

SEPARATE OPINION OF JUDGE GÓMEZ ROBLEDO

[Translation]

1. I agree with the overall conclusion reached by the Court at the end of its analysis, namely that the right to strike is protected under Convention No. 87. I would nevertheless like to make a few observations about the way in which the Court has applied the customary rule of treaty interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties (hereinafter the “VCLT”). The interpretation set forth in the Advisory Opinion is based first and foremost on Article 31, paragraph 1, of the VCLT, which focuses on the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose (Advisory Opinion, paras. 67-74). In my opinion, however, the ordinary meaning to be given to the terms of the Convention in their context and in light of its object and purpose remains ambiguous, if not obscure, unless one adopts a systemic approach to interpretation based on an analysis of all relevant rules of international law applicable in the relations between the parties, as provided for in Article 31, paragraph 3 (c). It is clear that the terms of Convention No. 87 do not exclude the right to strike, but this does not mean that they encompass the protection of that right. The Court appears to have been unwilling to depart from the finding reached by the Permanent Court of International Justice in another case also involving an ILO convention, in which the latter “rejected the argument that the mere absence of certain terms leads to the conclusion that particular activities fall outside the scope of ILO conventions” (Advisory Opinion, para. 68). But this approach is too rigid, does not take account of the reality that existed at the time Convention No. 87 was concluded and ultimately proves to be very superficial. This creates the impression of an interpretative process that has been distorted in order to make Convention No. 87 say something that it does not.

2. Article 3 of Convention No. 87 on freedom of association and protection of the right to organize guarantees workers’ and employers’ organizations “the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes”. The difficulty is that this provision does not define what the “activities” or “programmes” of such organizations may include. Article 8 stipulates that “[i]n exercising the rights provided for in th[e] Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land”. It is highly unlikely that the parties originally intended to include strike action among the types of activity that workers’ organizations might organize. It is evident, however, that the concept of “activities” must have a central element that remains unaffected by national legislation; this is clearly demonstrated by Article 8, paragraph 2, which provides that “[t]he law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention”.

3. Moreover, the Court concludes that, taken as a whole, the elements examined as subsequent practice of the parties within the meaning of Article 31, paragraph 3 (b), of the VCLT “cannot constitute subsequent practice in the application of Convention No. 87 . . . which establishes the agreement of the parties that Convention No. 87 protects the right to strike” (Advisory Opinion, para. 89). This conclusion clearly contradicts the one hastily arrived at by the Court in respect of Article 31, paragraph 1, which further undermines the overall reasoning adopted.

4. It would have been more convincing to bring to bear the conclusion reached by the Court regarding the interpretative approach proposed in Article 31, paragraph 3 (c), of the VCLT, namely that, in addition to context, account should be taken of any relevant rules of international law applicable in the relations between the parties to the treaty that is under interpretation. As the Court observed in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council*

Resolution 276 (1970), “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”¹.

5. When rules relating to human rights are in play, as is assuredly the case here, the approach adopted must be in keeping with the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights, which takes account of developments in international law that have occurred *since* the conclusion of the conventions that these courts are called upon to interpret. Indeed, the Strasbourg Court is well known for its repeated assertions that the European Convention on Human Rights is a “living instrument” that may evolve with the civilizations in which it is applied². The approach of the Inter-American Court of Human Rights is largely akin to, and explicitly based upon, that of the European Court³.

6. There are two reasons why these provisions should be interpreted in a systemic, evolutive way. First, the terms “activities” and “programmes” (in Article 3) and “law of the land” (in Article 8) are generic ones⁴. It would be absurd to argue that the “law of the land” to be respected by workers’ organizations is the law as it existed in 1948, when Convention No. 87 was concluded. Second, “law of the land” should be understood to include relevant rules of international law and not just rules of domestic law. Indeed, if national legislation prohibits activities that are otherwise protected by relevant rules of international law, it should not be taken into account as a valid constraint on the freedom of association set forth in Article 3 of the Convention. If one accepts that a relevant rule of international law establishes the right to strike, it follows that the exercise of that right in accordance with international law is a legitimate activity of workers’ organizations. The *Lohé Issa Konaté v. Burkina Faso* case, which was decided by the African Court on Human and Peoples’ Rights and concerned a comparable clause of the African Charter on Human and Peoples’ Rights, is a precedent that supports this interpretation of a clause which leaves room for the domestic law of States parties⁵.

7. The evolution of international law since the conclusion of Convention No. 87 in 1948 should therefore be taken into account in this case. In this regard, it is indisputable that the International Covenant on Economic, Social and Cultural Rights (hereinafter the “ICESCR”) explicitly protects the right to strike. It is also widely recognized that the International Covenant on Civil and Political Rights (hereinafter the “ICCPR”) does so implicitly through the right of association. The Advisory Opinion rightly refers to the interpretation of the Human Rights Committee on this point, which, for

¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 31, para. 53.

² See in particular *Case of Tyrer v. the United Kingdom* (Application No. 5856/72), Judgment, 25 Apr. 1978, para. 31:

“The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”

³ See *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 Oct. 1999, Series A, No. 16, paras. 112-115; *Atala Riffo and daughters v. Chile*, Merits, Reparations and Costs, Judgment of 24 Feb. 2012, Series C, No. 239, para. 83; L. Caflisch, A. A. Cañado Trindade, “Les conventions américaine et européenne des droits de l’homme et le droit international général”, *Revue générale de droit international public*, Vol. 108, 2004, pp. 13-14.

⁴ See in this regard *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, *I.C.J. Reports 1978*, p. 32, para. 77; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, p. 243, para. 66.

⁵ *Lohé Issa Konaté v. Burkina Faso* (Application No. 004/2013), Judgment, 5 Dec. 2014, paras. 128, 135, 146, 152-153 and 160-161. See also African Commission on Human and Peoples’ Rights, *Malawi African Association v. Mauritania* (Communication No. 54/91), 11 May 2000, para. 102: “The expression ‘within the laws’ must be interpreted as reference to the international norms.”

a quarter of a century now, has recognized that the freedom of association enshrined in Article 22 of the ICCPR also protects the right to strike. The rules contained in those instruments thus shed light on the terms of Convention No. 87 and suggest that today those terms must be understood as protecting the right to strike. This, in my view, is central to the Court's interpretation of Convention No. 87 under the customary rule reflected in Article 31 of the VCLT. The rules contained in the two Covenants are far more decisive for the conclusion that Convention No. 87 protects the right to strike than is recourse to the ordinary meaning to be given to the terms of the treaty under Article 31, paragraph 1. Therefore, I would like to have seen the Court give even greater weight to those applicable rules of international law — since they are relevant rules subsequent to the conclusion of Convention No. 87 — as part of a systemic and necessarily dynamic or evolutive interpretation, rather than rushing to found its reasoning on the ordinary meaning of the terms of the Convention, or on its object and purpose, when neither of those elements attests to the existence of an express intention to protect the right to strike.

8. The jurisprudence examined above, together with other analogous cases, also suggests that “relevant rules” can stem from international treaties, from rules of customary international law and even from general principles. It is therefore perfectly possible to take account of rules of a similar substance, even if they derive from different sources for the various parties to the treaty under interpretation (in this case, the ICCPR for some States, the ICESCR for others, and both of these instruments for a third group of States).

9. The Court has thus rightly noted 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.)

The Court concludes that “[s]uch 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).

10. Although I fully support those arguments, given the ambiguous, if not obscure, meaning of the terms of the treaty in question and the inexactness of the Court's conclusion based on Article 31, paragraph 1, of the VCLT (Advisory Opinion, para. 74), I am of the opinion that it would have been far more judicious to have recourse to the supplementary means of interpretation provided for in Article 32 of the VCLT *in order to determine the meaning of those terms*.

11. As recalled in paragraph 100 of the Advisory Opinion, the Court has previously referred to supplementary means of interpretation

“either to confirm the meaning resulting from the application of Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to Article 31

leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable”⁶.

The supplementary means of interpretation to which the Court has had extensive recourse allow *not for the confirmation, but for the determination of the meaning to be given to the terms of Convention No. 87*, namely that Convention No. 87 protects the right to strike. Although the analysis of the *travaux préparatoires* of Convention No. 87 “leads to an inconclusive result” (Advisory Opinion, para. 111), the Court has drawn widely on the subsequent practice of the parties as a supplementary means of interpretation (Advisory Opinion, para. 115), on the pronouncements of ILO supervisory bodies and on regional instruments, as well as on African, Arab, European and inter-American jurisprudence on the protection of human rights. It has noted in this regard that

“[a] large majority of States parties to Convention No. 87 are parties to . . . various regional instruments [that] reveal a shared view of those States parties to Convention No. 87 that the protection of the right to strike is encompassed in the protection of the freedom of association” (Advisory Opinion, para. 137).

It concludes from this that

“the supplementary means of interpretation taken into consideration by the Court in accordance with Article 32 of the Vienna Convention on the Law of Treaties confirm the conclusion reached by it through its interpretation based on Article 31, namely that the right to strike is protected under Convention No. 87” (Advisory Opinion, para. 138).

12. The Court has once again engaged with the subtleties inherent in carrying out “a single combined operation”⁷ and, despite the meanderings of a sometimes less than rigorous reasoning, arrives at an overall result that is consistent with the state of the applicable international law, which is ultimately what matters. I hope that this Advisory Opinion will serve to put an end to the disputes that have for too long fuelled the deleterious climate within the ILO, for the greater benefit of the protection of workers’ rights.

(Signed) Juan Manuel GÓMEZ ROBLEDO.

⁶ *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. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 109-110, para. 160, and *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), pp. 320-321, para. 91.

⁷ *Yearbook of the International Law Commission*, 1966, Vol. II, p. 219; *ibid.*, 2018, Vol. II, Part Two, p. 24, conclusion 2. See also *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 177.