolve this question for the purpose of assessing whether any pronouncements by ILO supervisory bodies have given rise to a relevant subsequent practice of the parties under Article 31, paragraph 3 *(b)*, it is important for determining the weight to be given to any subsequent practice of the parties under Article 32 that does not establish their agreement (see Section 2 *(b)* below).

(c) ***Paragraph 3*** **(c)*: relevant rules applicable in the relations between the parties***

15. Article 31, paragraph 3 *(c)*, of the VCLT provides that "other relevant rules of international law applicable in the relations between the parties" must also be taken into account. In considering this provision, the Court takes an innovative turn in its reasoning, which, while to some extent acceptable, raises concerns without being particularly helpful for the answer to the question posed.

16. Article 31, paragraph 3 *(c)*, applies when two conditions are met. First, there must be another relevant rule of international law. Second, that rule must be applicable in the relations between the parties. Although this is not as obvious as the Court assumes, I agree that Article 8 of the ICESCR and Article 22 of the International Covenant on Civil and Political Rights (ICCPR) are relevant rules for the interpretation of Convention No. 87 (see Section 1 *(c)* (i) below). However, I wonder whether it can be said that Article 8 of the ICESCR and Article 22 of the ICCPR are "applicable in the relations between the parties" to Convention No. 87 (see Section 1 *(c)* (ii) below).

(i) Article 8 of the ICESCR and Article 22 of the ICCPR as relevant rules

17. It cannot, in my view, simply be presumed that freedom of association under Convention No. 87 has the same scope and meaning as the freedom of association that is enshrined in the human rights Covenants, such that the latter could inform the interpretation of the former as a matter of course. After all, Convention No. 87 and the Covenants are different treaties, with Convention No. 87 serving a particular purpose in a specific context. This is the case regardless of the "generally recognized principle that, when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations"[4] — which does not preclude the existence of distinct but mutually compatible obligations, some of which may be less far-reaching than others.

18. The Court finds that "Article 8 of the ICESCR and Article 22 of the ICCPR assist in establishing a common understanding of the States parties to Convention No. 87 that the protection of the right to strike is encompassed in the protection of the freedom of association", as affirmed by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee (Advisory Opinion, paras. 97-98). It further states that "the Human Rights Committee has

[4] *Obligations of States in respect of Climate Change, Advisory Opinion of 23 July 2025*, para. 165.

considered, for more than 25 years now, that the protection of the right to strike is encompassed in the protection of the freedom of association under the ICCPR" (Advisory Opinion, para. 91).

19. However, the pronouncements of the Human Rights Committee over the last 25 years have not expressed clear support for the existence of such a "common understanding". While the Committee has, during this period, referred in the pronouncements cited in the present Opinion to a *relationship* between the right to strike and the freedom of association, it has, for some of this period, done so in a cautious and indeterminate manner, without clearly affirming that "the protection of the right to strike is encompassed in the protection of the freedom of association"[5].

20. The *travaux préparatoires* of the two Covenants also indicate that the question of the right to strike has been contentious since the inception of these instruments. While some States described strikes as a "corollary" or an essential component of trade union activity, other States regarded them as "primitive", "anti-social and harmful", capable of "distort[ing] the true concept of trade unionism", or merely instrumental rather than constitutive of a legal right[6]. Such a divergence of views, taken together with the Human Rights Committee's original negative approach, suggests that, although a relationship between strike action and freedom of association has been contemplated by some States since the entry into force of the Covenants, the question whether the right to strike forms part of the freedom of association has long been contested and unsettled[7].

21. On the other hand, a closer look at the *travaux préparatoires* of the Covenants also suggests that, in drafting those instruments, States understood themselves to be giving expression to the same underlying concept of freedom of association that was already recognized in Convention No. 87, albeit with different degrees of specificity. In its original proposal for Article 22, paragraph 3, of the ICCPR, France emphasized the "link between the United Nations and its specialized agencies in their work on human rights", noting that the provision would constitute "a test of relations with the specialized agencies" and that it was "therefore important to recognize their efforts in promoting human rights"[8]. The Secretary-General's annotation on the draft Covenants explained that the proposed cross-reference in the Covenants to Convention No. 87 responded to concerns that its omission "could be interpreted as an indication that the United Nations overlooked or underestimated

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[5] See e.g. Concluding observations on the fourth periodic report of Chile, 30 March 1999, UN doc. CCPR/C/79/Add.104, para. 25 ("The general prohibition imposed on the right of civil servants to organize a trade union and bargain collectively, as well as their right to strike, raises serious concerns, under article 22 of the Covenant. Therefore: The State party should review the relevant provisions of laws and decrees in order to guarantee to civil servants the rights to join trade unions and to bargain collectively, guaranteed under article 22 of the Covenant."); Concluding observations on the second periodic report of Lithuania, 4 May 2004, UN doc. CCPR/CO/80/LTU, para. 18 ("The Committee is concerned that the new Labour Code is too restrictive in providing, inter alia, for the prohibition of strikes in services that cannot be considered as essential and requiring a two-thirds majority to call a strike, which may amount to a violation of article 22.").

[6] UN General Assembly, Eleventh Session, 719th Meeting of the Third Committee, UN doc. A/C.3/SR.719, 3 Jan. 1957, pp. 192-193; UN General Assembly, Eleventh Session, 720th Meeting of the Third Committee, UN doc. A/C.3/SR.720, 3 Jan. 1957, p. 198; UN General Assembly, Eleventh Session, 721st Meeting of the Third Committee, UN doc. A/C.3/SR.721, 4 Jan. 1957, p. 202; UN General Assembly, Eleventh Session, 723rd Meeting of the Third Committee, UN doc. A/C.3/SR.723, 7 Jan. 1957, p. 211; B. Saul, D. Kinley and J. Mowbray, "Article 8: Trade Union Related Rights", in *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*, Oxford, OUP, 2014, pp. 576-577.

[7] As discussed in paragraph 7 of this separate opinion, this conclusion is supported by the Human Rights Committee's initial position, expressed in 1986, according to which Article 22 of the ICCPR does *not* imply a right to strike. See *J.B. et al.* v. *Canada*, Communication No. 118/1982, CCPR/C/28/D/118/1982 (1986).

[8] Commission on Human Rights, Summary Record of the 171st Meeting, UN doc. E/CN.4/SR.171, 8 May 1950, p. 12, para. 63.

the progress achieved in safeguarding trade union rights in international law"[9]. Article 8, paragraph 3, of the ICESCR was subsequently introduced "to bring the text into line with the draft Covenant on Civil and Political Rights . . . which dealt with freedom of association and also with trade-union rights as one aspect of freedom of association"[10].

22. Thus, in my view, the inclusion of these conflict clauses within the Covenants served to ensure coherence within the broader international legal system, treating freedom of association under the Covenants and Convention No. 87 as expressions of the same underlying guarantee. At the same time, as discussed in Section 2 *(a)* below, the *travaux préparatoires* show that States did not seek to resolve all questions relating to the scope of the right of association in the labour context. However, this does not prevent the conclusion that the Covenants contain rules that are relevant for the interpretation of Convention No. 87.

(ii) Article 8 of the ICESCR and Article 22 of the ICCPR as "applicable in the relations between the parties"

23. The Court holds that

> "Article 31, paragraph 3 *(c)*, does not necessarily require all parties to the treaty under interpretation to be bound by the 'relevant rules of international law' in order for those rules to be taken into account. A rule may be 'applicable in the relations between the parties' if it expresses their common understanding regarding certain provisions of the treaty under interpretation." (Advisory Opinion, para. 90.)

24. This is an innovative statement. An uninitiated reader will ask how a rule can be applicable in the relations between parties if it is not binding between them. An informed reader will be reminded of the formulation contained in paragraph 472 of the report of the Study Group of the International Law Commission, entitled "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", according to which

> "it might also be useful to take into account the extent to which that other treaty relied upon can be said to have been 'implicitly' accepted or at least tolerated by the other parties 'in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the . . . term concerned'"[11].

25. I understand, and find acceptable, the Court's recognition that the phrase "applicable in the relations between the parties", contrary to its apparent technical meaning, is not necessarily limited to an identical and formally binding legal relationship between the parties, provided that the "relevant rule" expresses a "common understanding" of the parties.

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[9] Draft International Covenants on Human Rights: Annotation Prepared by the Secretary-General, UN doc. A/2929, 1 July 1955, p. 163, para. 152.

[10] 719th Meeting, UN doc. A/C.3/SR.719, 3 Jan. 1957, in B. Saul, *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires: Volume II*, Oxford, OUP, 2016, p. 1170, para. 23.

[11] Fragmentation of International Law: Difficulties Arising from 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 Apr. 2006, p. 239, para. 472.

26. The same logic also underlies Article 31, paragraph 3 *(b)*, of the VCLT, according to which "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" must be taken into account in the interpretation of the treaty. Such practice may include not only acts, but also omissions, including relevant silence[12]. As the Court has found, the practice of one or more parties, if unopposed by one or more other parties, may contribute to establishing a common understanding where "it is clear that the circumstances were such as called for some reaction, within a reasonable period"[13]. A broader understanding along these lines of what can constitute a rule "applicable in the relations between the parties" appropriately reflects the contemporary state of international law, in which many rules build upon and cross-reference one another.

27. However, a broader understanding of the phrase "applicable in the relations between the parties" may not, and should not, come at the expense of the basic principle which underlies Article 31 of the VCLT and which distinguishes the general rule of interpretation under Article 31 from the supplementary means of interpretation under Article 32 of the VCLT: the principle of consent. The elements of interpretation listed in Article 31 have in common that they are "authentic", being expressions of the agreement of the parties to the treaty, unlike the supplementary means contemplated in Article 32[14]. While such agreement does not necessarily have to be explicit or formal, it must at least be reflected in a common understanding. As under Article 31, paragraph 3 *(b)*, in certain circumstances, even silence may contribute to such a common understanding.

28. I agree with the approach of the Court in principle and to this extent. My doubts relate to its application in the present case and its limits. If the ICCPR and the ICESCR contain relevant rules of international law for the purpose of interpreting Convention No. 87, the question arises whether all States parties to that Convention have the common understanding that freedom of association protects the right to strike, as is said to be reflected in Article 8 of the ICESCR and Article 22 of the ICCPR, and as interpreted by the respective treaty bodies under the Covenants. The Court shows that three of the four States parties to Convention No. 87 that are not parties to both Covenants have confirmed that they share the understanding that freedom of association protects the right to strike (Advisory Opinion, para. 94). This is not so clear in the case of the fourth such State party — Saint Lucia — for which no positive indication of its position could be found. However, by obliquely referring to the "circumstances" (Advisory Opinion, para. 94), the Court effectively says that, given that Saint Lucia has not objected to the well-known and repeatedly debated positions taken by the ILO and human rights supervisory bodies over recent decades that the right to strike flows from the freedom of association, its silence contributes to a common understanding of the parties of Convention No. 87. Indeed, the "relevance of silence or inaction for the establishment of an agreement regarding interpretation depends to a large extent on the circumstances of the specific case"[15].

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[12] See International Law Commission (ILC), Conclusion 4, paragraph 2 of the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 35, para. 17; See also e.g. *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 815, para. 30. See generally D. Azaria, *State Silence Across International Law: Meaning Context, and Developments*, Oxford, OUP, 2025.

[13] *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 23. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 410, para. 39.

[14] ILC, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 220, para. 10.

[15] Conclusion 10, paragraph 2, of the ILC Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 66, paras. 18 and 20.

29. However, one may wonder whether the conclusion that the present circumstances permit interpretative significance to be attached to Saint Lucia's silence goes too far in assuming consent, when there is no positive indication but only an assumption derived from unspecified circumstances. In my view, mere non-objection, toleration or acquiescence cannot, without more, establish a sufficient commonality for the purpose of identifying a consent-based, authentic element of treaty interpretation under Article 31[16]. I would therefore have preferred the Court to caution against applying Article 31, paragraph 3 *(c)*, in a way that tends to dilute the principle of consent and the important distinction between an interpretation based on "authentic means of interpretation" and one based on the secondary elements under Article 32. To emphasize this point, the Court could have held that the circumstances of the present case required Saint Lucia, as a party to a fundamental treaty within an international organization of which it is a member and for which a monitoring system has been established, to react to a long-standing and unmistakably debated series of pronouncements of the competent supervisory bodies. The Court could also have concluded that, even if it was not possible to identify a common understanding of the parties to a treaty (because Saint Lucia's silence did not reflect a common understanding), a relevant rule that is *not* applicable in the relations between the parties may nevertheless be used as a supplementary means of interpretation, just as subsequent practice in the application of the treaty that does not establish the agreement of the parties may be so used (see Advisory Opinion, paragraphs 89 and 112-115).

30. Thus, while I agree that the ICCPR and the ICESCR could, in principle, be taken into account under Article 31, paragraph 3 *(c)*, of the VCLT, even if not all parties to Convention No. 87 are also parties to the ICCPR and the ICESCR, I have certain doubts that, in the present case, these two human rights treaties reflect a sufficiently clear "common understanding" of "the parties" to Convention No. 87 that would enable the ambiguity resulting from the interpretation of that Convention under Article 31, paragraph 1, of the VCLT to be resolved.

(d) *Conclusion under Article 31 of the VCLT*

31. Thus, in my view, the interpretation of Convention No. 87 resulting from the application of Article 31 of the VCLT leaves the meaning of the Convention ambiguous. The Court should therefore have had recourse to supplementary means of interpretation under Article 32 to determine whether Convention No. 87 encompasses the right to strike and should not merely have used such means to confirm that this is the case.

32. It is worth noting at this point that, even though Articles 31 and 32 of the VCLT are respectively entitled "General rule of interpretation" and "Supplementary means of interpretation", their separation should not be overstated. If Article 32 is applicable, treaty interpretation under both articles is a "single combined operation"[17]. As the ILC noted in 1966, "the provisions of [what then became Article 32] by no means have the effect of drawing a rigid line between the 'supplementary' means of interpretation and the means included in [what then became Article 31]"[18]. The priority enjoyed by Article 31 is thus a relative one, which results from the "authentic" character of the means

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[16] See, *mutatis mutandis*, *ibid*., Conclusion 13, paragraph 3, p. 82 ("Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 *(b)*, accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body").

[17] Conclusion 2, paragraph 5, of the ILC Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 26; *Obligations of States in respect of Climate Change, Advisory Opinion of 23 July 2025*, para. 177 (referring to the work of the International Law Commission on both what became Articles 31 and 32).

[18] ILC, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 220, para. 10.

of interpretation that are referred to therein[19]. But where the application of Article 31 of the VCLT does not yield a clear result, as in the present case, Article 32 "establishes a general link between the two articles and maintains the unity of the process of interpretation"[20]. In other words, Article 32 is part of a continuum with Article 31 and should be used whenever any doubt arises as to the meaning of the terms in question.

2. Supplementary means of interpretation

33. Article 32 of the VCLT refers to two "supplementary means of interpretation" (*travaux préparatoires* and the circumstances of a treaty's conclusion) as examples of an unspecified number of other such means of interpretation ("including").

(a) Travaux préparatoires *of Convention No. 87*

34. In my view, the *travaux préparatoires* of Convention No. 87 indicate that the absence of an explicit recognition of the right to strike in the Convention is the result of a deliberate decision by the negotiating States and the ILO to distinguish freedom of association from the well-known controversial question of the right to strike. Indeed, the International Labour Office's 1948 report on member States' responses to its questionnaire concluded that "[s]everal Governments . . . 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" (Advisory Opinion, para. 108). In my view, this passage suggests that the absence of an explicit provision on the right to strike was a direct consequence of an unresolved disagreement among States as to whether the right to strike would be encompassed within freedom of association under what would become Convention No. 87[21]. By moving to defer the question of strike action to another, future convention, at least some States indicated that they considered the matter to fall outside the scope of Convention No. 87[22].

35. The understanding that Convention No. 87 and the freedom of association it enshrines are not a source of specific labour rights was reaffirmed during the International Labour Conference in 1948. Shortly before the adoption of the Convention and during the debates on Article 3, when several amendments were proposed to set minimum conditions for industrial organizations, the Chairman of the Conference Committee stated that "the Convention was not intended to be a 'code of regulations' for the right to organise, but rather a concise statement of certain fundamental principles"[23] — underscoring the aim of the drafters to establish foundational norms while deferring the recognition of specific rights to future instruments[24].

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[19] *Ibid.*

[20] *Ibid.*

[21] The replies by States in a second round (see Advisory Opinion, paragraph 109) gave no reason for the International Labour Office to change its assessment that the Convention did not "relate" to the right to strike. International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise, Supplement, pp. 8-12.

[22] International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise (ILO Document No. 158), p. 87.

[23] International Labour Conference, 31st Session, 1948, Record of Proceedings, Appendix X, Freedom of Association and Protection of the Right to Organise, (ILO Document No. 164), p. 477.

[24] International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise (ILO Document No. 158), p. 87; International Labour Conference, Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92) (ILO Document No. 126).

36. The 1947 ILO survey of State practice prepared for the 30th Session of the International Labour Conference provides additional evidence of such restraint. The Office noted that civil servants were excluded from the right of association in several legal systems, not because associating itself was denied, but because legislators "actually intended to debar them from the right to strike and not from the right of association"[25]. The report highlighted France as a key example: although civil servants were initially precluded from forming trade unions, they established common-law associations, later recognized by the State in an Act of 19 October 1946[26]. During French parliamentary debates on the Act, legislators explicitly distinguished between the right of association and the right to strike, agreeing that recognition of the former did not entail recognition of the latter[27]. The International Labour Office accordingly concluded that "[i]t follows that the recognition of the right of association does not imply a recognition of the right to strike"[28].

37. At the same time, however, the *travaux préparatoires* reveal a measure of deliberate ambiguity regarding the place of strike action within the Convention's framework. Notably, the 1948 questionnaire addressed only the right of *public officials* to strike, rather than that of workers generally[29]. This restrictive formulation suggests that the broader issue was consciously avoided, reflecting the sensitivity of States and the International Labour Office to the disputed nature of rights potentially derived from freedom of association. That restraint was likely due, at least in part, to the experience of the ILO in the late 1920s, when a first attempt to elaborate a convention on freedom of association had been unsuccessful, not least because of disagreements about what freedom of association would entail[30].

38. Thus, both the International Labour Office and member States consciously avoided direct reference to strike action and other specific external forms of collective activity, choosing instead to construct what became Convention No. 87 in terms of the "fundamental principles" of association and organization[31]. This approach is one of constructive ambiguity: by neither endorsing nor rejecting the right to strike as encompassed by freedom of association under Convention No. 87, the drafters aimed to avoid a divisive debate that had previously blocked progress.

39. It should also be noted that the *travaux préparatoires* do not contain a clear decision by the negotiating States to *exclude* the right to strike from possibly being included by implication in the freedom of association under the Convention. The focus of certain States on excluding the right of public officials to strike may even imply an intention to keep the broader question open. Thus, although the *travaux préparatoires* of Convention No. 87 lean towards an understanding that freedom of association does not encompass the right to strike, they are not entirely clear in this respect.

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[25] International Labour Conference, 30th Session, 1947, Report VII, Freedom of Association and Industrial Relations (ILO Document No. 147), p. 46.

[26] *Ibid.*

[27] *Ibid.*

[28] *Ibid.*

[29] International Labour Conference, 31st Session, 1948, Questionnaire, Freedom of Association and Protection of the Right to Organise (ILO Document No. 157), p. 15.

[30] ILO Written Statement, pp. 64-66, paras. 290-298.

[31] International Labour Conference, 31st Session, 1948, Record of Proceedings, Appendix X, Freedom of Association and Protection of the Right to Organise (ILO Document No. 164), p. 477.

(b)*Subsequent practice under Article 32*

40. While there is no subsequent practice establishing the agreement of the parties within the meaning of Article 31 (3) *(b)* of the VCLT, the Court finds "that a significant majority have accepted the interpretation that Convention No. 87 protects the right to strike" (Advisory Opinion, para. 114). As noted in the Advisory Opinion (paras. 84 and 114-115), reactions by States parties to pronouncements of ILO supervisory bodies constitute subsequent practice in the application of Convention No. 87 within the meaning of Article 32 of the VCLT, indicating that the right to strike has gradually come to be recognized by a significant majority of States parties as falling within the scope of the Convention.

41. As discussed in the Advisory Opinion, from 1959 onwards, the Committee of Experts progressively recognized the connection between the right to strike and freedom of association[32], leading, in 1983, to its first categorical statement that a general ban on strikes would be incompatible with the principles of freedom of association (Advisory Opinion, para. 80). In my view, the Committee's identification of State practice in 1973, together with the positive reactions of many States to its 1983 General Survey, indicate that agreement among a large number of States parties on this point began to emerge in the period following 1973[33].

42. In subsequent decades, State practice increasingly reflected explicit acceptance of the view that Convention No. 87 encompasses a right to strike. In 1989, members of the Employers' Group raised objections to the Committee of Experts' interpretation of the right to strike[34]. However, the participating Government representatives did not appear to formulate objections or concerns and tended to affirm their commitment to promoting the right to strike domestically[35]. The 1994 International Labour Conference reinforced this movement toward acceptance by most States[36]. During the 2012 International Labour Conference, "[s]everal Government members recalled that the right to strike was well established and widely accepted as a fundamental right", including a State which had previously asserted that "the question of the right to strike must be kept strictly apart from the question of freedom of association"[37]. In my view, the 2015 Government Group statement before a Tripartite Meeting is particularly significant (Advisory Opinion, para. 114). Although several States emphasized that domestic law retains an important role in regulating the scope and modalities of strike action, the collective statement made by this group of ILO member States "vested with governance functions in relation to determining the standard-setting agenda of the Conference"

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[32] After initially maintaining that Convention No. 87 "does not deal with the right to strike", see e.g., Case No. 50 (Turkey, 1953), Sixth Report of the CFA, Seventh Report of the International Labour Organization to the United Nations, Appendix V, p. 362, para. 864; Case No. 60 (Japan, 1954), Twelfth Report of the CFA, Eighth Report of the International Labour Organization to the United Nations, Appendix II, p. 211, para. 53; International Labour Office, The Standards Initiative — Appendix III (ILO Document No. 108), p. 15, fn. 11.

[33] International Labour Conference, 58th Session, 1973, 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. 44, para. 107; International Labour Conference, 69th Session, 1983, 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. 63, para. 205. Notably, there was no State resistance recorded during these proceedings, apart from Tunisia's call for clearer definitions in 1983. See International Labour Conference, 69th Session, 1983, Record of Proceedings of the International Labour Conference, pp. 31/13-31/14, paras. 61-62.

[34] International Labour Conference, 76th Session, 1989, Record of Proceedings, pp. 26/6, 26/35, 26/43, 26/51.

[35] See e.g. *ibid.*, pp. 26/38 (Dominican Republic; Ecuador), 26/40 (Haiti; United States of America), 26/48 (Nicaragua), 26/51-26/52 (Poland).

[36] International Labour Conference, 81st Session, 1994, Record of Proceedings, Report of the Committee on the Application of Standards, pp. 25/40-25/41, paras. 144-147.

[37] International Labour Conference, 101st Session, 2012, Records of Proceedings, Report of the Committee on the Application of Standards, Part I/24, para. 90; International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise, Supplement, pp. 11-12.

(Advisory Opinion, para. 39) indicates an overwhelmingly shared interpretative understanding among States parties that Convention No. 87 protects the right to strike[38].

43. Ultimately, an overwhelming majority of States parties have either expressly endorsed, confirmed through their domestic legislation, or otherwise accepted the interpretation of the ILO supervisory bodies that Convention No. 87 encompasses a right to strike. At the same time, State practice has not been perfectly uniform, and a small number of States have maintained their objections (Advisory Opinion, para. 85).

(c) ***Relevant rules under Article 32***

44. Assuming that "relevant rules of international law" which are *not* applicable in the relations between the parties (i.e. not reflecting their common understanding) may nevertheless be a supplementary means of interpretation under Article 32 (see paragraph 29 above), I consider that the provisions on freedom of association contained in the 1966 human rights Covenants constitute such rules. In my view, even if the Covenants do not reflect a common understanding of (all) the parties to Convention No. 87 (because one or more of them have remained silent without a reaction having been called for), the near-complete cross-ratification by States parties of the ICESCR, the ICCPR and Convention No. 87, together with the conflict clauses in both Covenants which expressly assume a high level of protection through the guarantees of Convention No. 87, nevertheless show that an overwhelming majority of the States parties to Convention No. 87 have accepted the position of the treaty bodies that the right to strike forms part of the freedom of association under the human rights Covenants. Included in this overwhelming majority are States that have expressed objections to the right to strike being included in Convention No. 87, including Japan and Switzerland. In contrast, States parties to Convention No. 87 that have not ratified the ICESCR and ICCPR are not among those which have actively opposed the interpretation that Convention No. 87 encompasses the right to strike (Advisory Opinion, para. 94).

45. It is in the context of Article 32 that the Court could have recognized the element of "toleration" that is contained in the standard proposed in the Fragmentation Report of the ILC Study Group (see paragraph 24 above, "the extent to which the other treaty relied upon can be said to have been 'implicitly' accepted or at least tolerated")[39]. This would have — *e contrario* — preserved the specific function of the consent-based "authentic means of interpretation" under Article 31 while accepting the possibility of using (other) rules to which not all States parties are bound as means of interpretation. Such an approach would have reassured States that the principle of consent continues to be taken seriously, while not closing one's eyes to the positions taken by an overwhelming majority of States parties which, as a means of interpretation under Article 32, may sometimes tilt the balance in one direction or the other.

(d) ***Pronouncements of ILO supervisory bodies***

46. I agree, in principle, that pronouncements of the ILO supervisory bodies may also constitute supplementary means of interpretation (Advisory Opinion, para. 118). They may not only

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[38] Government Group Statement, 23 Feb. 2015, GB.323/INS/5/Appendix I, Annex II, para. 4.

[39] Fragmentation of International Law: Difficulties Arising from 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 Apr. 2006, p. 239, para. 472.

inform the interpretation of a treaty under Article 32 by giving rise to subsequent practice by States[40]; they may also, under certain conditions, constitute a supplementary means of interpretation in themselves. However, supervisory treaty bodies generally do not possess (quasi-)judicial authority, let alone legislative powers. They are of a different kind and serve different roles; their mandates, decision-making procedures, institutional composition, membership qualifications and operational contexts are quite distinct. Therefore, the formulation used by the Court in the *Ahmadou Sadio Diallo* case, according to which "it [the Court] should ascribe great weight to the interpretation adopted by this independent body [the Human Rights Committee]", should not be understood as a general recognition by the Court that the pronouncements of treaty bodies are always to be ascribed "great weight"[41]. The Court's use of the term "*mutatis mutandis*" in paragraph 118 of this Advisory Opinion reflects this consideration, although the Court does not spell out the significance of any differences between treaty bodies in the present context. In any event, it bears emphasizing that the Court deemed "it important to recall that it is 'in no way obliged, in the exercise of its judicial functions, to model its own interpretation [on that of those bodies]'" (Advisory Opinion, para. 118) and that pronouncements of treaty bodies do not constitute a category of materials that possess an inherent interpretative significance, such as judicial decisions.

47. Even if the Court could have gone further and identified differences between, on the one hand, the interpretative significance and weight of a pronouncement by the Human Rights Committee, as in the *Diallo* case, and the pronouncements of the ILO supervisory bodies in this case, on the other, there is one reason why it should not have done so here. This is because, in evaluating the interpretative significance of the pronouncements of the ILO supervisory bodies in the present case more specifically, the Court could be seen as departing from its own reasoning in another context, where it observed that "by reintroducing a question that was intentionally omitted, the Court would substitute its assessment for that of the body requesting the advisory opinion" (Advisory Opinion, para. 59). The omitted question, in its first part, reads as follows:

> "Was the Committee of Experts on the Application of Conventions and Recommendations of the ILO competent:
>
> *(a)* to determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)"?[42]

48. In my view, the question that was ultimately put to the Court does not require an assessment of the precise legal weight of these pronouncements. Their more elaborate assessment might have been seen as an implicit response to a question that was deliberately omitted.

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[40] Conclusion 13, paragraph 1, of the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 107, para. 4, fn. 602. See also Conclusion 6, paragraph 24, *ibid.*, p. 50, para. 24 ("The considerations that are pertinent for the identification of subsequent agreements and subsequent practice under article 31, paragraph 3 *(a)* and *(b)*, also apply, *mutatis mutandis*, to the identification of subsequent practice under article 32."); Conclusion 13, paragraph 3, *ibid.*, p. 110, para. 11.

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

[42] Draft Minutes of the 349th *bis* (Special) Session of the Governing Body, November 2023, Geneva, 10 Nov. 2023, GB.349*bis*/PV/Draft (ILO Document No. 31), p. 35. The second part of the omitted question is "*(b)* in examining the application of that Convention, to specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?", GB.322/INS/5, The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, October 2014 (ILO Document No. 34), p. 32.

(e) ***Regional instruments and practice***

49. Finally, I question the methodology underlying the Court's reliance on regional instruments to "confirm[] that the protection of the right to strike is encompassed in the protection of the freedom of association" (Advisory Opinion, para. 122). In particular, the Court's account appears to give the same interpretative significance to treaty provisions, judicial decisions and pronouncements of supervisory bodies (Advisory Opinion, paras. 122-124, 127 and 135), notwithstanding the differing interpretative weight of such material for the question before it. The uniform treatment of these sources risks obscuring the distinction between binding treaty commitments, judicial determinations and interpretative statements by supervisory bodies rendered within specific regional legal frameworks.

50. More fundamentally, I am concerned that relying on regional practice to interpret a universal instrument inappropriately favours States from those regions within which regional legal structures have been established. Thus, by listing "regional instruments", the Court has implicitly excluded most Asian States from its analysis, whereas it has — at least indirectly — included States that are members of a regional organization but are not parties to Convention No. 87. Conversely, a more inclusive understanding of what constitutes regional practice could have brought the Court to recognize, for example, that India (which is not a party to Convention No. 87) protects freedom of association but does not consider, according to the constant jurisprudence of its Supreme Court, that this freedom encompasses the right to strike[43].

(f) ***Conclusion under Article 32***

51. Taken together, it appears that the most relevant supplementary means of interpretation point in different directions: whereas the *travaux préparatoires* speak more in favour of the proposition that the right to strike is not encompassed by Convention No. 87, the subsequent practice of an overwhelming majority of States parties, as well as the apparent general acceptance of the interpretation by human rights treaty bodies that parallel human rights guarantees encompass the right to strike, speak more in favour of that right being part of the freedom of association enshrined in Convention No. 87.

3. Overall conclusion by way of a "single combined operation"

52. After all relevant means of interpretation have been taken into account, they must be applied together in a "single combined operation"[44]. This operation is not limited to the application of the means of interpretation set forth in Article 31, paragraph 1[45], and those mentioned in

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[43] See Supreme Court of India, *All India Bank Employees* v. *National Industrial Tribunal*, 28 Aug. 1961, 1962 AIR 171; Supreme Court of India, *T.K. Rangarajan* v. *Government of Tamil Nadu & Others*, 6 Aug. 2003, AIR 2003 SC 3032.

[44] ILC, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 219, para. 8.

[45] As could be misunderstood from *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 475, para. 71; see more clearly *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*, *Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 29, para. 64.

paragraph 3 of the same provision[46], but may also include those referred to in Article 32 of the VCLT "when the interpretation according to article 31 . . . leaves the meaning ambiguous" (see paragraph 32 above).

53. In my view, the interpretation of Convention No. 87 under Article 31 of the VCLT leaves the Convention's meaning ambiguous. The *travaux préparatoires*, while speaking more in favour of the right to strike being excluded from the freedom of association under the Convention, nevertheless provide some indications to the contrary. The subsequent practice of an overwhelming majority of States parties for more than a decade points towards recognition of the right to strike. In my view, this factor tips the balance towards recognizing that the right to strike is protected by Convention No. 87. It is reinforced by the more recent widely accepted interpretation of the human rights Covenants as other relevant rules of international law under Article 32.

54. In reaching this conclusion, I do not disregard the significance of objections to this interpretation of Convention No. 87 by individual States parties. Such objections are important. Treaty interpretation cannot simply proceed based on majority views. Thus, the subsequent practice of less than all parties, however extensive, may point in a particular direction, but it cannot be determinative regardless of other relevant means of interpretation. In the present case, however, the ambiguity that results from the various other means of interpretation set forth in Article 31, paragraph 1, of the VCLT makes it possible to draw this conclusion.

55. At this point, one might ask whether this reasoning is not simply a form of evolutive interpretation. In my view, this is not the case, as the jurisprudence of the Court suggests. In *Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the Court held that,

> "where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning"[47].

56. On this basis, the Court found that the term *comercio* (commerce) in the 1858 Treaty of Limits between Costa Rica and Nicaragua was to be interpreted as encompassing not only goods, but also services, because the parties had concluded the treaty for an unlimited duration and were therefore presumed to have intended that the meaning of the term *comercio* would be interpreted depending on the circumstances at the time of its application[48].

57. In the present case, in contrast, the parties to Convention No. 87 deliberately did not include the right to strike in the Convention (see paragraph 34 above); rather, they expected the question of the right to strike to be addressed at a later stage by the conclusion of another convention on conciliation and arbitration[49]. In *Navigational and Related Rights*, the change in the meaning of

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[46] ILC, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 219, para. 8.

[47] See *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 243, para. 66.

[48] *Ibid.*, paras. 67-70.

[49] International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise (ILO Document No. 158), p. 87; Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92) (ILO Document No. 126).

the term *comercio* derived from broader socio-legal developments outside the particular treaty context and not from specific developments constantly involving the parties, as is the case here. Finally, also in contrast to the treaty in *Navigational and Related Rights*, Convention No. 87 is subject to a termination clause (Article 16) and thus deliberately not as strictly envisaged to be of unlimited duration. In my view, these differences preclude an evolutive interpretation of Convention No. 87 as including the right to strike[50].

II. SOME GENERAL OBSERVATIONS ON THE RULES OF TREATY INTERPRETATION

58. As a more general matter, the question may be asked whether the Court should have so fully and systematically applied the customary rules of interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. After all, in many cases the Court does not refer to these rules, or refers to them only incompletely, and still arrives at satisfactory interpretations of treaties in specific cases.

59. Rules of interpretation are distinctive rules. Such rules do not confer rights or impose obligations of conduct. Rather, they concern the way in which rules are to be understood. Many States have not enacted such rules in their domestic legislation, at least not at the level of detail found in Articles 31 to 33 of the VCLT. Even in legal systems where rules of interpretation are recognized as a matter of doctrine, lawyers caution against applying them as if they were ordinary rules. Rules of interpretation, it is sometimes said, cannot be applied with precision and leave a significant margin of appreciation for the interpreter. Some even go so far as to assert that rules of interpretation provide a false sense of certainty in a process that leaves the interpreter relatively unconstrained. The ILC, when preparing the VCLT's rules of interpretation, itself observed that "the interpretation of documents is to some extent an art, not an exact science"[51]. It further cautioned against overestimating the role of such rules in stating that

> "[a]ny attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable. Accordingly the Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties[52]".

60. The inevitable element of openness in the process of interpretation and the need for a considerable amount of subjective appreciation does not, however, mean that the interpretation of treaties is a wholly personal or purely intuitive exercise. It is, rather, precisely the purpose of the Vienna Convention's rules of interpretation, or of corresponding informal conventions or understandings, to reduce the risk that arbitrariness or the interpreter's personal preferences will prevail.

61. How can the rules of interpretation reduce that risk? These rules formulate the expectation that interpreters articulate their reasoning in terms of certain generally recognized criteria reflected in Articles 31 to 33 of the Vienna Convention (the "means of interpretation"). Those rules are

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[50] ILC, Conclusion 8 of the Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 66, paras. 8-9.

[51] ILC, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 218, para. 4.

[52] *Ibid.*, pp. 218-219, para. 5.

reminders of the most relevant considerations which must or may be taken into account in the process of treaty interpretation. They serve to make the interpretative process, including deliberations among different interpreters, reach an appropriate level of complexity and transparency. The outcome of a process of interpretation can then be evaluated and criticized by the legal community which is subjected to a decision resulting from that interpretation.

62. Since the rules of interpretation under Articles 31 to 33 are multifactorial and open-ended, they may have an ambivalent effect. They may be used in a way which enhances the quality of the process of interpretation and the substantive reasoning, but they may also be used to rationalize an intuitively preferred result. They enhance quality when interpreters remain open-minded while examining the legal rule from the perspective of one means of interpretation to the next, until they undertake the "single combined operation" of balancing the different factors, giving appropriate weight to each of them. On the other hand, they rationalize the preferred result when interpreters look at every means of interpretation from the perspective of an intuitive assumption of a certain outcome, until they undertake a "single combined operation" that will confirm their initial intuitive assumption.

63. I understand that it is not always easy to determine the "appropriate weight" of any particular means of interpretation in a given case or situation. Nor is it easy to recognize intuitive preferences which narrow or divert the open mind. But this is not a reason to avoid making a genuine effort — one that is not only important for an individual interpreter to reach the desired level of reasoning, but also for a court to be able to adjudicate with persuasive authority. It is precisely the purpose of the Vienna Convention's rules of treaty interpretation to induce courts and other interpreters to identify as faithfully as possible the (presumed) intention of the parties, and to be as transparent as possible when it comes to explaining their interpretative assessments.

64. It is especially important to articulate in a persuasive manner the reasons for a particular interpretation of a legal rule according to generally recognized criteria when interpreting treaties. Treaties are different from domestic legislation — even if many treaties are to be implemented by way of domestic law. Of course, treaties also share some features with domestic legislation. For instance, the interpretation of both treaties and domestic legislation depends on the ordinary meaning of their terms, their object and purpose, as well as related legal rules. However, treaties, being solemn undertakings between States, raise issues that are usually less relevant for the interpretation of contracts between private individuals or rules of domestic law. This is because States parties emphasize, and international law recognizes, the primary role of the States parties to a treaty — they are the "masters of the treaty" and are ultimately responsible for its application. This is why, for example, the conduct of the parties to a treaty, before and after its conclusion, deserves particular attention. The parties to a treaty and the institutions established by a treaty typically consider, explicitly or implicitly, that such conduct is relevant for the determination of the treaty's meaning, exceptions notwithstanding. Also, parties to a treaty simultaneously conceive of a treaty as being a self-sufficient set of rules, *as well as* being placed within a certain normative environment — mostly without being clear about the relationship between the two. Such considerations are particularly relevant for treaties. They are therefore explicitly reflected in Articles 31 to 33 of the VCLT. These rules are reminders of the most relevant considerations which must or may be taken into account in the process of treaty interpretation.

III. CONCLUSION

65. I am content that the Court has systematically considered all the relevant elements of the applicable rules of interpretation and has endeavoured to explain their assessment, individually and

in combination, in its answer to the question put to it. From that perspective, it is of secondary importance that I am not convinced by significant parts of the Court's reasoning.

(Signed) Georg NOLTE.

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