DISSENTING OPINION OF JUDGE HMOUD

Jurisdiction established — No compelling reason to decline request for Advisory Opinion — Majority has adopted conclusion-driven reasoning — Holistic application of the rules of interpretation contained in Articles 31 and 32 VCLT leads to the conclusion that the right to strike is not protected under Convention No. 87 — Ordinary meaning, context, and object and purpose do not support inclusion of a right to strike — Arbitrary assortment of meanings by the majority to the terms of Convention No. 87 — No evidence of common understanding among all States parties that right to strike is protected under Convention No. 87 — Travaux préparatoires *of the Convention indicates that the issue of including the right to strike was left open by Contracting Parties — The majority is emphasizing a novel approach to interpretation involving the application of the relevant rules of international law — Improper reliance on instruments like ICCPR and ICESCR which are part of different treaty régime — Majority seems to superimpose, or transpose, treaty obligations found in different legal régimes to expand the obligations of States parties in the name of unity and coherence of international law.*

1. I voted in favour of the first and second operative paragraphs of the Advisory Opinion concerning the Court's jurisdiction and its decision to comply with the request for an Advisory Opinion. However, I append the present dissenting opinion with respect to the third operative paragraph which concludes that the right to strike is protected under Convention No. 87.

2. Reading the Advisory Opinion as a whole, it is difficult to escape the impression that the Court's opinion conveys the appearance of a predetermined conclusion in search of justification. The majority appears to have inverted the judicial process, starting from a conclusion and, thereafter, assembling its reasoning to support it.

3. In my view, the rules of interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), when applied holistically, do not merit a conclusion that the right to strike is protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention No. 87; the Convention).

I. ORDINARY MEANING OF THE TERMS OF THE CONVENTION IN THEIR CONTEXT AND IN LIGHT OF ITS OBJECT AND PURPOSE UNDER ARTICLE 31, PARAGRAPH 1, OF THE VCLT

4. Convention No. 87 does not define freedom of association. Part I of the Convention, specifically Article 3, however, when describing the scope of the Convention's protections, provides for the right to establish and join organizations, the right to draw up constitutions and rules, to elect representatives in full freedom, to organize *activities* and to formulate *programmes*, and the right to protect and defend the interests of workers or employers. However, the Convention offers no definitions of the terms "activities" and "programmes". Furthermore, the term "strike" does not appear anywhere in Convention No. 87.

5. In paragraph 70 of the Advisory Opinion, the majority provides for an ordinary meaning of each of the terms "activities", "programmes" and "strike". Thereafter, it concludes that a collective reading of Articles 2, 3, paragraph 1, and 10 of Convention No. 87 "suggests that strike action is *capable* of falling within the ordinary meaning of the term 'activities' and, thus, within the scope of Convention No. 87" (emphasis added).

6. At first, I express my strong reservation to the arbitrary assortment of meanings by the majority to the terms of Convention No. 87. The majority does not provide any basis for or any

connection between its proposed definitions and Convention No. 87. The definition of the term "activities" in paragraph 70 is a dictionary definition of the generic term without any context. In the same manner, a generic definition of the term "programmes" is being used again without a specific context to labour matters and is given a broad scope to conveniently reach the conclusion that was in the minds of the majority. It then adopts a definition of the term "strike" arising from the decision of the Committee on Freedom of Association (CFA), which has no mandate under Convention No. 87 or other ILO instruments, to define terms of Convention No. 87.

7. Furthermore, the majority, in paragraphs 70 and 71, is making the argument that the relevant ordinary meaning of the terms "activities" and "programmes" is broad enough, making the term "strike" capable of falling within the ordinary meaning of the term "activities". It then concludes 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 the right to strike is excluded. According to this logic, any activity by labour organizations, unless specifically and expressly excluded in the Convention, must be included because the relevant terms are "broad enough". This runs counter to the object and purpose of the Convention as well as to the context of the terms, as I will explain later. It disregards the different labour situations in the States parties to the Convention and the scope of activities that every State allows under its national legal system. What if a labour organization decides to lock down an essential facility, such as the national water supply or an electrical grid? According to this logic, because it is not excluded from the ordinary meaning of the terms, then it must be protected as activity under the Convention. In the same vein, a labour organization's strike action that shuts down a whole national infrastructure or essential services is protected by Convention No. 87 because it was not specifically excluded. There is nothing in the *travaux préparatoires* that indicates that this was the intent of the drafters of the Convention. The Advisory Opinion also ignores the fact that Article 3 of the Convention refers to the non-interference by public authorities in the *lawful* exercise of the "activity".

8. The majority also conveniently does not read Article 3 in conjunction with Article 8, which provides that, in exercising the rights, the workers, employers and their organization must respect the law of the land. Instead, Article 3 is only read in conjunction with Articles 2 and 10, which have nothing to do with understanding or giving context to the term "activities" to reach the conclusion that strike action is *capable* of falling within the ordinary meaning of the term. Since Article 31, paragraph 1, requires the Court to interpret treaties in accordance with ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, free-standing definitions of this sort should not be employed for the purposes of treaty interpretation unless a clear connection is shown with the context and object and purpose of the treaty.

9. Furthermore, the majority's view is devoid of an explanation as to why the ordinary meaning of the term "activities" must necessarily also include strike action, especially given the context and the object and purpose of Convention No. 87. In my view, the ordinary meaning of the terms "activities" and "programmes", when read in good faith, in their context, and in light of the object and purpose of the treaty, could not indicate that strike action must *necessarily* fall within the ambit of the "freedom of association", which is envisaged by States to be protected under Convention No. 87. The object and purpose of the Convention, its raison d'être, seems to be to improve the labour conditions, to ensure peace and guarantee the lawful exercise of workers and employers of their rights, without any undue interference by the State party in such an exercise. I am not convinced that strike action is an essential tool that can help achieve the aforementioned object and purpose of Convention No. 87 (which I will discuss later). It is also not essential to the exercise of freedom of association, especially as envisaged in the context of Convention No. 87. If such were to be the case, i.e. strike action was such an indispensable tool for the exercise of such freedom, thereby fulfilling the Convention's object and purpose, the drafters of the Convention would have expressly provided for it.

10. In addition, I also find the Court's reference to the decisions of the Permanent Court of International Justice (PCIJ) in paragraph 68 devoid of context. The Court has referred to the PCIJ's decisions in *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* and *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* to suggest that "the absence of an express treaty provision governing a certain issue does not necessarily mean that the issue is excluded from that treaty". It is important to appreciate here that these PCIJ Advisory Opinions do not explicitly forward this generalized assertion in the way the Court summarizes it. In fact, it is the unique context of those Opinions that influenced the PCIJ's decision to protect aspects that were otherwise not directly protected under the relevant conventions.

11. For instance, in the *1919 Convention concerning Employment of Women during the Night* case, the PCIJ was interpreting the term "women" and decided that its meaning should not be limited to women engaging in labour but should extend to women also serving in managerial roles. Similarly, in the *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* case*,* the Court considered whether the ILO has the competence to regulate conditions of labour for persons employed in agriculture. In both these cases, the PCIJ decided to widen the scope of the protection specifically with regard to the issues and context of the cases. This is not the same as saying that there exists a general rule provided for in the PCIJ jurisprudence that the mere absence of certain terms does not exclude particular activities from the scope of an ILO convention. It may very well be the case that the context and the object and purpose of a convention merit the conclusion that the absence of a direct mention to a particular activity or obligation constitutes an exclusion of the same from the ambit of the convention under consideration.

12. Lastly, the majority's treatment of strike action as an intrinsic corollary to freedom of association is based on a pre-conceived notion of what collective bargain constitutes or includes. This preconceived notion of collective bargain to necessarily include strike action is not truly universal and collective bargain may be practiced differently in different States and by workers' groups.

13. Paragraph 73 pronounces that strike action is one of the main activities engaged in and tools used by workers and their organizations to promote their interests and improve conditions of labour thereby ensuring the effective exercise of freedom of association under Convention No. 87. This sweeping statement is made without any evidence to support it. No analysis or comparison of practice on the various national systems of the States parties is employed. The Court never explains how strike action ensures the effective exercise of freedom of association under the Convention.

14. This brings me to the context of the terms, which the Court should have discussed as part of applying the authentic means of interpretation in Article 31, paragraph 1, of VCLT. The majority conveniently avoids dealing with the context and for a good reason. This is because two elements can be identified in determining the scope of rights and the context of the terms in which to define the freedom of association and the right to organize: (1) the State may not interfere by restricting or impeding the *lawful* exercise of the freedom of association and the related right to organize; and (2) in the exercise of such a right and freedom, the workers and their organizations must respect the law of the land of the State concerned. This law shall not impair or be applied to impair the guarantees provided for in the Convention.

15. As such, in order to provide a holistic interpretation of the relevant terms freedom of association and right to organize, one has to determine their scope and whether there are any limitations thereto, as part of examining the context of such terms under the Convention. In this

regard, it is clear that the drafters of Convention No. 87 considered the freedom of association and the right to organize not to be absolute. Rather, they restrict such rights by providing that the public authorities of a State may not interfere with their *lawful* exercise. The Convention also allows the State to enact legislation to regulate and limit the exercise of the freedom of association and right to organize as long as it does not violate the core of these protections.

16. The questions that then arise are: whether a State party can limit the exercise of the freedom of association and the right to organize through strike actions; whether strike action is considered to be a lawful exercise of such a right and freedom; and whether strike action — if authorized under the national laws of the State — can be restricted in scope by such national laws. Participants, including those who considered the right to strike as part of such freedom and right, generally agreed, in their written and oral proceedings, that both the freedom of association and the right to organize are not absolute. Therefore, it would have been important that the Court, in analysing the freedom and the right involved, define the limitations that can be exercised by the States as part of its analysis of the context.

17. National laws, in most States that provide for the right to strike, place limitations on such a right in order to protect the legitimate interests involved. And the fact that the Convention provides a State party with the authority to restrict the freedom of association and the right to organize under certain conditions, confirms that not all tools for the exercise of such freedom and right may be necessary tools. This includes strike action.

18. Therefore, this contextual reading of the relevant terms in Convention No. 87, does not lead to the conclusion that the right to strike is protected under the Convention.

II. SUBSEQUENT AGREEMENT AND PRACTICE IN THE APPLICATION OF CONVENTION NO. 87 UNDER ARTICLE 31, PARAGRAPH 3 *(A)* AND *(B)*, OF THE VCLT

19. I turn now to the question of whether at any point, following the adoption of the Convention, the States parties to the Convention concluded a subsequent agreement regarding its interpretation, or whether, through their subsequent practice, they agreed to interpret the Convention to include the right to strike. There is no evidence to conclude that there has been a subsequent agreement between the parties to Convention No. 87 regarding its interpretation or application on the inclusion of strike action as a protected right; nor has there been any subsequent practice in its application that establishes the agreement of the parties on the inclusion of the right to strike as part of the protected freedom of association or right to organize.

20. Article 31, paragraph 3 *(a),* of the VCLT only applies when a subsequent agreement is expressly reached. There is no evidence that an agreement was reached between States parties to include the right to strike at any point in the history of Convention No. 87[1]. There is also no subsequent practice in the application of Convention No. 87 which establishes the State parties' agreement that Convention No. 87 protects the right to strike. Only (i) conduct undertaken in the application of a treaty, after its conclusion, (ii) which establishes the agreement [a common

[1] There is no particular moment in the history of Convention No. 87 when all parties to the Convention decided to formally reach an agreement as to the interpretation to include the right to strike in Convention No. 87.

understanding] of *all* parties regarding the interpretation of the treaty is considered relevant under Article 31, paragraph 3 *(b),* of the VCLT[2].

21. Although the majority could have concluded after a brief analysis that there is no subsequent practice establishing the agreement of the parties to Convention No. 87 to protect the right to strike, based on the positions of a number of States parties which opposed such an inclusive interpretation, the majority instead dwells upon an overview of the interpretations of Convention No. 87 advanced by different ILO supervisory bodies and the reactions to those interpretations by States parties. The majority then considers the pronouncements of such bodies separately as supplementary means of interpretation. This dual approach by the majority purports to emphasize the importance of such pronouncements in light of the weakness of its reasoning relating to the ordinary meaning of the relevant terms of Convention No. 87 under Article 31, paragraph 1, of the VCLT.

22. In addition, the majority, which should have endeavoured to determine the point in time by which the subsequent practice may have established the agreement of the parties regarding its interpretations, instead examined the development of the pronouncements of the supervisory bodies without even determining when the supposed convergence of the pronouncements on an interpretation encompassing the right to strike in the protection of Convention No. 87 took place. This would have been important to determine whether the States parties have agreed to such an interpretation at any point in time. Instead, the majority chose selective pronouncements from such bodies, which differ in content, to conclude, in paragraph 83 of the Advisory Opinion, that "these ILO supervisory bodies have progressively recognized the right to strike as being protected under Convention No. 87, a position that they now have affirmed for decades". The majority never explains at what point in time such pronouncements "converged" to support such recognition. This would have been crucial for the latter examination of the reactions of States parties whether in the context of subsequent practice under Article 31, paragraph 3 *(b),* of the VCLT or as a supplementary means of interpretation under Article 32.

23. Then the majority declares that it has examined "the positions expressed over time by various States parties as and when the ILO supervisory bodies have affirmed that the right to strike is protected under [Convention No. 87]" (paragraph 84). It adds that, "while a significant majority of States parties to Convention No. 87 have accepted or endorsed the interpretation of the supervisory bodies that Convention No. 87 protects the right to strike, a number of States, have over the years, occasionally challenged this interpretation" (paragraph 85). The majority does not explain if and how it examined every State party's position vis-à-vis such an interpretation, whether in the context of subsequent practice under Article 31, paragraph 3 *(b),* or in its analysis of the subsequent practice of parties and the pronouncement of ILO supervisory bodies as two supplementary means of interpretation.

24. The majority considered the statement of the 2015 Government Group — that the Group recognizes that the right to strike is linked to the freedom of association, and that without it such freedom cannot be fully realized — to determine that "a significant majority of States parties to Convention No. 87 consider[ed] that the Convention protects the right to strike" (paragraphs 114 and 115)[3]. The majority ignores the fact that this statement by the Government Group is not synonymous

[2] International Law Commission, 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, Conclusion (4), p. 26.

[3] Government Group Statement, 23 February 2015, GB.323/INS/5/Appendix I, Annex II.

with the proposition that the right to strike is encompassed in the protection of freedom of association under Convention No. 87.

25. The majority also does not explain why it considers this statement by the Government Group, which is composed of 28 members, to represent acceptance, of at least a "significant majority" of States parties, that Convention No. 87 encompasses right to strike in protection. The examination by the majority of the States parties' practice presumes that every State party should have actively opposed such an interpretation even if it did not agree that the right to strike is encompassed in the protection of freedom of association. Silence by a State party is not an automatic endorsement or acquiescence to such pronouncements, especially when such a State does not expect that its silence be interpreted to bind it to such an interpretation of Convention No. 87. States parties' positions vis-à-vis the pronouncements of such bodies should be read in this context.

26. Furthermore, the majority places undue emphasis on the pronouncements of "supervisory bodies", not only when examining States parties' practice in the context of applying the rules of interpretation in Article 31, paragraph 3 *(c),* and Article 32 of the VCLT, but also when considering such pronouncements to be a separate supplementary means of interpretation. While the Court has discretion to ascribe the weight it deems appropriate to such pronouncements, this should not be at the expense of examining the practice of States parties to Convention No. 87 as a key element in arriving to its conclusion as regards interpretation.

27. In paragraph 118, it is stated that it may ascribe "great weight" to these pronouncements, before concluding that they confirm the right to strike is protected under Convention No. 87. In effect, the majority's exercise of interpretation has depended significantly on the position of such supervisory bodies as evidenced by the overall reading of the Advisory Opinion. This is unwarranted considering that their mandates do not include the interpretation of Convention No. 87, which is reserved, under Article 37 of the ILO Constitution, to the ICJ and/or to a tribunal that is appointed for a specific interpretative purpose.

28. What is further concerning is that the majority later discusses the positions of States parties to Convention No. 87 in different treaty régimes, namely the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), to support its conclusion that the right to strike is protected under Convention No. 87 — a matter which I will discuss below in the context of the majority's analysis of the relevant rules of international law (Article 31, paragraph 3 *(c),* of the VCLT). The conduct of the States parties in relation to pronouncements from other treaty bodies as regards the provision of those treaties should not be used as evidence to assess the States parties' position in relation to an interpretation of a text in a third treaty (i.e. Convention No. 87). This undermines the rigorous approach expected from the Court in reaching its conclusions.

III. RELEVANT RULES OF INTERNATIONAL LAW APPLICABLE IN THE RELATIONS BETWEEN THE PARTIES UNDER ARTICLE 31, PARAGRAPH 3 *(C),* OF THE VCLT

29. For a rule to qualify as "any relevant rules of international law applicable in the relations between the parties", it should be a rule of general international law that applies between *all* the parties to Convention No. 87. The general rule may be customary or a general principle of law, or a rule of another treaty or agreement that applies between the parties. In my view, Article 31, paragraph 3 *(c),* of the VCLT excludes regional legal instruments and rules that apply to certain geographic regions such as regional customary principles.

30. The interpretation of Article 8 of ICESCR and Article 22 of ICCPR that the majority relied upon, based on pronouncements from the treaty bodies under those two instruments and the reaction of the State parties to those instruments, ignores the fact that those are separate treaty régimes than the one under Convention No. 87. The majority then dwells upon a novel analysis by explaining the overlap of the two treaty régimes with the Convention No. 87 régime, in terms of States parties and the reaction to the evolving interpretation of the protection of the right to strike as part of the freedom of association; a novel approach to interpretation involving multilateral treaties in the reliance on Article 31, paragraph 3 *(c),* of the VCLT.

31. The majority could have advanced the argument that there exists a customary rule of international law that considers the right to strike as part of the protection of freedom of association or the right to organize, which developed or crystallized independently or in conjunction with the jurisprudence under the ICESCR and ICCPR's régimes, that would assist in establishing a common understanding under Article 31, paragraph 3 *(c)*, of the VCLT. Instead, the majority superimposes a treaty rule from two independent instruments on Convention No. 87, by considering that Article 31, paragraph 3 *(c)*, does not require all parties to the Convention to be bound by that rule arising from separate treaty régimes.

32. In this regard, it should be mentioned that the ICCPR does not provide for the right to strike. It includes freedom of association under Article 22 but allows a State party to restrict it for reasons, such as national security, *ordre public* or public health. The ICESCR, on the other hand, provides for the right to strike, but not as part of freedom of association or right to organize (of trade unions) and its exercise is subject to the national laws of the States parties concerned.

33. The two Covenants were adopted in 1966, more than 18 years after the adoption of Convention No. 87. Had the parties to the Covenants considered the right to strike as part of the freedom of association and the right to organize, they would have expressly provided for it in the ICCPR and not as a separate right under Article 8 of the ICESCR. This undermines the argument that there exists one conventional rule that can be derived from the two Covenants' treaty régimes which should be applied in the interpretation of Convention No. 87. The question also arises as regards the content of such a rule. Is it that the right to strike relates to the trade unions' rights under the ICESCR régime? Or is the right part of the protection of the freedom of association under the ICCPR, despite not being mentioned in Article 22 of the Covenant? This is while bearing in mind that the two Covenants were adopted on the same date by the United Nations General Assembly (16 December 1966).

34. In paragraph 91, the Court endeavours to make a connection between the ICESCR and the ICCPR régimes and the Convention No. 87 régime to determine the "relevant rules of international law". It refers to the saving clauses in Articles 8 and 22 of the ICESCR and ICCPR, according to which States parties to Convention No. 87 are not authorized by virtue of the provisions of those articles to take legislative measures that would prejudice the guarantees provided in the Convention. While it is clear that the saving clauses were intended to override the principle of *lex posterior derogat legi priori* vis-à-vis the States parties to Convention No. 87, somehow, the majority finds this pertinent in determining "the relevant rule". It does not explain how such saving clauses are important nor endeavours to explain why it chose to ignore dealing with the context of the relevant terms in Convention No. 87 that would require it to determine the scope and limitations of the possible protection of the right to strike, including restrictions of the right under national laws of the States parties. Through this approach, the majority is conveniently determining that "an interpretation taking into account the relevant rules of international contained in the ICESCR and ICCPR indicates that the protection of the right to strike is encompassed in the protection of the freedom of association provided by Convention No. 87" (see paragraph 98). The majority also seems to superimpose, or

transpose, treaty obligations found in different legal régimes to expand the obligations of States parties to Convention No. 87 in the name of unity and coherence of international law (systemic integration).

35. But what are the "relevant rules" under ICESCR and ICCPR treaty régimes? Is it that the right to strike is protected separately from the protection of the trade union's rights (Article 8 of the ICESCR)? Or is it a part of the freedom of association although not provided for in Article 22 of the ICCPR? Or is it that a right may be limited by the States parties for reasons such as national security, public safety and public order? The majority also never explains the relation between the limitations contained in those treaty régimes about the exercise of freedom of association and right to strike with the limitations contained in Convention No. 87, including the *lawful* exercise and respect of the laws of the land (Article 3, paragraph 2, and Article 8 of Convention No. 87). I would assume that this would be necessary to determine the content of the "relevant rule" of international law that can be deduced from the ICESCR and ICCPR treaty régimes. But this does not seem to be important for the majority. Instead, it refrains from spelling out what the relevant rules are altogether.

36. The majority, which avoided analysis the subsequent practice of States parties to Convention No. 87 — whether in context of applying the authentic means of interpretation or the supplementary means — has decided to interpret the conduct of certain States parties in the context of different treaty régimes (see paragraph 95). Without any explanations or having jurisdiction to do so, the majority interprets the reservations and declarations of such parties in a selective manner to reach the conclusion that the right to strike is protected; again, without clarifying its relationship to the freedom of association or trade union rights.

37. On the other hand, the majority discusses the conduct of four States parties to Convention No. 87 that are neither a party to the ICESCR or ICCPR before the ILO supervisory bodies (see paragraph 94). But how is this related to identifying the relevant rules from those treaty régimes? How does such conduct determine the relevant rules from Article 8, paragraph 1 *(d)*, and Article 22 of the ICESCR and ICCPR respectively? The majority then concludes that "these four States, under the circumstances, [either] understand that the right to strike is protected under Convention No. 87" or do not object to that interpretation (see paragraph 94). The question here is how this conclusion relates to identifying the relevant rules of international law applying between the States parties to Convention No. 87, i.e. the supposed rule(s) under the ICESCR and ICCPR régimes?

38. The majority then makes references, in paragraph 97, to the joint statement issued in 2019 by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee recalling that the right to strike is corollary to the effective exercise of the freedom to form and join trade unions; and that they have *sought* to protect the right to strike in their reviews of the implementation by States parties of the two Covenants. Again, the majority here avoids describing the "relevant rule" that can be deducted from this statement which it can then transpose to Convention No. 87. Also, by this reference to those treaty bodies *seeking* to protect the right to strike though their review mechanisms may have inadvertently undermined its argument that such a pronouncement is an interpretation of the "relevant rule" as approved to being a "policy consideration" by those treaty bodies.

39. In paragraph 90, the Court states that "[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". This statement which is derived from the Report of the Study Group of the

International Law Commission on the Fragmentation of International Law[4], contradicts what the Court has mentioned in the previous sentence of paragraph 90; that "Article 31, paragraph 3 *(c)*, does not necessarily require the 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". The proposition advanced by the majority is that there is a conventional rule under the ICESCR and ICCPR treaty régimes that considers the right to strike to be protected as part of the freedom of association under those treaty régimes, which a State or a group of States parties to Convention No. 87 is not bound by under those treaty régimes, but that somehow reflects their common understanding. Therefore, these States also become bound by this "common understanding", by explicitly or implicitly accepting it (for example through their silence or inaction) in this separate treaty régime. This view is further elaborated on, in paragraph 92, when the Court states that "[s]uch a common understanding may be presumed when rules contained in another treaty have been so widely adopted that they [i.e. those rules] can be considered implicitly accepted by all parties to the treaty being interpreted". In other words, these States — not bound by an ICESCR and/or ICCPR treaty rule — become bound by such a rule through their implicit acceptance of the rule in a different treaty régime (Convention No. 87)!

40. Unfortunately, this logic put forward by the majority, will not advance the principle of systemic integration in international law and will undermine the concept of consent of States to be bound by treaty obligations. The majority does not explain the legal basis for creating such a presumption of a common understanding when treaty rules become "so widely adopted" and also seems to be creating a new category for legal obligation under the law of treaties, i.e. becoming bound to a treaty's legal obligation through mechanisms and structures of different treaty régimes. The majority also never explains how a rule can be applicable between all the parties if they are not all bound by it.

41. What is further perplexing is that the majority has interpreted the words "the agreement of the Parties" under Article 31, paragraph 3 *(b)*, of the VCLT to mean "common understanding of *all* the parties" so the words "agreement" and "common understanding" were considered synonymous (see Advisory Opinion, paragraph 77). But under Article 31, paragraph 3 *(c)*, the common understanding of the parties does not seem to mean, for the majority, the agreement of *all* the parties, i.e. consent of all parties to be bound by it.

42. This statement in paragraph 91 disregards the different legal structures that govern the two Covenants and Convention No. 87. Not only are the relevant provisions different under these instruments; but the means by which the States parties to each instrument become bound by the obligations arising from such provisions are also different.

43. It is also worth noting that the majority never explains the discrepancy in the text of the two Covenants in relation to the right to strike. One would assume that this would be important in identifying "the relevant rule" that is applicable, considering that the right to strike is protected separately from the trade union rights and not provided for in the text of the other Covenants on the freedom of association. The Court instead mentions, in paragraph 91, that "the Human Rights Committee has 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". The question here is whether States parties to Convention No. 87 were expected to react to the pronouncements of the Human Rights Committee on the matter even when they were not parties to the procedures before the Committee. It seems that the answer for the majority is in the affirmative, taking into account the statement in the subsequent paragraph 92 that the "common understanding may be presumed when

[4] International Law, Report of the Study Group of the International Law Commission, finalized by Mr Martti Koskenniemi, UN docs. A/CN.4/L.682, 13 April 2006, p. 96, para. 472 and A/CN.4/L.682/Add.1, 2 May 2006.

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". So, States parties to Convention No. 87 that do not regard the right to strike as protected under the Convention should have been actively opposing the pronouncements of the Human Rights Committee as regards its interpretation of Article 22 of the ICCPR over the last 25 years.

44. But even then, would this have been enough to refute this presumption of the common understanding? The answer by the majority is that the supposed rule in the two Covenants is so "widely adopted" that even a State party to Convention No. 87 that actively opposes this interpretation of the rule under the two Covenants is considered as implicitly accepting this common understanding! The majority also never explains what it means by "widely adopted". Is it by States parties to the two Covenants or by those parties to the Convention No. 87? There was no examination of the legislations nor of the judicial practice of the States parties to any of those instruments. The majority also does not explain how the "high degree of overlap" of States parties translates to a common understanding of the parties to Convention No. 87 regarding the relevant provisions being interpreted. In short, the majority's logic and reasoning lack any coherent approach and abandon the rigorous methodology expected from the Court when employing the means of interpretation under international law.

45. In conclusion, this novel approach to applying the rule of interpretation contained in Article 31, paragraph 3 *(c)*, of the VCLT is misguided, risking undermining the operation of the various treaty régimes under international law and binding States parties to obligations that they have not consented to under such régimes.

IV. SUPPLEMENTARY MEANS OF INTERPRETATION IN LIGHT OF ARTICLE 32 OF THE VCLT

46. Article 32 of the VCLT allows consideration of a broader range of State-related materials, including unilateral practice, soft law instruments and partial or contested State conduct, that may shed light on the circumstances in which the treaty was concluded or on how the parties themselves understood it. The weight accorded to such evidence depends on its consistency with the text, its contemporaneity and its coherence with the treaty's object and purpose.

47. First, as already stated above (see paragraphs 13 *et seq.*), the practice of the supervisory bodies cannot be a determinative factor. The decisions and guidelines of the supervisory bodies such as the CFA and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) are not binding on States parties to Convention No. 87[5]. They are at best advisory or suggestive, provided with the intent to offer technical guidance and assist national authorities in applying the conventions they have acceded to or ratified. As mentioned earlier, there is no evidence to support the contention that the practice of CEACR and CFA has triggered a common broad-based and settled practice by States parties which established the agreement of all the parties to Convention No. 87.

48. Second, although CFA and CEACR's practice may be considered under Article 32 of the VCLT as a subsidiary means of interpretation, there should not be given much weight to the evidentiary value of such practice. Between 1952 and 1959, the CFA admitted that "Convention

[5] ILO Constitution, Article 19; ILO, *Freedom of association: Compilation of decisions of the Committee on Freedom of Association* (6th ed., 2018), p. 15, para. 61; ILO, *Handbook of procedures relating to international labour Conventions and Recommendations* (Centenary Edition, 2019), pp. 43-45, paras. 75-78.

No. 87 does not deal with the right to strike"[6]. This changed between 1959 and 1964, as expert bodies were merely suggesting that a complete prohibition of the right to strike would impede the full realization of the rights and freedoms guaranteed in Convention No. 87. It was only in the General Surveys of 1973 and 1983 that there was an express recognition by the expert bodies that the right to strike was protected under the Convention.

49. This inconsistent and evolving position of the two bodies also casts doubt as to whether such a position by those bodies has triggered subsequent practice by States within the meaning of Article 31, paragraph 3 *(b)*, or Article 32 of the VCLT.

50. In paragraph 114, the majority refers to the Statement of 23 February 2015 issued by the Government Group which represents the governments represented at the Governing Body of the ILO and which states the following:

> "The Government Group recognizes that the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO. The Government Group specifically recognizes that without protecting a right to strike, Freedom of Association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized." (Government Group Statement, 23 February 2015, GB.323/INS/5/Appendix I, Annex II, para. 4.)

As mentioned earlier, this statement cannot be regarded as representative, nor does it reflect what the majority claims it to represent, namely, the *opinio juris* of States, as suggested by the majority.

51. Similarly, an analysis of the *travaux préparatoires* reveals that the question of including the right to strike was left open at the time the Convention was adopted[7]. Even though the right to strike was briefly discussed during the negotiations, the Contracting Parties ultimately decided not to include the right to strike in Convention No. 87, which leads to the conclusion that the matter was left open.

52. The majority also considers regional instruments and frameworks to ascertain if States treaty right to strike as a corollary to freedom of association. However, it disregards the fact the Arab framework, the European framework and the Inter-American framework have their own varying conceptions of the right to strike and the various limitations regarding that right. In my view, the majority should have been more careful with regard to the conceptual nuances and distinctions in the right to strike in these different regions when trying to ascertain a common understanding between States as to the protection of the right under Convention No. 87.

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[6] Case No. 50 (Turkey), Sixth Report of the CFA, Appendix V of the *Seventh Report of the International Labour Organisation to the United Nations* (1953), p. 362, para. 864; Case No. 60 (Japan), Twelfth Report of the CFA, in Appendix II of the *Eighth Report of the International Labour Organisation to the United Nations* (1954), p. 211, para. 53.

[7] The issue of freedom of association and industrial relations was brought before the ILO at the request of the Economic and Social Council of the United Nations, which has taken note of the item "regarding trade union rights placed on its agenda at the request of the World Federation of Trade Unions and the American Federation of Labor". Both these organizations had also submitted memoranda and their versions of the draft resolution to be adopted by the Economic and Social Council concerning this matter. Interestingly, the draft of the resolution suggested by the American Federation of Labor included a reference to determining to what extent is the *right of workers and of their organizations to resort to strikes* recognized and protected. However, the Economic and Social Council ended up adopting the following text of the resolution, which the Secretary General of the United Nations officially communicated to the office of the Director General of the ILO on 18 April 1947 without any explicit reference to the right to strike. Following this, the Governing Body decided to place the question of "freedom of association and industrial relations" on the agenda of the 30thSession of the Conference, which met in Geneva from 19 June to 11 July 1947.

53. The Advisory Opinion goes into great length in the discussion of regional instruments and the pronouncements of relevant regional bodies as supplementary means of interpretation to confirm its own interpretation that the right to strike is protected under Convention No. 87. It explains that the regional "instruments are relevant as supplementary means of interpretation of Convention No. 87, since they reflect the position of States parties to those instruments regarding the relationship between the protection of the right to strike and the protection of freedom of association" (see paragraph 120). Here again, the majority does not explain how it arrives to this conclusion or how being a party to a regional instrument determines a State party's position vis-à-vis the protection of the right to strike under Convention No. 87. The majority also presumes, in paragraph 120, that States parties to those instruments have one common position on the matter disregarding the conduct and practice of States under those treaty régimes. Despite its lengthy discussions of regional instruments, there is no in-depth analysis of the States' practice under those instruments nor the link between such instruments, the mandates of the regional bodies referred to or the methodology by which the majority arrived to in its conclusion as regards each regional régime. Evidence from such régimes seems to be carefully channelled towards the majority's ultimate conclusion. One example can be found in paragraphs 127 and 128 of the Advisory Opinion when referring to the jurisprudence of the European Court of Human Rights starting from 2002, without mentioning that the jurisprudence, especially from earlier periods, considers that the strike action — which is not mentioned under Article 11 of the European Convention on Human Rights (ECHR) on freedom of assembly and association — may be restricted under the national laws of the States parties to the ECHR[8].

54. The majority then concludes that "[a] large majority of States parties to Convention No. 87 are parties to the various regional instruments" and that "[t]hese instruments 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 freedom of association" (paragraph 137). Despite the disparity in the texts of such instruments, the conduct and reactions of parties to such instruments as regards the issue of protecting the right to strike, and the limitations and conditions placed by States parties on strike actions, the majority nonetheless decides that there is a "shared view" established by those States that are also parties to Convention No. 87 that the right to strike is protected under the Convention.

55. The supplementary means of interpretation under Article 32 of the VCLT does not establish or confirm that the right to strike is included within the ambit of the protection of Convention No. 87.

56. In light of the foregoing, by applying the rules of international law regarding treaty interpretation, as contained in Articles 31 and 32 of the VCLT, I can only conclude that the right to strike is not protected under Convention No. 87.

(Signed) Mahmoud HMOUD.

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[8] ECtHR, *Schmidt and Dahlström* v. *Sweden (Application No. 5589/72), Decision, 6 February 1976*, pp. 12-13, paras. 36-37; ECtHR, *National Union of Belgian Police* v. *Belgium (Application No. 4464/70), Decision, 27 October 1975*, pp. 30-31, paras. 12-16.