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Institutional Section

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Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution

Office background report

Purpose of the document

This document has been prepared for the purposes of the special meeting of the Governing Body convened under article 7(8) of the ILO Constitution following the request of the Workers' group and of 36 governments to refer urgently the dispute over the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution. A background report is appended that provides factual information on the origins and scope of the long-standing dispute in order to facilitate the discussion and decision-making of the Governing Body. The Governing Body is invited to take note of the background report and provide guidance on action to be taken in relation to the referral requests (see the draft decision in paragraph 27).

Relevant strategic objective: None.

Main relevant outcome: Outcome 2: International labour standards and authoritative and effective supervision.

To minimize the environmental impact of ILO activities, Governing Body documents published before or after the sessions are not printed. Only documents issued in-session are printed in limited numbers and distributed to Governing Body members. All Governing Body documents are available at www.ilo.org/gb.

Policy implications: None.

Legal implications: None at this stage.

Financial implications: None at this stage.

Follow-up action required: Depending on the decision of the Governing Body.

Author unit: Office of the Legal Adviser (JUR).

Related documents: GB.347/PV(Rev.); GB.347/INS/5; GB.323/INS/5/Appendix III; GB.322/INS/5.

Introduction

1. Under the ILO Constitution and the Standing Orders of the Governing Body, a special meeting of the Governing Body may be convened when a minimum number of regular members of the Governing Body so request in writing, or when the Chairperson of the Governing Body considers it necessary.

2. Concretely, article 7(8) of the Constitution provides that: "… A special meeting [of the Governing Body] shall be held if a written request to that effect is made by at least sixteen of the representatives on the Governing Body."

3. In addition, paragraph 3.2.2 of the Standing Orders of the Governing Body provides as follows:

> Without prejudice to the provisions of article 7 of the Constitution of the Organization, the Chairperson may also convene after consulting the Vice-Chairpersons, a special meeting should it appear necessary to do so, and shall be bound to convene a special meeting on receipt of a written request to that effect signed by sixteen members of the Government group, or twelve members of the Employers' group, or twelve members of the Workers' group.

4. Accordingly, the holding of a special meeting is either compulsory, when a written request is made by 16 regular members regardless of group, by 16 regular Government members or by 12 regular Employer members or 12 regular Worker members, or voluntary when convened at the Chairperson's discretion. [1]

5. To date, special meetings have been convened on three occasions, in September 1932, October 1935 and May 1970, all under the discretionary authority of the Chairperson of the Governing Body. [2]

Chronology

6. By a letter dated 12 July 2023 addressed to the Director-General, the Worker Vice-Chairperson of the Governing Body formally requested that the long-standing dispute over the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike be referred urgently to the International Court of Justice for decision, in accordance with article 37(1) of the ILO Constitution. To this end, the Worker Vice-Chairperson requested the Office to take all necessary steps to place an item on the agenda of the 349th Session of the Governing Body (October–November 2023), for discussion and decision, regarding the request to the International Court of Justice for an advisory opinion, and also requested the Office to prepare a comprehensive report to facilitate an informed decision by the Governing Body at that session.

7. In the days and weeks following the receipt of the Worker Vice-Chairperson's letter, the Director-General received similar letters on behalf of the Governments of the Member States

[1] For more information, see the Office note on the origin and evolution of rules on convening special Governing Body sessions.

[2] For more information, see the Office note on past practice on special Governing Body sessions.

of the European Union and Iceland and Norway, and from the Governments of Angola, Argentina, Barbados, Brazil, Colombia, Ecuador and South Africa requesting that the matter be discussed urgently at the next session of the Governing Body with a view to deciding on whether to refer it to the International Court of Justice for an advisory opinion. Echoing the request of the Workers' group, the aforementioned Governments asked the Office to prepare and circulate ahead of the Governing Body's discussion a background report with all the necessary elements and to bring their letters to the attention of all constituents of the Organization.

8. By circular letter dated 17 July 2023, the Director-General informed all Member States of the referral requests that had thus far been received and indicated that, pending confirmation by the Officers of the Governing Body, the Office was looking into all necessary arrangements, including preparing a comprehensive report to be circulated well in advance of the next Governing Body session.

9. The referral requests were transmitted to the Officers of the Governing Body for confirmation that the matter would be discussed at the 349th Session, on the understanding that the tripartite screening group should subsequently be convened to agree on any necessary adjustments to the agenda. In transmitting the requests to the Officers, the Office clarified that, as the request at hand related to the implementation of a constitutional procedure, it should be directly and immediately transmitted to the Governing Body for its consideration and that the Officers and the other members of the screening group had no authority to block or delay the transmission of the request to the Governing Body. It also clarified that any substantive objections to the referral in general, or to the questions to be put to the Court in particular, could and should be raised during the Governing Body discussion, and not at the level of the Officers, whose only task at that stage was to confirm that the matter would be discussed at the next Governing Body session.

10. By letters dated 18 July and 2 August 2023 addressed to the Director-General, the Employer Vice-Chairperson of the Governing Body expressed her group's opposition to the requests and made reference to paragraph 3.1.3 of the Standing Orders of the Governing Body, which requires consultations with the tripartite screening group before the provisional agenda is updated. Accordingly, the Employer Vice-Chairperson requested the Director-General to place an item on the agenda of the 350th Session (March 2024) regarding proposals on further steps to ensure legal certainty on the interpretation of the "right to strike" in the context of Convention No. 87. She also asked the Office to prepare a note that examines in detail all possible proposals to resolve the existing interpretation issue through social dialogue within the framework of established ILO procedures and rules. In his reply dated 3 August 2023, the Director-General indicated that since the proposal of the Employers' group did not invoke a constitutional procedure but rather sought to add a new item to the agenda of the March 2024 Governing Body session, it would need, as per standard practice, to be considered by the screening group when it reviewed the provisional agenda of that session.

11. By circular letter dated 4 August 2023, the Director-General informed all Member States of one additional referral request, of the letter of 2 August of the Employer Vice-Chairperson and of the Office note dated 13 July 2023 containing legal clarifications on the procedure to be followed.

12. The Officers held two meetings, on 2 and 9 August 2023, regarding the process. At the second meeting, the attention of the Officers was drawn to the fact that the conditions of article 7(8) of the Constitution had been met, thus rendering any continued discussion about process unnecessary, since in essence, the referral request related to the implementation of a

constitutional procedure set out in article 37(1) and, therefore, the Officers had no authority to withhold or delay its transmission to the Governing Body for examination and decision. At the same meeting, the Chairperson received a letter dated 9 August 2023 signed by the 14 regular Worker members of the Governing Body requesting him to convene a special meeting in accordance with paragraph 3.2.2 of the Standing Orders in the event that the Officers were unable to reach agreement.

13. In light of these considerations, it was determined that a special meeting would be held in late autumn in conjunction with the 349th Session of the Governing Body, in accordance with the original request of the Workers' group and of a number of governments that an additional item be included on the agenda of that session. [3]

14. By a circular dated 10 August 2023, the Director-General informed all Member States of two additional referral requests and of the decision taken at the end of the second Officers' meeting to hold a special meeting in late autumn, in conjunction with the 349th Session of the Governing Body, regarding the referral request of the Workers' group and of a number of governments. The Director-General further indicated that the Office's comprehensive report to facilitate the forthcoming Governing Body discussion was expected to be circulated to all Member States by 8 September and that any comments received by 6 October would be summarized and made available ahead of the special meeting.

15. Between 25 August and 15 September, the Office received identical letters from six national employers' organizations drawing its attention to the failure of their respective governments to undertake tripartite consultations, as required under the Tripartite Consultation (International Labour Standards) Convention, 1976 (No 144), with respect to the referral request addressed to the ILO, and requesting that the Director-General intervene urgently to remind the respective governments of the need to comply with their obligations under that Convention. The Office forwarded copies of those communications to the governments concerned with the indication that, in accordance with established practice, the observations of the employers' organizations, as well as any comments that the governments might wish to make on the matters raised in those observations, would be brought to the attention of the Committee of Experts on the Application of Conventions and Recommendations at its next session (November–December 2023). One of those employers' organizations subsequently withdrew its communication.

16. By email dated 20 August 2023, the Secretary-General of the International Organisation of Employers transmitted a "Note on procedural matters regarding the inclusion of an urgent item in the agenda of the Governing Body" detailing the Employers' group's position as follows:

(a) placing an urgent item on the agenda can only be done through the screening group and therefore the screening group procedure should not be bypassed;

(b) article 37 matters cannot be treated in the same way as representations under article 24 and complaints under article 26;

(c) article 7(8) of the Constitution for special sessions is not applicable to article 37(1) matters, and in any case there is no real urgency or necessity for a special meeting;

[3] Confirmation was subsequently sought and received from those governments that their requests should be understood as referring to an urgent Governing Body discussion regardless of the specific format this discussion might take for procedural reasons.

(d) convening a special meeting under paragraph 3.2.2. of the Standing Orders is not justified or appropriate, and in any case there must be agreement on the agenda of that special session by the screening group;

(e) the past referrals under article 37(1) are so different that they are not at all comparable.

17. In its reply dated 29 August 2023, the Office provided clarifications on the following points:

(a) the authority of the Officers and of the tripartite screening group is limited in relation to the implementation of constitutional procedures;

(b) the compulsory holding of a special meeting under article 7(8) of the Constitution and paragraph 3.2.2 of the Standing Orders is self-triggered and the only condition to which it is subject is the minimum number of members submitting the request;

(c) the six referrals to the Permanent Court of International Justice are relevant and could unquestionably be considered to serve as a precedent.

The Office concluded by indicating that the applicable legal framework had been scrupulously observed, that the compulsory holding of a special meeting had been confirmed by the Officers on the basis of article 7(8) of the Constitution since the threshold of 16 regular members making such a request had been attained, and that the Chairperson was bound to convene a special meeting since the 14 regular Worker members had made a written request to that effect, as provided for in paragraph 3.2.2 of the Standing Orders.

18. By circular letter dated 12 September 2023, the Director-General informed all Member States of two additional referral requests, and of a communication received from the Government of the Swiss Confederation in which it recalled that its position with regard to the possible referral of the dispute around Convention No. 87 to the International Court of Justice was that the International Labour Conference should approve the referral and the question or questions to be put to the Court, that the relevant discussions should be open to all Member States, and that the States parties to Convention No. 87 must be involved in the discussions concerning the question or questions to be put to the Court. Moreover, the Swiss Government requested that the Officers of the Governing Body schedule a discussion at the Governing Body in the form of a Committee of the Whole.

19. At a meeting held on 13 September 2023, the tripartite screening group decided that the special meeting would be held on 10 November 2023, immediately after the closure of the 349th Session, with only one item on its agenda: *Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*.

20. At the meeting of the screening group, the Employer Vice-Chairperson of the Governing Body handed the Chairperson of the Governing Body a letter dated 12 September and signed by the 14 regular members of the Employers' group requesting a special meeting under paragraph 3.2.2 of the Standing Orders of Governing Body on the urgent inclusion of a standard-setting item on the right to strike on the agenda of the 112th Session (June 2024) of the International Labour Conference. The purpose of the special meeting would be to pave the way for the adoption of a Protocol to Convention No. 87 on the right to strike, or on industrial action more broadly, which would authoritatively determine the scope and limits of the right to strike in the context of Convention No. 87 and would thus settle the ongoing dispute.

21. By circular letter dated 15 September 2023, the Director-General informed all Member States that the 349th *bis* (special) Session of the Governing Body would be held on 10 November 2023

to discuss the referral request of the Workers' group and of 36 governments, and also that a request had been received from the 14 regular Employer members of the Governing Body for a special meeting for the urgent inclusion of a standard-setting item on the right to strike on the agenda of next year's Conference.

▶ Office background report

22. As specifically requested in the referral request of the Workers' group and of a number of governments, the Office has prepared a background report to facilitate the deliberations of the Governing Body. The report, which is appended, describes the origins and scope of the dispute and the legal and procedural aspects of a possible referral to the International Court of Justice for an advisory opinion. [4] Its sole purpose is to provide information and explain the various aspects of the matter to enable the tripartite constituents to make an informed decision on a possible referral to the International Court of Justice. It does not provide substantive answers to the long-standing controversy concerning the right to strike, nor does it assess the merits of the opposing views, or express any views on the advisability of a referral to the Court.

23. The background report focuses on the two key aspects of the dispute – the interpretation of Convention No. 87 and the mandate of the Committee of Experts on the Application of Conventions and Recommendations – and provides the factual context for the ongoing debate. It also offers brief explanations of the questions that might be put to the Court for an advisory opinion and the procedural steps that that would entail.

24. The report was communicated to all ILO Member States on 31 August 2023, together with an invitation to transmit before 6 October 2023 any comments they may wish to make in respect of the issues at hand after consulting the most representative employers' and workers' organizations. A summary of the comments received will be published as a separate document.

▶ Next steps

25. Against this background, the special meeting of the Governing Body will examine the request for the urgent referral of the interpretation dispute to the International Court of Justice, that is, whether or not it is necessary to bring the matter before the Court with a view to obtaining an advisory opinion and, if so, which question or questions should be put to the Court with a view to settling the dispute. Accordingly, the special meeting will offer an opportunity for a full exchange of views and an informed decision on what, if anything, needs to be done, including but not limited to a request for an advisory opinion from the International Court of Justice.

26. It is believed that as currently worded, the item on the agenda of the special meeting invites reflection and allows scope to debate all possible outcomes, for instance: a referral to the International Court of Justice, whether immediate or conditional; the continuation of the

[4] The report should be read in conjunction with the following documents: *The Standards Initiative – Appendix III: Background Document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the Right to Strike and the Modalities and Practices of Strike Action at National Level (revised) (Geneva, 23–25 February 2015)*, GB.323/INS/5/Appendix III, paras 1–59; GB.322/INS/5, paras 7–53 and GB.347/INS/5, paras 9–27.

discussion and postponement of a decision until a future meeting; or agreement on means of pursuing a settlement of the interpretation dispute other than a referral to the Court.

▶ Draft decision

27. **Further to the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution, the Governing Body decided to**

[decision to be taken at the end of the special meeting]

Appendix

The dispute on the interpretation of Convention No. 87 in relation to the right to strike – Background report

Executive summary

For over 70 years, the ILO Committee of Experts on the Application of Conventions and Recommendations, consisting of independent experts responsible for monitoring the application of ratified Conventions by Member States, has taken the view that the right to strike is a corollary to the right to freedom of association, and that, as such, it is recognized and protected by the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

In around 1989, the Employers' group began to question the Committee of Experts' interpretation of Convention No. 87 and to challenge the Committee's authority to interpret Conventions.

The controversy gradually intensified and in 2012 gave rise to a major institutional crisis, with the Conference Committee on the Application of Standards being prevented for the first time from exercising its supervisory functions.

There is a widespread sentiment that the persistent disagreement over such key aspects of the ILO's normative mandate impacts negatively on the credibility of the supervisory system and the ILO's reputation as a standard-setting organization.

Under the applicable rules, a legal question arising within the scope of ILO activities, such as the interpretation of an international labour Convention, may be referred to the International Court of Justice for an advisory opinion either by the International Labour Conference or by the Governing Body, which has been specifically authorized by the Conference to make such a referral.

The legal questions on which the two non-governmental groups of the ILO disagree and which could potentially be put to the Court are: first, whether the right to strike may be considered to flow from Convention No. 87 as an internationally recognized workers' right even though not explicitly provided for in the Convention; and second, whether the Committee of Experts has been acting within its powers when affirming that the right to strike is inherent to freedom of association and thus protected by Convention No. 87 or when reviewing whether limits or conditions for the exercise of the right to strike may be such as to impede the exercise of the right to freedom of association contrary to the Convention.

If the Governing Body decides to refer the matter to the International Court of Justice, this would be the seventh time that the ILO has requested an advisory opinion under article 37 of its Constitution but only the second time with regard to the interpretation of an international labour Convention.

This report provides an overview of the underlying issues to help the tripartite constituents to make an informed decision on a possible referral to the International Court of Justice.

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I. Understanding the long-standing dispute

I.1. The two opposing views at a glance

1. The dispute between the ILO Employers' and Workers' groups, which has lasted more than 30 years, has two dimensions: one relates to the interpretation per se – whether literal or dynamic – of certain provisions, in particular Articles 3 and 10, of Convention No. 87, and the other concerns the authority of the Committee of Experts to engage in such interpretation and the limits of any such authority.

2. On the question of the interpretation of Convention No. 87, the Employers' group advances two main arguments: first, that Convention No. 87 does not contain any provision whose ordinary or literal meaning would imply – in accordance with the customary rule of treaty interpretation enshrined in article 31 of the Vienna Convention on the Law of Treaties – the existence of a right to strike; and, second, that the preparatory work that led to the adoption of Convention No. 87 – which, under article 32 of the Vienna Convention, may serve as supplementary means of interpretation – confirms that the intention of the drafters was clearly not to include the right to strike within the scope of Convention No. 87. [5]

3. As regards the competence of the Committee of Experts to interpret Conventions, the Employers' group's position is that, despite the Committee's attempts to de facto widen its mandate, since its establishment its tasks have been purely technical and not judicial. Moreover, the Employers' group contends that the Committee's findings cannot be regarded as binding pronouncements since, under article 37 of the ILO Constitution, only the International Court of Justice may give a binding interpretation of international labour standards. The Employers' group therefore consistently objects to what it considers a "dogmatic" acceptance by the Committee of Experts of a universal, explicit and detailed right to strike and the Committee's attempts to produce new "jurisprudence" despite lacking law-making power or the authority to issue binding rulings on the application of national laws and regulations. [6] According to a publication of the International Organisation of Employers:

> [A] right to strike is not provided for in ILO Conventions 87 or 98 – nor did the tripartite constituents intend there to be one at the time of the instruments' creation and adoption … Despite this background, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) maintains that the right to strike is based on Art. 3 of Convention No. 87 … and Art. 10 … On the basis of this interpretation, every year, the CEACR looks into numerous cases involving specific national provisions or practices restricting strike action. In approximately 90 to 98 per cent of these cases, the Experts conclude that restrictions on strike action, be they de facto or de jure, are not compatible with the Convention. Thus they have formulated a comprehensive corpus of minutely-detailed strike law which amounts to a far-reaching, almost unrestricted, freedom to strike. [7]

4. The Workers' group defends diametrically opposite positions on both issues. While agreeing that the interpretation rules set out in the Vienna Convention represent customary international law and therefore apply to Convention No. 87, the Workers' group focuses on the possibility for "dynamic" interpretation afforded by article 31 of the Vienna Convention, insofar

[5] International Labour Conference (ILC), 81st Session, 1994, *Record of Proceedings*, 25/31–35. See also Alfred Wisskirchen, "The standard-setting and monitoring activity of the ILO: Legal questions and practical experience", *International Labour Review* 144, No. 3 (2005): 283–285.

[6] ILC, 81st Session, 1994, *Record of Proceedings*, 28/8–10. See also Wisskirchen, 271–273.

[7] IOE, *Do ILO Conventions 97 and 98 recognise a right to strike?*, October 2014, pp. 1–2.

as it requires treaty provisions to be interpreted in their context and in the light of the object and purpose of the treaty. Accordingly, the Workers' group contends that the terms of Convention No. 87 guaranteeing the right to organize must be understood in the context of the relevant provisions of the Preamble to the ILO Constitution and of the Declaration of Philadelphia and taking into account any subsequent practice that establishes general agreement regarding their interpretation, such as the consistent case law of the bodies responsible for overseeing the application of the Convention. In addition, the Workers' group argues that no recourse to the preparatory work is needed, as the conditions of the Vienna Convention are not met; that is to say, the interpretation suggested in accordance with article 31 does not leave the meaning ambiguous or obscure nor does it lead to a result that is manifestly absurd or unreasonable. [8]

5. With respect to the mandate of the Committee of Experts, the Workers' group considers that all ILO bodies involved in supervision necessarily interpret the meaning of standards, and that therefore the Committee of Experts – as well as Commissions of Inquiry examining article 26 complaints, tripartite committees examining article 24 representations and the Committee on the Application of Standards – may occasionally perform interpretative functions, subject to any binding interpretation being issued by the International Court of Justice. [9]

6. As for the possible way forward, the Employers' group often recalls that it "proposed to discuss the question of whether a right to strike should be included in an ILO instrument at the [International Labour Conference] [but] there was no follow up" and notes that this is "despite the fact that, with its unique tripartite structure, the ILO would be the appropriate and legitimate arena for solving this issue". [10] At the 344th Session of the Governing Body (March 2022), while discussing the work plan on the strengthening of the supervisory system and proposals to ensure legal certainty, the Employer spokesperson stated that:

> [A]rticle 37 [did not provide] a viable way forward, as the right to strike was a multifaceted and complex issue that could not be separated from the widely diverging industrial relations systems and practices in ILO Member States. It was doubtful that recourse to the options under article 37 could achieve legal certainty, as it was unclear how external and judicial bodies could possibly develop a solution that would be widely accepted by ILO constituents on such a complex matter ... There was significant room for dialogue and cooperation among those stakeholders to move closer to consensus. Referral to external and judicial bodies, the International Court of Justice or an ILO tribunal should not occur unless all possibilities of dialogue between the main ILO actors competent with respect to ILO standards had been exhausted, which was not currently the case. [11]

7. Addressing the same question of legal certainty one year later at the 347th Session of the Governing Body (March 2023), the Employer spokesperson reiterated that "referral to the International Court of Justice should be a last resort. It would be preferable to seek internal solutions that received wide support from the constituents". [12]

8. In contrast, the Workers' group argues that those who wish to continue challenging the right to strike have two options under the ILO Constitution: to seek a referral of the matter by the ILO Governing Body to the International Court of Justice for an advisory opinion (article 37(1) of

[8] ITUC, *The right to strike and the ILO: The legal foundations*, March 2014, pp. 74–88.

[9] ITUC, pp. 35–40.

[10] IOE, p. 11.

[11] *Minutes of the 344th Session of the Governing Body of the International Labour Office*, GB.344/PV, para. 139.

[12] GB.347/PV(Rev.), para. 231.

the ILO Constitution) or to agree to the establishment of an internal, independent tribunal to provide for the expeditious determination of the dispute or question relating to the interpretation of Convention 87 (article 37(2)). [13] When the question of implementing article 37 of the Constitution came before the Governing Body in March 2022, the Worker spokesperson indicated that "[t]he only way to solve the persisting interpretation dispute concerning Convention No. 87 and the right to strike, in a manner that provided legal certainty and was in line with the ILO Constitution, was to refer it to the International Court of Justice". [14] A year later, at the March 2023 session of the Governing Body, the Worker spokesperson stated that:

> The ILO had a conflict resolution mechanism in its own Constitution. … [T]oo much time had already been devoted to the matter and [there was] no merit in continuing social dialogue on the matter when consensus had not been achievable. Consensus could not be achieved if positions were mutually exclusive: members either accepted there was a relationship between Convention No. 87 and the right to strike – as previously established not only by the Committee of Experts, but also by the tripartite Committee on Freedom of Association – and respected the authority of the ILO's supervisory system and the Committee of Experts – or they did not. Some disagreements could not be resolved through dialogue but only by turning to an authority. The ILO had such an authority in its Constitution, and that was the ICJ. … The ILO should make good use of the conflict resolution it had in its system. [15]

I.2. Chronology of the legal dispute

9. Although the dispute over the interpretation of Convention No. 87 in relation to the right to strike is commonly believed to have emerged in the last ten years, in reality it has fuelled political and legal debate for over half a century, mainly within the Conference Committee on the Application of Standards. It is characterized by firm and uncompromising positions that put to the test the basic principles of the ILO's supervisory system and constitutional order.

10. The first instance of the scope of Convention No. 87 in relation to the right to strike being questioned can be traced back to 1953, when the Employer spokesperson of the Committee on Freedom of Association stated that there was "no international instrument regulating the right to strike which would authorise bodies related to the I.L.O. to pass judgment on the national regulations in force in any given country". [16] This point was next raised during the discussions of the Committee on the Application of Standards at the 58th Session of the Conference (1973) concerning the right to strike in the public sector. The Worker member of Japan indicated that, "while it was often stated that the right to strike was not protected by international labour Conventions, Convention No. 87 did provide for the right of trade unions to organize their activities and formulate their programmes, and thus implicitly guaranteed the right to strike". In contrast, the Employer member of Japan stated that "in no case had the

[13] ITUC, p. 4.

[14] GB.344/PV, para. 145. In the same vein, the representative of the group of industrialized and market economy countries expressed the view that "[t]ripartite consensus-based modalities had thus far only generated temporary political consensus and could not provide the requisite legal certainty to ensure the effective and efficient functioning of the supervisory system. Efforts should therefore be made to seek a resolution under article 37 of the Constitution. … [The] group looked forward to engaging in a tripartite process on the formulation of a balanced question to be referred to the International Court of Justice and on the process for compiling the dossier" (paras 150–151).

[15] GB.347/PV/(Rev.), para. 278. Along the same lines, the representative of the European Union and its Member States considered that "[t]he protracted disagreement on the right to strike, in the context of Convention No. 87, should be resolved under the provisions of article 37(1). The ICJ was well placed to examine that dispute, and … the Governing Body [should] refer the dispute without delay." (para. 254). Similar views were expressed by the representatives of the group of Latin American and Caribbean countries (para. 247) and the group of industrialized and market economy countries (para. 250).

[16] *Minutes of the 121st Session of the Governing Body* (March 1953), p. 38.

Committee on Freedom of Association ever referred to the right to strike as an absolute right, particularly in essential services and in the public service", while the Government member of Switzerland indicated that the right to strike was not covered under Convention No. 87, as shown by the preparatory work leading to its adoption. [17]

11. In 1986, in the context of a discussion concerning the application of Convention No. 87 by the Syrian Arab Republic, the Government member of the German Democratic Republic recalled that:

> [N]o mention was made of the right to strike in any of the provisions of the Convention. Further, the Committee of Experts had noted that the prohibition of strikes was not in conformity with Article 3 of the Convention. This conclusion was not based on the text of the Convention but rather should be considered as a personal interpretation of the Committee of Experts. Such a method of work should be rejected because it was in direct contradiction with the principle which required governments to report upon the instruments they had ratified. Any other conclusion would lead to uncertainty and legal insecurity which would dissuade new ratifications because States would be unable to know in advance the interpretations which would be given to the Conventions. [18]

12. In 1989, the Employer member of Sweden of the Committee on the Application of Standards observed that:

> [O]nly one body – the International Court of Justice – could make authoritative interpretations of international labour Conventions. … [T]he role of the International Court of Justice as the ultimate arbiter should always be borne in mind. A Convention had to be interpreted in line with the principles laid down in the Vienna Convention on [the Law of] Treaties (1969). … [T]his year's report of the Committee of Experts unfortunately contained a number of over-interpretations, especially regarding basic human rights Conventions and in particular Convention No. 87. [19]

13. At the closure of the general discussion at the same session, the representative of the Secretary-General stated, inter alia, that:

> [I]t was within the power of governments disagreeing with the interpretations given by the supervisory bodies to have recourse to the International Court of Justice. In two cases, the Committee of Experts had drawn attention to this option. On the questions of the right to strike and essential services, it could be said that the jurisprudence of the supervisory bodies was consistent. On the right to strike, both the Committee of Experts and the Committee on Freedom of Association had considered this right to be one of the essential means available to workers and their organisations to promote and to defend their economic and social interests. This principle had always been supported by both supervisory bodies which, over time, had fixed the conditions in which this right could be exercised. [20]

14. In 1990, part of the general discussion at the Committee on the Application of Standards was devoted to the relationship between the supervisory bodies and the interpretation of Conventions. In reacting to the Committee of Experts' position that its views on the content and meaning of provisions of Conventions should be considered as valid and generally recognized insofar as they were not contradicted by the International Court of Justice, and that

[17] ILC, 58th Session, 1973, *Record of Proceedings*, p. 544, para. 26.

[18] ILC, 72nd Session, 1986, *Record of Proceedings*, 31/33.

[19] ILC, 76th Session, 1989, *Record of Proceedings*, 26/6, para. 21.

[20] ILC, 76th Session, 1989, *Record of Proceedings*, 26/6–7, para. 23.

the acceptance of those considerations was indispensable for the certainty of law and the principle of legality, the Employer members considered that:

> [T]he opinion of the Committee of Experts that its evaluations are binding unless corrected by the International Court of Justice, could not be correct. … A legal reason was that this was contradicted by the ILO Constitution and by the Standing Orders of the Conference concerning the submission of governments' reports and the terms of reference of the Conference Committee, which had an independent competence to examine reports.
>
> …
>
> In this connection, the Employers' members recalled that they had a different interpretation from the Experts, for instance on the question of the right to strike. Although this question was not expressly settled by any Convention or Recommendation (except the very special case dealt with in the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)), the Experts had progressively deduced from Convention No. 87 a right to strike which was hardly limited. The Employers' members could not accept this, not only because they considered the Experts' opinion questionable in law but also because the issue touched directly on employers' interests. [21]

15. In the following three years, the Employer members of the Committee on the Application of Standards regularly put on record their principled objection to the interpretative function of the Committee of Experts, in particular as regards Convention No. 87 and the right to strike. For instance, in 1991, the Employer members stated that:

> [T]he Experts were required to follow the criteria of interpretation laid down in the 1969 Vienna Convention on the Law of Treaties. The criteria of interpretation contained in this instrument cannot be set aside by simply recognising that there is a similarity of opinion between different ILO bodies, as is done for instance with the Committee on Freedom of Association … The application of the Vienna Convention was uncontested in international law … Another uncontested principle of international law was *in dubio mitius* (i.e. if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted). The Employers' members did not insist on this principle for its own sake, but because of its concrete bearing on the manner in which important issues are interpreted and applied in practice, such as the right to strike, which was not even written into the relevant Convention but had become the subject of minutely elaborated principles derived by way of interpretation. [22]

In the same vein, the Employer member of the United States noted that:

> [I]t was inappropriate for the Experts to function as a supranational legislature if their interpretation was not within the contemplation of the tripartite Committee which drafted the Convention. It was in acting without restraint that the Committee of Experts might introduce the very legal uncertainty which it considered as undermining the "proper functioning of the standard-setting system of the ILO". … It was inappropriate for the Committee of Experts to adopt in full the decisions of the Committee on Freedom of Association, which were founded on general principles and were not limited to the terms of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), thus extending the scope of these Conventions beyond what was intended by their drafters, as reflected in their texts and legislative history. [23]

[21] ILC, 77th Session, 1990, *Record of Proceedings*, 27/6, paras 22–23.

[22] ILC, 78th Session, 1991, *Record of Proceedings,* 24/6, para. 26.

[23] ILC, 78th Session, 1991, *Record of Proceedings*, 24/6, para. 28.

16. At the same session, the Government member of Denmark, speaking on behalf of the Nordic Governments, expressed the view that:

> [P]erhaps the Committee of Experts went too far when it suggested that a government which did not agree with its interpretation would have to obtain a legally binding opinion from the International Court of Justice, [since] this obligation was not within the spirit of article 37 of the ILO Constitution. [24]

17. In 1993, during a discussion of the advisability of setting up an in-house tribunal under article 37(2) of the Constitution, the Employer members of the Committee on the Application of Standards recalled that "[t]he report of the Conference Committee that had led to the creation of the Committee of Experts stated that it would have no judicial capacity or competence to give interpretations of Conventions" and also indicated that their position had remained consistent, because as early as 1953 the "Employers' spokesman, Pierre Waline, had clearly rejected the deduction of a detailed right to strike from Conventions Nos. 87 and 98". Further, they reiterated that "Convention No. 87 does not regulate the right to strike [as] [t]he text of the Convention did not mention it, and the preparatory work showed the Conference had reached no consensus on the matter". [25]

18. Also at the 1993 session, the Worker members expressed the view that:

> [T]he ordinary meaning of the terms of a Convention concerning human rights (such as Convention No. 87) must be found in their context and in the light of the object and purpose of the Convention. Human rights Conventions must necessarily be interpreted progressively as living instruments. [26]

and observed that:

> The right to strike was inseparable from the notion of freedom of association … [V]arious principles of freedom of association were regarded as part of customary law; the Committee of Experts' interpretation of the right to strike in Convention No. 87 had been accepted over many years, and this made it relevant under article 31 (3) (c) of the Vienna Convention. … [T]he right to strike had to be seen in the light of the principle of *ubi jus ibi remedium* as a last resort means of exercising the substantive rights of Conventions Nos. 87 and 98. [27]

19. In 1994, the publication of the Committee of Experts' General Survey on Conventions Nos 87 and 98 provided an opportunity for a fresh exchange of views on the right to strike within the Committee on the Application of Standards. [28] The Employer members indicated that "they absolutely could not accept that the Committee of Experts deduced from the text of the Convention a right so universal, explicit and detailed". [29] Making specific references to the Conference proceedings that had led to the adoption of Conventions Nos 87 and 98 and of Recommendation No. 92, the Employer members stated that:

> [I]t was incomprehensible to the Employers that the supervisory bodies could take a stand on the exact scope and content of the right to strike in the absence of explicit and concrete provisions on the subject. … The Committee of Experts had put into practice here what was called in mathematics an axiom and in Catholic theology a dogma: that is complete, unconditional acceptance of a certain and exact truth from which everything else was

[24] ILC, 78th Session, 1991, *Record of Proceedings*, 24/7, para. 33.

[25] ILC, 80th Session, 1993, *Record of Proceedings*, 25/5, paras 20, 21; 25/9, para. 58.

[26] ILC, 80th Session, 1993, *Record of Proceedings*, 25/5, para. 23.

[27] ILC, 80th Session, 1993, *Record of Proceedings*, 25/10, para. 61.

[28] ILC, 81st Session, 1994, *Record of Proceedings*, 25/31–41, paras 114–148.

[29] ILC, 81st Session, 1994, *Record of Proceedings*, 25/32, para. 116.

> derived. … [T]he right to strike had not been forgotten during the elaboration of these instruments: attempts had been made to incorporate this right into the Conventions but had been rejected in the absence of a majority in favour. … As regards the statement of the Workers' member of Poland that Conventions should be interpreted in a dynamic and functional manner, the Employers' members saw in this an admission that there was no legal basis for the right to strike in ILO instruments. [30]

20. Countering those arguments, the Worker members stated once again that:

> [T]he right to strike was an indispensable corollary of the right to organize [that was] protected by Convention No. 87 and by the principles enunciated in the ILO Constitution. Without the right to strike, freedom of association would be deprived of its substance. It was enough to go through the preparatory works of Convention No. 87, the multiple conclusions and recommendations of the Committee on Freedom of Association and the successive general surveys elaborated by the Committee of Experts on this subject to be convinced of this. In its 1994 survey, the Committee of Experts formally and unambiguously confirmed this relationship by dedicating a separate chapter to the principles and modalities of the right to strike. [31]

21. In the ensuing 15 years, the Employer members continued to systematically raise reservations on the Committee of Experts' interpretation of Convention No. 87 in relation to the right to strike. For instance, in 1999, the Employer members of the Committee on the Application of Standards stated that:

> [T]hey entertained substantial doubts concerning the interpretation of the Conventions, which had deviated widely from their wording. It was therefore small consolation that the only binding interpretation of legal texts could be made by the International Court of Justice. In view of the absence of any decision by that Court, there was therefore no generally binding interpretation of the two Conventions. [32]

22. In 2002, the Employer members expressed the view that:

> [I]t was misleading in many respects to think that the individual recommendations made by the Committee on Freedom of Association could create a jurisprudence on the right to strike. The Employer members had repeated throughout the last 12 years, but also going back to 1953, that a right to strike in labour disputes could not be derived from Conventions Nos. 87 and 98 concerning freedom of association and collective bargaining. This view was based on three grounds: the wording of the standards, the correct application of binding rules of interpretation concerning international treaties, and the documents containing evident declarations on their scope when the standards or instruments were elaborated and adopted. [33]

23. In the same vein, in 2004, the Employer members recalled that:

> [N]othing should be interpreted which was not to be interpreted. The International Court of Justice had also found that the Vienna Convention upheld this principle. The basis of interpretation was the text itself, i.e. the wording of a Convention according to its usual and natural meaning under the so-called "ordinary meaning rule". The preparatory materials *(travaux préparatoires)* to a Convention were only of importance if the wording of a text remained unclear. [34]

[30] ILC, 81st Session, 1994, *Record of Proceedings*, 25/32–35, paras 119, 124–125.

[31] ILC, 81st Session, 1994, *Record of Proceedings*, 25/38, para. 136.

[32] ILC, 87th Session, 1999, *Record of Proceedings*, p. 23/37, para. 114.

[33] ILC, 90th Session, 2002, *Record of Proceedings*, p. 28/14, para. 48.

[34] ILC, 92nd Session, 2004, *Record of Proceedings*, 24/20, para. 79,

while in 2010, they "once again asked the Committee of Experts to reconsider their interpretation on the right to strike that had progressively expanded since 1959 and that had no basis in Conventions Nos 87 and 98". [35]

24. In 2012, the persistent disagreement over the Committee of Experts' interpretation of Convention No. 87 in relation to the right to strike caused an institutional crisis. For the first time since the establishment of the Committee on the Application of Standards, the Employers' and Workers' groups could not agree on the list of cases of non-compliance to be examined by the Committee. The Employer members objected in the strongest terms to the interpretation by the Committee of Experts of Convention No. 87 and the right to strike in its General Survey of 2012, and indicated that "their views and actions in all areas of ILO action relating to the Convention and the right to strike would be materially influenced". [36] Accordingly, without any clarification regarding the mandate of the Committee of Experts with respect to the General Survey, "they could not accept the supervision of Convention No. 87 cases that included interpretations by the Committee of Experts regarding the right to strike". [37] However, the Workers' group considered that this was not acceptable, [38] and as a result, the Committee on the Application of Standards ended its work without discussing any cases of non-compliance. [39]

25. In November–December 2012, in view of the direct challenge to its authority and the Employers' group's request that the report of the Committee of Experts should include a disclaimer regarding the right to strike, the Committee of Experts presented its views regarding its mandate. It considered, in particular, that monitoring the application of Conventions:

> logically and inevitably requires an assessment, which in turn involves a degree of interpretation of both the national legislation and the text of the Convention. … The Committee's combination of independence, experience, and expertise continues to be a significant further source of legitimacy within the ILO community. … [I]t has been consistently clear that its formulations of guidance … are not binding. … The Committee's non-binding opinions or conclusions are intended to guide the actions of ILO member States by virtue of their rationality and persuasiveness [and] their source of legitimacy …. [40]

The Committee concluded that a disclaimer was not necessary, as it "would interfere in important respects with its independence". [41]

26. At the 102nd Session of the Conference (2013), a note was inserted in the conclusions of all individual cases examined by the Committee on the Application of Standards in relation to the application of Convention No. 87 stating: "The Committee did not address the right to strike in

[35] ILC, 99th Session, 2010, *Provisional Record*, Part I/18, para. 57.

[36] ILC, 101st Session, 2012, *Record of Proceedings*, Part I/22, para. 82.

[37] ILC, 101st Session, 2012, *Record of Proceedings*, Part I/36, para. 150.

[38] ILC, 101st Session, 2012, *Record of Proceedings*, Part I/41, para. 171.

[39] On the institutional crisis of 2012, see, among others: Françis Maupain, "The ILO supervisory system: A model in crisis?", *International Organizations Law Review* 10, No. 1 (2013): 117–165; Lee Swepston, "Crisis in the ILO Supervisory System: Dispute over the Right to Strike", *International Journal of Comparative Law and Industrial Relations* 29, No. 2 (2013): 199–218; Janice R. Bellace, "The ILO and the right to strike", *International Labour Review* 153, No. 1 (2014): 29–70; Keith D. Ewing, "Myth and Reality of the Right to Strike as a 'Fundamental Labour Right'", *International Journal of Comparative Labour Law and Industrial Relations* 29, No. 2 (2013): 145–166; and Paul Mackay, "The Right to Strike: Commentary", *New Zealand Journal of Employment Relations* 38, No. 3 (2014): 58–70.

[40] ILC, 102nd Session, 2013, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), paras 33–36.

[41] ILC, 102nd Session, 2013, *Report of the Committee of Experts,* para. 36.

this case as the Employers do not agree that there is a right to strike recognized in Convention No. 87”. [42]

27. In November–December 2013, the Committee of Experts discussed again the question of a disclaimer and decided to insert the following paragraph, which has since become a standard paragraph of its report:

> Mandate
>
> The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee’s work based on its impartiality, experience and expertise. The Committee’s technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers’ and workers’ organizations. This has been reflected in the incorporation of the Committee’s opinions and recommendations in national legislation, international instruments and court decisions. [43]

28. At the 103rd Session of the Conference (2014), the Committee on the Application of Standards was unable to adopt conclusions in 19 individual cases due to the disagreement on the question of the right to strike. [44]

29. In view of the impasse, the Governing Body considered at its October–November 2014 session a document on the modalities, scope and costs of action under article 37 of the Constitution. [45] During the discussion, the Worker spokesperson indicated that the group “had reached the inescapable conclusion that referral of the interpretation dispute to the International Court of Justice for an advisory opinion, as a matter of urgency, was the necessary way forward if the ILO supervisory system was to remain relevant and continue to function”. [46] However, the Employer members did not support a referral to the Court and favoured a resolution through tripartite discussions, as it “was more efficient time-wise, and was also far cheaper, more inclusive and more flexible than a referral to the [International Court of Justice], which would be a clear acknowledgment not only that tripartism and social dialogue had failed but also that social dialogue had not even been given a chance to resolve the dispute.” [47] Among the Governments, the group of Latin American and Caribbean countries, the group of industrialized market economy countries and the European Union and its Member States supported the proposed referral to the International Court of Justice, while the Asia and Pacific

[42] ILC, 102nd Session, 2013, *Record of Proceedings*, 16, Part I.

[43] ILC, 103rd Session, 2014, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), para. 31.

[44] ILC, 103rd Session, 2014, *Record of Proceedings* 13, Part I/50–56, paras 201–219.

[45] ILO, *The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards*, GB.322/INS/5, Appendix I.

[46] ILO, *Minutes of the 322nd Session of the Governing Body of the International Labour Office*, GB.322/PV, para. 50.

[47] GB.322/PV, para. 58.

group preferred tripartite discussions and the Africa group was of the view that recourse to the International Court of Justice should be a last resort. [48]

30. Against this background, the Governing Body decided to convene a tripartite meeting, which would report to it at its March 2015 session, on the question of Convention No. 87 in relation to the right to strike and the modalities and practices of strike action at the national level. The meeting took place from 23 to 25 February 2015. At the meeting, the Workers' and Employers' groups presented a joint statement concerning a package of measures to find a possible way out of the existing deadlock in the supervisory system. [49] This joint statement acknowledged that the right to take industrial action by workers and employers in support of their legitimate industrial interests is recognized by the constituents of the International Labour Organization and that this international recognition by the International Labour Organization requires the Workers' and Employers' groups to address specific systemic questions, such as the mandate of the Committee of Experts and the working methods of the Committee on the Application of Standards (adoption of the list and of conclusions). The joint statement did not include specific follow-up on the question of Convention No. 87 in relation to the right to strike. The Government group issued two statements. In the first, it expressed its common position on the right to strike, recognizing that "the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO. … [W]ithout 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". It also noted, however, that the right to strike "is not an absolute right [and] the scope and conditions of this right are regulated at the national level". In its second statement, the Government group acknowledged the joint statement of the Employers' and Workers' groups and called for a comprehensive discussion in the Governing Body. [50]

31. The three statements were presented to the Governing Body at its March 2015 session as constituting the outcome of the tripartite meeting. At the session, the Employer members reiterated their view that the "right to strike" was not recognized in Convention No. 87, and that the joint statement was considered as a commitment to continue to work together to strengthen the supervisory system despite the differences of view. The Worker members confirmed that the joint statement was only intended to allow the ILO to resume the supervision of standards. They maintained that the right to strike was protected by Convention No. 87. In the light of the outcome of the tripartite meeting, the Governing Body decided "not to pursue for the time being any action in accordance with article 37 of the Constitution to address the interpretation question concerning Convention No. 87 in relation to the right to strike". At the same time, the Governing Body took a number of decisions in relation to the supervisory system and the establishment of the Standards Review Mechanism. [51]

32. At the 104th Session of the Conference (2015), only one of the conclusions of the Committee on the Application of Standards relating to the application of Convention No. 87 included views on the right to strike. The absence of any reference to the right to strike is the *modus vivendi* which has prevailed to date in the Committee. The Employer members have nonetheless

[48] GB.322/PV, paras 64, 70, 78, 82.

[49] ILO, *The Standards Initiative: Addendum*, GB.323/INS/5(Add.); ILO, *The Standards Initiative – Appendix I*, GB.323/INS/5/Appendix.I, Annex I.

[50] GB.323/INS/5/Appendix I, Annex II and Annex III.

[51] ILO, *Minutes of the 323rd Session of the Governing Body of the International Labour Office*, GB.323/PV, paras 51, 52, 84.

continued to raise their objections to the comments of the Committee of Experts addressing the conditions for the exercise of the right to strike. [52]

33. In conclusion, the following observations can be made. First, at the heart of the legal challenge is both whether the right to strike is a legitimate means of defending workers' interests that is recognized and protected by Convention No. 87 and whether the Committee of Experts is empowered to develop, while carrying out its supervisory functions, an expanded and elaborate framework for reviewing and commenting upon the conditions of the exercise of that right. Second, more generally, the main focus of the disagreement has been whether the Committee of Experts has the authority to create new legal obligations for States that have ratified international labour Conventions through its incidental, or functional, interpretation of those Conventions when carrying out its supervisory responsibilities. Third, there is broad agreement that Convention No. 87 should be interpreted in accordance with the principles of treaty interpretation under customary international law codified in the 1969 Vienna Convention on the Law of Treaties, and also that the power to make authoritative and binding pronouncements on the interpretation of international labour Conventions lies exclusively with the International Court of Justice.

II. The core elements of the dispute

34. To better understand the deeply divided views of the Employers' and Workers' groups on the issue, it is important to examine more closely, first, Convention No. 87, its negotiating history and the manner in which it has been interpreted by the ILO supervisory bodies and, second, the Committee of Experts, especially how its mandate and working methods have evolved in matters related to the interpretation of international labour Conventions.

II.1. ILO Convention No. 87 and the right to strike

II.1.1. The negotiating history of Convention No. 87

35. Convention No. 87 originated from a request made in 1947 by the United Nations Economic and Social Council in accordance with the 1946 Agreement between the United Nations and the International Labour Organization. [53] As a result, at its 30th Session (1947), the International Labour Conference held a first discussion on the question of freedom of association and industrial relations, and adopted a resolution concerning freedom of association and protection of the right to organize and to bargain collectively, which defined the fundamental principles on which freedom of association should be based. [54] The Conference also decided to place on the agenda of its 31st Session (1948) the questions of freedom of association and of the protection of the right to organize, for consideration under the single-discussion procedure. [55]

36. The Office prepared a summary report on the proceedings of the 30th Session of the Conference, together with a questionnaire seeking constituents' views on the form and content

[52] For instance, ILC, 110th Session, 2022, *Records of Proceedings 4A, Part One*, paras 113–114, 127, 233. See also ILC, 110th Session, 2022, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), paras 17, 20.

[53] ECOSOC adopted a resolution transmitting to the ILO documents submitted by the World Federation of Trade Unions and the American Federation of Labor, with a request that an item on trade unions rights be placed upon the agenda of the forthcoming session of the International Labour Conference; see ECOSOC, fourth session, 1947, Resolution 52/IV.

[54] ILC, 30th Session, 1947, *Record of Proceedings*, Appendix XIII, pp. 587–588.

[55] ILC, 30th Session, 1947, *Record of Proceedings*, Appendix XIII, p. 589.

of possible international regulations concerning freedom of association and the protection of the right to organize. The questionnaire invited comments on, among other things, whether "it would be desirable to provide that the recognition of the right of association of public officials by international regulation should in no way prejudge the question of the right of such officials to strike".[56] Several respondents (Australia, Austria, Belgium, Bulgaria, Canada, Denmark, Ecuador, Finland, France, Hungary, India, Switzerland, the Union of South Africa and the United States) were in favour, one country (Mexico) opposed it, and two countries (the Netherlands and Sweden) considered that the Convention should not be concerned with questions relating to the right to strike.[57]

37. Based on the views expressed, the Office concluded that:

> Several Governments … have … 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. In these circumstances, it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association.[58]

38. As a result, there was no focused or substantive discussion on the right to strike during the negotiations that led to the adoption of Convention No. 87. In fact, the only explicit references to the right to strike throughout the Conference proceedings were in relation to a draft amendment submitted by the Government representative of India in 1947 with a view to excluding the police and the armed forces from the field of application of freedom of association "because they were not authorised to take part in collective negotiations and had not the right to strike"[59] and to a statement of the Government representative of Portugal in 1948 expressing support for those countries that had "stated more or less explicitly that we should avoid any drafting which might imply the idea that we were granting public servants the right to strike".[60]

39. Indeed, the record shows that, from its inception, Convention No. 87 was intended to affirm and codify general principles pertaining to freedom of association and not to provide a detailed regulatory framework. As the Office explained in its first report to the Conference:

> The documentary enquiry on freedom of association had disclosed the fact that the legislation concerning trade associations differed considerably in detail and in form from country to country, but that the fundamental questions were dealt with on a fairly uniform basis.
>
> The Office therefore preferred, instead of submitting to the Conference a draft scheme of detailed regulations which would have obliged the majority of countries to amend their legislation, to frame the essential elements of the problem in a number of precise formulae,

[56] ILC, 31st Session, 1948, *Freedom of Association and Protection of the Right to Organise: Questionnaire*, p. 15.

[57] ILC, 31st Session, 1948, *Freedom of Association and Protection of the Right to Organise: Report VII*, p. 67.

[58] ILC, 31st Session, 1948, Report VII, p. 87. Indeed, the law and practice report on industrial relations contained a section on strikes and lockouts in the context of conciliation and arbitration procedures; see ILC, 31st Session, 1948, *Industrial Relations*, Report VIII(1), pp. 111–118.

[59] The amendment was ultimately rejected; see ILC, 30th Session, 1947, *Record of Proceedings,* p. 570. At the next session of the Conference, the Government of India presented a new amendment aiming at excluding the armed forces and the police from the scope of the Convention "on the ground that most countries would not find it possible to ratify a Convention which required absolute freedom of association and organisation to be granted to members of the armed forces and the police, having regard to the responsibility of Governments for defending the law and assuring the maintenance of public order". The clause was modified during the discussion and finally adopted as Article 9 of Convention No. 87; see ILC, 31st Session, 1948, *Record of Proceedings,* p. 478.

[60] ILC, 31st Session, 1948, *Record of Proceedings*, p. 232.

> the adoption of which would have constituted a sufficient guarantee for the free functioning of employers' and workers' associations.
>
> The draft submitted to the Conference was limited to a guarantee, on the one hand, of the freedom of workers and employers to organise for the collective defence of their occupational interests and, on the other hand, of the freedom of trade associations to pursue their objects by all means not contrary to law or to the regulations enacted for the maintenance of public order. [61]

40. It is precisely because of this intended level of generality of Convention No. 87 that reference is often made to Article 3, which lays down the principle that workers' and employers' organizations are free to choose the means of action for defending their interests, and which has therefore been interpreted to also cover the right to strike. Article 3 reads as follows:

> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

41. The Office questionnaire explained that the object of this Article was to supplement the guarantee with regard to the establishment of organizations with a guarantee of the right of such organizations to organize their internal and external life in full autonomy; the word "lawful" in the text aimed to declare that employers' and workers' organizations were bound, in the exercise of their rights, to respect the general laws of the country. [62]

42. During the discussion at the 1948 session of the Conference, all proposed amendments to Article 3 to include references to national legislation setting minimum conditions for the constitution or operation of organizations were withdrawn after 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". [63]

43. Another oft-cited provision in the debate on the interpretation of Convention No. 87 in relation to the right to strike is Article 10, which reads: "In this Convention the term *organisation* means any organisation of workers or of employers for furthering and defending the interests of workers or of employers." This provision was the outcome of discussions of various proposals to insert a definition of "workers' and employers' organisations". It originated from an amendment submitted by the Government of the United Kingdom of Great Britain and Northern Ireland to define the term "organisation" as "any organisation of workers or of employers for furthering or defending the interests of workers and employers respectively, except any trust or cartel as defined by national law or regulations". The reference to trusts and cartels was eventually deleted. It was generally understood that trade union activity was not limited to the professional field alone and that the definition should not be interpreted as restricting the right of trade union organizations to take part in political activities. [64]

44. Four other developments after Convention No. 87 was adopted provide additional context. First, in 1953, the Director-General informed the Governing Body that he had considered that it would be inappropriate to express an opinion on the interpretation of Conventions Nos 87

[61] ILC, 30th Session, 1947, *Freedom of Association and Industrial Relations: Report VII*, pp. 16–17.

[62] ILC, 31st Session, 1948, Questionnaire, pp. 8–9. See also ILC, 31st Session, 1948, Report VII, pp. 24–31, 90–91.

[63] ILC, 31st Session, 1948, *Record of Proceedings*, p. 477.

[64] ILC, 31st Session, 1948, *Record of Proceedings*, p. 476.

and 98, owing to the existence of a special procedure laid down by the Governing Body for dealing with complaints concerning alleged infringements of freedom of association. [65] Second, in 1956, the Governing Body decided against revising the report form on the application of Convention No. 87 with a view to adding specific questions on restrictions to the right to strike for public employees, as it considered that Convention No. 87 did not cover the right to strike. [66] Third, in 1987, the Conference issued a resolution concerning the 40th anniversary of the adoption of Convention No. 87, in which no mention was made of the right to strike. [67] Fourth, in 1991, the Governing Body discussed a proposal to place a standard-setting item concerning the right to strike on the agenda of the Conference but ultimately decided against it. [68]

II.1.2. Subsequent practice: ILO supervisory bodies and the right to strike

45. In the 75 years since the adoption of Convention No. 87, various ILO supervisory bodies entrusted with either regular supervision or special procedures have spoken to the linkages between the right to strike and the principle of freedom of association enshrined in Convention No. 87. As outlined below, they have invariably affirmed that the right to strike is intrinsically linked to the principle of freedom of association and is thus protected under Convention No. 87.

Committee of Experts on the Application of Conventions and Recommendations

46. The Committee of Experts first expressed a view on the right to strike in relation to Convention No. 87 in its General Survey of 1959. In commenting on the right of employers' and workers' organizations to organize their activities and to formulate their programmes under Article 3(1) of Convention No. 87, the Committee observed that:

> [T]he prohibition of strikes by workers other than public officials acting in the name of the public powers … may run counter to Article 8, paragraph 2, of [Convention No. 87], according to which "the 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 the Convention, and especially the freedom of action of trade union organisations in defence of their occupational interests. [69]

47. The Committee of Experts made further comments on the right to strike in subsequent General Surveys. For instance, in 1973, the Committee expressed the view that:

> A general prohibition of strikes constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interests of their members (Article 10 of Convention No. 87) and of the right of trade unions to organise their activities (Article 3); it should be recalled, in this connection, that Article 8 of the Convention establishes that the law

[65] ILO, *Minutes of the 122nd Session of the Governing Body (May–June 1953)*, p. 110.

[66] ILO, *Minutes of the 131st Session of the Governing Body*, March 1956, Appendix XXII, p.188.

[67] See Resolutions adopted by the International Labour Conference at the 73rd Session (1987). In contrast, the 1957 Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation makes reference to the "unrestricted exercise of trade union rights, including the right to strike, by the workers", while the 1970 Resolution concerning Trade Union Rights and Their Relation to Civil Liberties calls for systematic studies of the law and practice in matters concerning freedom of association and trade union rights, including the right to strike.

[68] See ILO, *Agenda of the 81st (1994) Session of the Conference*, GB.253/2/3(rev.), paras 14 and 35–38 and Appendix I.

[69] ILC, 43rd Session, 1959, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part IV), pp. 101–29, para. 68.

> of the land shall not be such as to impair nor shall it be so applied as to impair the guarantees provided for in the Convention, including the right of trade unions to organise their activities. [70]

48. Furthermore, citing the Committee on Freedom of Association, the Committee of Experts indicated that "the conditions which have to be fulfilled, under the law, in order to render a strike lawful, should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organisations". [71]

49. In 1983, the Committee of Experts stated that "the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests". [72] It reiterated the position it had expressed in 1973 with respect to the right to strike and Articles 3 and 10 of the Convention, and stressed that "[a] general ban on strikes ... is ... not compatible with the principles of freedom of association". [73]

50. In 1994, the Committee of Experts described the right to strike as a "basic right" and as a "general principle". [74] It noted that "[a]lthough the right to strike is not explicitly stated in the ILO Constitution or in the Declaration of Philadelphia, nor specifically recognized in Conventions Nos. 87 and 98, it seemed to have been taken for granted in the report prepared for the first discussion of Convention No. 87" but that, "during discussions at the Conference in 1947 and 1948, no amendment expressly *establishing* or *denying* the right to strike was adopted or even submitted". [75] According to the Committee of Experts, "[i]n the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject". [76]

51. The Committee explained that the position it had expressed since 1959 was "based on the recognized right of workers' and employers' organizations to organize their activities and to formulate their programmes for the purposes of furthering and defending the interests of their members (Articles 3, 8 and 10 of Convention No. 87)". [77] In particular, from a combined reading of Articles 3 and 10 of the Convention, the Committee concluded that strike action is included within the concepts of "activities" and "programmes" of organizations pursuant to Article 3. [78] As such, the Committee "confirm[ed] its basic position that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87". [79]

52. In 2012, the Committee of Experts noted that, "[i]n the absence of an express provision in Convention No. 87", both it and the Committee on Freedom of Association had for decades

[70] ILC, 58th Session, 1973, *General Survey on the Application of the Conventions on Freedom of Association and on the Right to Organise and Collective Bargaining*, Report III (Part 4B), para. 107.

[71] ILC, 58th Session, 1973, General Survey, para 108. The Committee also addressed cases where, under certain conditions, the right to strike could be prohibited or limited (paras 109–111).

[72] ILC, 69th Session, 1983, *Freedom of Association and Collective Bargaining: General Survey*, Report III (Part 4 B), paras 200–201.

[73] ILC, 69th Session, 1983, General Survey, para. 205. The Committee of Experts continued also to develop its views on conditions for the prohibition or limitation of the right to strike (paras 204–226).

[74] ILC, 81st Session, 1994, *Freedom of Association and Collective Bargaining: General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949*, Report III (Part 4B), paras 137, 159.

[75] ILC, 81st Session, 1994, General Survey, para. 142.

[76] ILC, 81st Session, 1994, General Survey, para. 145.

[77] ILC, 81st Session, 1994, General Survey, para. 147.

[78] ILC, 81st Session, 1994, General Survey, paras 148–149.

[79] ILC, 81st Session, 1994, General Survey, para. 151. At the same time, the Committee emphasized that "the right to strike cannot be considered as an absolute right", and went on to describe prohibitions and restrictions applicable to the right to strike; paras 151–179.

progressively developed "a number of principles relating to the right to strike" on the basis of Articles 3 and 10 of that Convention. [80] In response to the views expressed by the Employers' group in the Committee on the Application of Standards at the 99th Session (2010) of the Conference, the Committee asserted that "the absence of a concrete provision [on the right to strike in Convention No. 87] is not dispositive" and that while "the preparatory work is an important supplementary interpretative source when reviewing the application of a particular Convention in a given country, it may yield to the other interpretative factors, in particular, in this specific case, to the subsequent practice over a period of 52 years (see Articles 31 and 32 of the Vienna Convention on the Law of Treaties)". [81] Accordingly, the Committee "reaffirm[ed] that the right to strike derives from [Convention No. 87]" [82] and went on to specify "a series of elements concerning the peaceful exercise of the right to strike, its objectives and the conditions for its legitimate exercise". [83]

53. In the same General Survey, the Committee reiterated that its position on the right to strike "lies within the broader framework of the recognition of this right at the international level", citing provisions of the International Covenant on Economic, Social and Cultural Rights; the Charter of the Organization of American States; the Charter of Fundamental Rights of the European Union; the Inter-American Charter of Social Guarantees; the European Social Charter; the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights; and the Arab Charter on Human Rights. [84] In addition, it noted that other international labour standards – such as the Abolition of Forced Labour Convention, 1957 (No. 105), and the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92) – and resolutions adopted in different contexts at the ILO also made reference to the right to strike. [85]

54. In addition to the General Surveys cited above, the Committee of Experts has, over the past 65 years, made numerous country-specific comments on the right to strike in the context of regular supervision and the examination of reports submitted under article 22 of the Constitution. As part of its monitoring of the application of Convention No. 87, in the last two years, the Committee addressed 75 observations to Member States concerning the exercise of the right to strike. [86]

Committee on Freedom of Association

55. By and large, the Committee of Experts' comments concerning the right to strike reflect relevant pronouncements of the Governing Body's Committee on Freedom of Association, which has, over the years, developed a body of detailed decisions to ensure that legislation and practices reviewed in relation to the scope and conditions of exercise of that right comply

[80] ILC, 101st Session, 2012, *Giving Globalization a Human Face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report III (Part 1B), para. 117.

[81] ILC, 101st Session, 2012, General Survey, para. 118.

[82] ILC, 101st Session, 2012, General Survey, para. 119.

[83] ILC, 101st Session, 2012, General Survey, paras 122–161.

[84] ILC, 101st Session, 2012, General Survey, para. 120.

[85] ILC, 101st Session, 2012, General Survey, para. 121.

[86] ILC, 110th Session, 2022, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part A), pp. 97–318, and ILC, 111st Session, 2023, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part A), pp. 101–342.

with the principles of freedom of association and collective bargaining.[87] In fact, the Committee on Freedom of Association was the first supervisory body that recognized the right to strike as a trade union right; when examining a complaint lodged against the Government of Jamaica (Case No. 28) in March 1952, it stated that "[t]he right to strike and that of organising union meetings are essential elements of trade union rights, and measures taken by the authorities to ensure the observance of the law should not, therefore, result in preventing unions from organising meetings during labour disputes".[88]

56. Among its numerous decisions, the Committee on Freedom of Association has affirmed that "[p]rotests are protected by the principles of freedom of association only when such activities are organized by trade union organizations or can be considered as legitimate trade union activities as covered by Article 3 of Convention No. 87".[89]

57. The Committee has further stated that "[w]hile [it] has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, it has regarded it as such only in so far as it is utilized as a means of defending their economic interests".[90] As regards Convention No. 87, the Committee has regularly taken the view that "[t]he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87" and that "[t]he prohibition on the calling of strikes by federations and confederations is not compatible with Convention No. 87".[91]

58. In addition, the Committee has found that "[t]he dismissal of workers because of a strike constitutes serious discrimination in employment on grounds of legitimate trade union activities and is contrary to Convention No. 98" and that "[i]n certain cases … it is difficult to accept as a coincidence unrelated to trade union activity that heads of departments should have decided, immediately after a strike, to convene disciplinary boards which, on the basis of service records, ordered the dismissal not only of a number of strikers, but also of members of their union committee".[92]

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[87] The mandate of the Committee "consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions". In cases where countries have ratified one or more Conventions on freedom of association, the Committee of Experts is normally entrusted with the examination of the effect given to the recommendations of the Committee on Freedom of Association, which draw the attention of the Committee of Experts to discrepancies between national laws and practice and the terms of the Conventions, or to the incompatibility of a given situation with the provisions of these instruments; see *Compendium of rules applicable to the Governing Body*, Annex II, Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, paras 14 and 72.

[88] See *Sixth report of the Committee on Freedom of Association*, para. 68. In its *Eighth report* , when examining a complaint against the Government of Japan (Case No. 60), the Committee presented a synthesis of its views at the time on the right to strike:

> 53. The Committee considers that it is not called upon to give an opinion on the question as to how far the right to strike in general – a right which is not specifically dealt with in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or in the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – should be regarded as constituting a trade union right. In several earlier cases and, in particular, in that relating to Turkey, the Committee has observed that the right to strike is generally accorded to workers and their organisations as an integral part of their right to defend their collective interests. In another case … the Committee recommended the Governing Body to draw the attention of the Government of Brazil to the importance which it attached, in cases in which strikes were prohibited in essential occupations, to ensuring adequate guarantees to safeguard to the full the interests of the workers thus deprived of "an essential means of defending occupational interests".

[89] See *Compilation of decisions of the Committee on Freedom of Association*, Sixth edition, 2018, paras 204, 210.

[90] Compilation of decisions, para. 751.

[91] Compilation of decisions, paras 754, 757.

[92] Compilation of decisions, paras 957 and 1110.

59. Moreover, the Committee on Freedom of Association has developed an extensive set of decisions in specific cases on various aspects of strike action, including the objective of the strike, the types of strike action, the prerequisites, cases in which strikes may be restricted or even prohibited and the related compensatory guarantees to be afforded to the workers concerned or the questions of sanctions, both in the event of a legitimate strike and in the event of abuse while exercising the right to strike. [93]

Fact-Finding and Conciliation Commission on Freedom of Association

60. Another mechanism competent to examine alleged violations of freedom of association, the Fact-Finding and Conciliation Commission on Freedom of Association, expressed similar views in relation to the right to strike in two cases. [94] The first case concerned allegations of infringements of trade union rights by Japan. In its report published in January 1966, the Commission:

> endorse[d] the principles established by the Governing Body Committee on Freedom of Association … that, where strikes by workers in essential services or occupations are restricted or prohibited, such restriction or prohibition should be accompanied by adequate guarantees to safeguard to the full the interest of the workers thus deprived of an essential means of defending occupational interests. [95]

61. The second case concerned allegations brought against South Africa (which, at that time, was not a Member of the ILO). In its report published in May 1992, the Commission summarized the situation as follows:

> While in international law the right to strike is explicitly recognised in certain texts adopted at the international and regional levels, the ILO instruments do not make such a specific reference. Article 3 of Convention No. 87, providing as it does for the right of workers' organisations “to organise their administration and activities and to formulate their programmes”, has been the basis on which the supervisory bodies have developed a vast jurisprudence relating to industrial action. In particular they have stated as the basic principle that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. The exercise of this right without hindrance by legislative or other measures has been consistently protected by the ILO principles. At the same time certain restrictions have been seen as acceptable in the circumstances of modern industrial relations. [96]

Article 26 complaints and article 24 representations

62. In three instances, Commissions of Inquiry set up to examine complaints concerning the observance of Convention No. 87 have addressed whether the right to strike is protected under

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[93] It has been noted that “[a] reading of the reports of the Committee of Experts and the [Committee on Freedom of Association (CFA)] since 1952 reveals that the CFA, not the Committee of Experts, has taken the lead role in delineating the meaning of the right to strike“. See Janice R. Bellace, “The Committee on Freedom of Association: Making freedom of association a reality, in Karen Curtis, Oksana Wolfson (eds), *70 Years of the ILO Committee on Freedom of Association: A Reliable Compass in Any Weather*, 2022, p. 16.

[94] The Commission was originally the first body established by the Governing Body in January 1950, under the procedure for the examination of allegations concerning the infringement of trade union right agreed between the ILO and ECOSOC; see *Minutes of the 110th Session of the Governing Body*, Appendix VI. Unlike the complaints submitted to the Committee on Freedom of Association, no allegations could be communicated to the Commission without the consent of the Government concerned.

[95] ILO, *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Persons Employed in the Public Sector in Japan*, *Official Bulletin*, Special supplement, Vol. XLIX, No.1, January 1966, p. 516.

[96] ILO, *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa*, GB.253/15/7, June 1992, para. 303.

the Convention. In 1968, the Commission of Inquiry appointed to examine complaints concerning the observance by Greece of Conventions Nos 87 and 98 noted that:

> Convention No. 87 contains no specific guarantee of the right to strike. On the other hand, ... an absolute prohibition of strikes would constitute a serious limitation of the right of organisations to further and defend the interest of their members (Article 10 of the Convention) and could be contrary to Article 8, paragraph 2, of the Convention, under which "the 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", including the right of unions to organise their activities in full freedom (Article 3). [97]

63. Similarly, in its report published in 1984, the Commission of Inquiry instituted to examine a complaint on the observance by Poland of Conventions Nos 87 and 98 concluded that:

> Convention No. 87 provides no specific guarantee concerning strikes. The supervisory bodies of the ILO, however, have always taken the view – which is shared by the Commission – that the right to strike constitutes one of the essential means that should be available to trade union organisations for, in accordance with Article 10 of the Convention, furthering and defending the interests of their members. [98]

64. Lastly, in 2009, the Commission of Inquiry established to examine complaints concerning the observance by Zimbabwe of Conventions Nos 87 and 98, while reviewing the national law and practice in relation to the right to strike, "confirm[ed] that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87". [99]

65. Moreover, to date, four representations under article 24 of the Constitution have pertained to the exercise of the right to strike. In examining those representations, the Committee on Freedom of Association reaffirmed that the right to strike is a legitimate means of defending the workers' interests [100] and that nobody should be deprived of their liberty or subjected to penal sanctions for the mere fact of organizing or participating in a peaceful strike. [101] The Committee also had occasion to recall that the right to strike could be restricted or prohibited in the public service only for public servants exercising authority in the name of the State or in essential services in the strict sense of the term. [102] Furthermore, the Committee concluded that excessive restrictions on the right to strike imposed on workers constitute a serious

[97] ILO, *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the complaints concerning the observance by Greece of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, para. 261.

[98] ILO, *Report of the Commission of Inquiry instituted under article 26 of the Constitution of the International Labour Organization to examine the complaint on the observance by Poland of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, para. 517.

[99] ILO, *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of Zimbabwe of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, para. 575.

[100] Case No. 1364 (1987), Representation against the Government of France pursuant to article 24 of the Constitution made by the General Federation of Labour, para. 140.

[101] Case No. 1304 (1985), Representation made by the Confederation of Costa Rican Workers (CTC), the Authentic Confederation of Democratic Workers (CATD), the Unity Confederation of Workers (CUT), the Costa Rican Confederation of Democratic Workers (CCTD) and the National Confederation of Workers (CNT), under article 24 of the ILO Constitution, alleging the failure by Costa Rica to implement several international labour conventions including Conventions Nos. 11, 87, 98 and 135, para. 99.

[102] Case No. 1971 (1999), Representation against the Government of Denmark presented by the Association of Salaried Employees in the Air Transport Sector (ASEATS) and the Association of Cabin Crew at Maersk Air (ACCMA) under article 24 of the ILO Constitution alleging non-observance by Denmark of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), para. 55.

violation of the principles of freedom of association and that such limitations would be justifiable only if the strike were to lose its peaceful character. [103]

II.1.3. Rules and practice of treaty interpretation

66. At the heart of the controversy, there is a divergence of views on the method of interpretation that should be used to determine whether the right to strike is protected under Convention No. 87. As noted above, the Employers' group seems to strongly favour a *textual* or *literal* interpretation based on the natural meaning of the terms of the Convention, whereas the Workers' group supports a *dynamic* interpretation, along the lines followed by the Committee of Experts and other ILO supervisory organs, that gives precedence to the effective achievement of the declared or apparent object and purpose of the provisions of Convention No. 87.

67. Under a textual approach, the aim and focus of interpretation should be limited to determining or confirming the ordinary meaning of the terms of a treaty. In contrast, according to a dynamic (often called teleological or evolutive) method of interpretation, [104] treaty provisions need to be understood in the light of their purpose and the goals that they aim to achieve. Both methods are reflected in article 31 of the 1969 Vienna Convention on the Law of Treaties, which is generally recognized to embody customary international law. [105]

68. Article 31 of the Vienna Convention advocates a good-faith search for the ordinary meaning of the terms of a treaty, read in their context. [106] At the same time, the reference to the "object and purpose" of a treaty in article 31(1) opens up the possibility for dynamic, extra-textual

[103] Case No. 1810 (1996), Representation made by the Confederation of Turkish Trade Unions (TURK-IS) under article 24 of the ILO Constitution alleging non-observance by Turkey of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), para. 61.

[104] The rationale of this type of interpretation is that certain terms are not static but may be given a meaning that changes over time so as to adapt to evolving realities. The advisory opinion of the International Court of Justice in the *Namibia* case and the judgment of the European Court of Human Rights in the *Tyrer* case are often cited as prominent examples; see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion of 21 June 1971, ICJ Reports 1971*, para. 53, and *Tyrer v United Kingdom*, *Judgment of 25 April 1978*. See also *Aegean Sea Continental Shelf Case*, *Judgment of 19 December 1978*, *ICJ Reports 1978*, para. 80; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009*, *ICJ Reports 2009*, para. 64; *Case concerning Pulp Mills on the River Uruguay, Judgment of 20 April 2010*, *ICJ Reports 2010*, para. 204.

[105] The International Court of Justice stated for the first time in 1991 that "Articles 31 and 32 of the Vienna Convention … may in many respects be considered as a codification of existing customary international law on the point"; see *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, ICJ Reports 1991*, para. 48. More recently, the Court confirmed the same in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007*, para. 160; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010*, para. 65. Accordingly, as articles 31 and 32 are universally binding as customary international law, they apply to all treaties outside the scope of the Vienna Convention, namely treaties concluded before 1969 and also treaties between States non-parties to the Vienna Convention.

[106] In the only advisory opinion requested thus far with respect to an international labour Convention, the Permanent Court of International Justice noted with regard to Article 3 of Convention No. 4: "The wording of Article 3, considered by itself, gives rise to no difficulty; it is general in its terms and free from ambiguity or obscurity … If, therefore, Article 3 … is to be interpreted in such a way as not to apply to women holding posts of supervision and management and not ordinarily engaged in manual work, it is necessary to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of the words". The Court went on to say that an examination of the preparatory work also confirmed the textual interpretation and that, therefore, "there is no good reason for interpreting Article 3 otherwise than in accordance with the natural meaning of the words"; see *Interpretation of the Convention of 1919 concerning employment of women during the night, Advisory opinion*, 15 November 1932, pp. 373, 380.

interpretation and the application of the principle of effectiveness. [107] In relation to the "general rule" of interpretation set out in article 31, it has been observed that:

> This provision merges the principles of textuality, ordinary meaning, and integration, as well as the teleological principle of "object and purpose" (which is itself generally regarded as incorporating the principle of "effectiveness"), into a single rule. Even though they are presented in an order that may accord some primacy to the text, if only as a starting point, a hierarchy among the various components of the rule is far from categorically, or even clearly, expressed. [108]

69. Furthermore, article 31(3) of the Vienna Convention provides that, for the purpose of the interpretation of a treaty, in addition to the context, account should be taken of any subsequent agreement and subsequent practice of the parties. [109] "Subsequent agreement" refers to an agreement reached after the conclusion of a treaty on the interpretation or application of the treaty, whereas "subsequent practice" consists of conduct which establishes the agreement of the parties regarding the interpretation of the treaty. Subsequent agreement and subsequent practice offer objective evidence of the understanding of the parties as to the meaning of the treaty. A subsequent agreement must reflect unequivocally a "meeting of the minds"; therefore, conflicting positions regarding interpretation expressed by different parties to a treaty preclude the existence of an agreement. Subsequent practice may consist of any conduct (actions or omissions) of the organs of a State, whether in the exercise of executive, legislative, judicial or other functions, official statements, judgments, enactment of domestic legislation or conclusion of international agreements. The interpretative weight of a subsequent agreement or subsequent practice depends on criteria such as its clarity and specificity, and on whether and how it is repeated.

70. Of particular interest is the weight that the pronouncements of expert bodies responsible for monitoring the application of a treaty may carry in interpreting that treaty. Although these pronouncements, views or comments cannot in and of themselves constitute a subsequent agreement or subsequent practice, they may give rise to a subsequent agreement or practice of the parties themselves that may in turn be reflected in, for instance, resolutions of organs of international organizations or of Conferences of States parties. In the *Diallo* case, the International Court of Justice considered that, in the interest of clarity, consistency and legal security, "it should ascribe great weight to the interpretation adopted by this independent body [the Human Rights Committee] that was established specifically to supervise the application of that treaty [the International Covenant on Civil and Political Rights]". [110] Regional

[107] The principle of effectiveness *(ut res magis valeat quam pereat)* is based on the assumption that a treaty is meant to achieve something and therefore needs to be interpreted in a manner that advances its aims.

[108] Malgosia Fitzmaurice, "Interpretation of Human Rights Treaties", in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law,* 2013, p. 746. In the words of the European Court of Human Rights, under the general rule of article 31 of the Vienna Convention, "the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article". *Golder v. United Kingdom Judgment,* 21 February 1975, para. 30. See also Richard Gardiner, *Treaty Interpretation*, 2008, pp. 161–202.

[109] See Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary*, 2012, pp. 552–560; Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, 2011, Vol. I, pp. 825–829; Gardiner, *Treaty Interpretation,* pp. 203–249. See also United Nations International Law Commission, "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries", 2018, pp. 23–33.

[110] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, *ICJ Reports 2010*, para. 66. In another case, the Court made reference to the "constant practice" of the Human Rights Committee to support its own interpretation of the extraterritorial applicability of the International Covenant on Civil and Political Rights; see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *ICJ Reports 2004*, para. 109.

human rights courts also draw on pronouncements of expert bodies when interpreting the relevant human rights treaties. [111]

71. Moreover, article 32 of the Vienna Convention provides that, as supplementary means of interpretation, the preparatory work of the treaty and the circumstances of its conclusion may be used to determine the meaning of the terms of a treaty when the result of an interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to an absurd or unreasonable result. [112] In this connection, under a general reservation clause in article 5 of the Vienna Convention, the basic rules of interpretation are without prejudice to any specific rules, practices or procedures applicable to treaties adopted within international organizations. In the case of the ILO, such specific rules could include the special importance attached to the preparatory work in view of the tripartite inputs and negotiations involved in standard-setting.

72. Against this background, and without pre-empting the Governing Body's decision on whether to refer the matter to the International Court of Justice, the points relating to the recognition of the right to strike under Convention No. 87 that the Court might consider it necessary to look into could include the following:

(a) Should terms and expressions such as "right to organize", "guarantees" and "defending the interests", used in Articles 3, 8 and 10 of Convention No. 87, be understood textually or evolutively?

(i) Can the ordinary meaning of any of those terms and expressions in their context and in the light of their object and purpose be considered to cover industrial action, and in particular, strike action?

(ii) What is the legal effect of the preparatory work that led to the adoption of Convention No. 87 and how decisive is the intention of the drafters in relation to the interpretation of the provisions in question?

(b) What is the legal weight of subsequent practice, especially in the form of comments and conclusions of supervisory organs such as the Committee of Experts, in the interpretation of Convention No. 87?

II.2. The mandate of the Committee of Experts

II.2.1. Establishment and evolution of the Committee's responsibilities

73. The Committee of Experts, together with the Committee on the Application of Standards, was established in 1926 by a resolution of the International Labour Conference, [113] in which the Conference requested the Governing Body to appoint "a technical Committee of experts,

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[111] For instance, the Inter-American Court of Human Rights has drawn on the findings of the Human Rights Committee to confirm its view that corporal punishment is incompatible with international guarantees against cruel, inhuman or degrading treatment; see *Caesar v. Trinidad and Tobago*, *Judgment of March 11, 2005*, paras 60–63. The European Court of Human Rights has referred to the ILO Committee of Experts' role as "a point of reference and guidance for the interpretation of certain provisions of the Convention [for the Protection of Human Rights and Fundamental Freedoms]"; see *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, *Judgment,* 8 April 2014, para. 97.

[112] See Dörr and Schmalenbach, pp. 571–578; Corten and Klein, pp. 846–859.

[113] ILC, Eighth Session, 1926, *Record of Proceedings*, Appendix VII, p. 429. The draft resolution submitted to the Conference provided for the establishment of the Committee of Experts by the Governing Body. During the Conference, it was also decided that the Conference would appoint at each of its session its own Committee to examine the summary prepared by the Director-General and the report of the Committee of Experts.

consisting of six or eight members, for the purpose of making the best and fullest use of this information [summary of reports from Member States] and of securing such additional data as may be provided for in the forms approved by the Governing Body". [114] In relation to the nature and scope of the Committee's competence, in particular as regards the interpretation of Conventions, the Conference agreed that:

> [It] would have no judicial capacity nor would it be competent to give interpretations of the provisions of the Conventions nor to decide in favour of one interpretation rather than of another. It could not therefore encroach upon the functions of the Commissions of Enquiry and of the Permanent Court of International Justice in regard to complaints regarding the non-observance of ratified Conventions or in regard to their interpretation. … It will note the cases where the information supplied appears to be inadequate for a complete understanding of the position either generally, or in a particular country. … Its examination will certainly reveal cases in which different interpretations of the provisions of Conventions appear to be adopted in different countries. The Committee should call attention to such cases. … [I]t would present a technical report to the Director, who would communicate this report … to the Conference. [115]

74. The Committee of Experts was appointed by the Governing Body at its 33rd Session (October 1926) for an initial trial period of two years, and became a permanent body in 1928. [116] Eight experts were initially appointed for the duration of the two-year trial period. As from 1934, the experts were appointed for a period of three years. [117] In 1939, the Committee of Experts had 13 members: nine from European countries and four from non-European countries.

75. In its early years, the Committee of Experts merely identified divergences in the interpretation of Conventions, and usually invited the Office to contact the Government concerned. When the difficulties were considered to be substantial – for instance, where they affected the national legislation of several countries – the Committee brought them to the Governing Body's attention. The Committee on the Application of Standards could also note the difficulties, and in turn, bring them to the attention of the Conference. The Committee on the Application of Standards and the Governing Body could also call on the Committee of Experts to pay special attention to differences of interpretation.

76. In 1947, the respective mandates of the Committee on the Application of Standards and of the Committee of Experts were broadened, further to the adoption of the constitutional amendment of 1946. [118] This was a major institutional development for both Committees, not only because their mandate had been expanded to include the examination of additional

[114] The Conference also considered that the Committee members "should essentially be persons chosen on the ground of expert qualifications and on no other ground whatever" and that "the sort of qualifications that [it] had in mind was knowledge of international legislation and experience of international labour conditions"; ILC, Eighth Session, 1926, *Record of Proceedings*, p. 239. This reflected the proposal set out in a note prepared by the Office for the discussion of the Conference, which provided that: "Members should be chosen who possess intimate knowledge of labour conditions and of the application of labour legislation. They should be persons of independent standing, and they should be so chosen as to represent as far as possible the varying degrees of industrial development and the variations of industrial methods to be found among the States Members of the Organisation." (Appendix V, p. 401).

[115] ILC, Eighth Session, 1926, *Record of Proceedings*, Appendix V, pp. 405–407.

[116] ILO, *Minutes of the 42nd Session of the Governing Body*, October 1928, p. 546.

[117] ILO, *Minutes of the 68th Session of the Governing Body*, September 1934, pp. 292, 409.

[118] Under the 1946 constitutional amendment, the obligations of Governments to submit reports were extended to include reports on measures taken to bring standards adopted by the Conference before the competent authorities, and on the difficulties which prevented or delayed more widespread ratification of Conventions and acceptance of Recommendations. In addition, Governments were required to communicate copies of their report to representative organizations of employers and workers.

standards-related reports submitted by Member States, but also because this expansion reflected an explicit acknowledgment of the importance of their work for the Organization. [119]

77. At its 102nd Session (June–July 1947), when the Governing Body decided to transmit to the Conference an amendment to its Standing Orders to broaden the terms of reference of the Committee on the Application of Standards, it noted that "the proposed extension of the terms of reference of the Conference Committee on the Application of Conventions will render necessary a corresponding extension of the terms of reference of the Committee of Experts on the Application of Conventions, which prepares the ground for the work of the Conference Committee". [120] The Conference broadened the terms of reference of the Committee on the Application of Standards at its 30th Session (June–July 1947). At its 103rd Session (December 1947), the Governing Body adopted the "corresponding widening of the terms of reference of the Committee of Experts". [121]

78. From the early 1950s, the sessions of the Committee of Experts were lengthened to an average of one and a half weeks and its composition was increased from 13 to 17 members. The Committee's composition was increased again in 1979 to its current level of 20 experts, while the current duration of its annual session is four weeks. [122]

79. The mandate of the Committee of Experts has remained unchanged since 1947. Nevertheless, its working methods have developed considerably, in particular concerning the interpretation of international labour Conventions. As was noted before the Governing Body:

> By comparison with this original mandate, it is clear that the Committee has taken on a more independent role regarding interpretation, as it also has in other fields, without raising objections of principle. This enlarged role is in fact a response to the inherent needs of its work and to the conditions in which it is called upon to examine a constantly increasing number of reports concerning Conventions that are also growing in number. [123]

80. This evolution resulted in no small measure from the requirement for Governments to submit reports on the effect given to unratified Conventions and Recommendations, which gave rise to the General Surveys of the Committee of Experts and their subsequent consideration by the Committee on the Application of Standards. [124] In the first General Surveys, the Committee of

[119] ILO, *Minutes of the 102nd Session of the Governing Body*, June–July 1947, p. 234. The extension of the scope of the constitutional supervisory procedures was suggested by the Committee on the Application of Standards in the form of a resolution adopted in 1945; see ILC, 27th Session, 1945, *Record of Proceedings*, p. 441.

[120] ILO, *Minutes of the 102nd Session of the Governing Body*, p. 233.

[121] ILO, *Minutes of the 103rd Session of the Governing Body*, December 1947, pp. 56–59 and 172–173. At that time, it was recognized "from the outset that the technical examination of the annual reports carried out by the Experts is an indispensable preliminary to the over-all survey of application conducted by the Conference through its Committee on the Application of Conventions".

[122] ILO, *Minutes of the 344th Session of the Governing Body,* para. 729.

[123] ILO, *Article 37, paragraph 2, of the Constitution and the Interpretation of International Labour Conventions*, GB.256/SC/2/2, para. 26.

[124] In November 1955, the Governing Body decided that the Committee of Experts should undertake a study of general matters, such as positions on the application of certain Conventions and Recommendations by all governments, to provide the basis for the discussion by the Committee on the Application of Standards. Such studies were intended to cover the Conventions and Recommendations selected for the submission of reports under article 19 of the Constitution. As the reports requested under article 19 were grouped around one or two central themes each year, it was proposed that the reports provided under article 22 of the Constitution might also be taken into consideration; see *Minutes of the 129th Session of the Governing Body*, May–June 1955, pp. 90–91, and *Minutes of the 130th Session of the Governing Body*, November 1955, pp. 44, 134–135.

Experts continued to limit itself to highlighting divergences in the interpretation of certain provisions of Conventions, but it progressively began to clarify their meaning in greater detail.

81. Before long, the interpretative function of the Committee of Experts came under scrutiny. In particular, from 1962 to 1989 the socialist countries raised concerns, pointing out that the Constitution did not authorize "judgments and condemnations" or "the interpretation of the provisions of Conventions".[125] In response, on the occasion of its 50th anniversary, the Committee of Experts recalled that its "terms of reference do not require it to give interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution" but that "to carry out its function of evaluating the implementation of Conventions, [it had] to consider and express its views on the meaning of certain provisions of Conventions".[126]

82. In its 1987 report,[127] the Committee of Experts returned to the subject of interpretation, making a similar statement, which led to a number of comments by members of the Committee on the Application of Standards. The socialist countries, in particular, considered that the Committee of Experts had gone beyond its terms of reference and had "converted itself into a kind of supra-national tribunal",[128] and proposed the establishment of a set of rules for the Committee. This proposal was rejected by the Employer spokesperson, the Worker members and by a number of Member States, who recalled that the report of the Committee of Experts "in which it evaluates the effect given to Conventions from a strictly legal point of view, is a basis for the dialogue which takes place in the Conference Committee".[129] Nonetheless, as from 1989 the Employer members began to voice concerns regarding the tendency of the Committee of Experts to "over-interpret" Conventions despite the fact that, under the ILO Constitution, only the International Court of Justice could make authoritative interpretations of international labour Conventions.[130]

83. When explaining the rationale and limits of its interpretative function, the Committee of Experts has always acknowledged that the International Court of Justice is the competent body under the Constitution to interpret international labour Conventions. At the same time, it has consistently emphasized that the fulfilment of its mandate requires it to clarify the meaning of the provisions of Conventions, building on the expertise of its members and guided by the key principles of independence, objectivity and impartiality. The report of its 81st Session (November–December 2010) sets out clearly the Committee's position:

> In accordance with the mandate given to it by the Governing Body, its task consists of evaluating national law and practice in relation to the requirements of international labour Conventions ... [Its members] are appointed in a personal capacity and are selected on the basis of their independent standing, impartiality and competence. The members are drawn from all parts of the world and possess first-hand experience of different legal, economic and social systems. ...
>
> Against this background, the Committee reiterates the functional approach that it has followed with regard to its role when examining the meaning of the provisions of Conventions. Although the Committee's mandate does not require it to give definitive interpretations of Conventions,

[125] ILC, 46th Session, 1962, *Record of Proceedings*, p. 417; ILC, 66th Session, 1980, *Record of Proceedings*, 37/3, para. 8; ILC, 69th Session, 1983, *Record of Proceedings*, 31/40; ILC, 71st Session (1985), *Record of Proceedings*, 30/5, para. 25.

[126] ILC, 63rd Session, 1977, *Summary of Reports on Ratified Conventions*, Report III (Part 1), General Report, para. 32.

[127] ILC, 73rd Session, 1987, *Summary of Reports*, Report III (Parts 1, 2 and 3), para. 21.

[128] ILC, 73rd Session, 1987, *Record of Proceedings*, 24/6, para. 26.

[129] ILC, 73rd Session, 1987, *Record of Proceedings*, 24/6, para. 27.

[130] ILC, 76th Session, 1989, *Record of Proceedings*, 26/6, para. 21.

> it has to consider and express its views on the legal scope and meaning of certain provisions of these Conventions, where appropriate, in order to fulfil the mandate with which it has been entrusted of supervising the application of ratified Conventions. The examination of the meaning of the provisions of Conventions is necessarily an integral part of the function of evaluating and assessing the application and implementation of Conventions. …
>
> [T]he Committee reiterates that it constantly and consistently bears in mind all the different methods of interpreting treaties recognized under international public law, and in particular under the Vienna Convention on the Law of Treaties, 1969. In particular, the Committee has always paid due regard to the textual meaning of the words in light of the Convention's purpose and object as provided for by Article 31 of the Vienna Convention, giving equal consideration to the two authentic languages of ILO Conventions, namely the English and French versions (Article 33 of the Vienna Convention). In addition, and in accordance with Articles 5 and 32 of the Vienna Convention, the Committee takes into account the Organization's practice of examining the preparatory work leading to the adoption of the Convention. This is especially important for ILO Conventions in view of the tripartite nature of the Organization and the role that the tripartite constituents play in standard setting. [131]

II.2.2. Interpretative functions of ILO supervisory bodies and secretariat

84. Without recourse to the International Court of Justice under article 37 of the Constitution, the ILO supervisory bodies, and even the International Labour Office, the Organization's secretariat, have occasionally exercised what might be called "interpretative functions". In the case of the supervisory organs, interpretation is incidental to the exercise of their responsibilities for monitoring the application of ratified Conventions, whereas in the case of informal opinions of the Office, interpretative explanations are normally sought by governments, usually prior to the ratification of a Convention. As the Office noted in a 1993 report, an interpretation machinery "has developed in parallel to fill the gaps … which to a certain extent makes it possible to settle day-to-day difficulties without having to go through the complex procedure of requesting an advisory opinion of the Court". [132]

85. The interpretative pronouncements of supervisory bodies are invariably based on the premise that a degree of interpretation is inherent in any function responsible for monitoring compliance. As stated above, the Committee of Experts has noted that monitoring the application of ratified Conventions "logically and inevitably requires an assessment, which in turn involves a degree of interpretation of both the national legislation and the text of the Convention". [133] The pronouncements of supervisory organs, such as the Committee of Experts or a Commission of Inquiry, carry considerable moral force due to the stature of their members and the quasi-judicial nature of their function. They may vary from practical guidance seeking to clarify the meaning of abstract terms and flexibility clauses to dynamic interpretation of key provisions of Conventions. [134]

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[131] ILC, 100th Session, 2011, *Report of the Committee of Experts on the Application of Conventions and Recommendations,* Report III (Part 1A), paras 10–12.

[132] GB.256/SC/2/2, para. 10. However, as the same report concludes, despite the "rare degree of diversity and richness" of the different types of interpretation machinery, "none of them meets all the conditions necessary to enable it to provide a definitive settlement of controversies concerning the meaning to be given to the provisions of a Convention" (para. 33).

[133] ILC, 102nd Session, 2013, Report III (Part 1A), para. 33.

[134] See Claire La Hovary, "The ILO's supervisory bodies' 'soft law jurisprudence'" in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law,* 2015, pp. 316–328.

86. Examples of such guidance include the explanations of the Committee of Experts of the meaning of “substantial equivalence” under Article 2(a) of Convention No. 147, [135] its clarification of the concept of “consultation” in Convention No. 169, [136] and its guidance on the conditions under which labour of prisoners in private prisons may be compatible with Convention No. 29. [137] Further examples include the finding of the Commission of Inquiry concerning Myanmar that the prohibition of forced labour had become a peremptory norm in international law, [138] and the conclusion of a tripartite committee examining an article 24 representation as to what should be understood by “reasonable duration” under Article 2(2) of Convention No. 158. [139]

87. The views and findings of ILO supervisory bodies have been directly invoked by international courts. For example, the European Court of Human Rights considered that “in defining the meaning of terms and notions in the text of the [Convention for the Protection of Human Rights and Fundamental Freedoms], [it] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values” [140] and has taken into account the position of the ILO supervisory mechanism regarding the right to strike. [141] Concerning the disclaimer included in the reports of the Committee of Experts, the European Court of Human Rights “[did] not consider that this clarification requires it to reconsider this body’s role as a point of reference and guidance for the interpretation of certain provisions of the Convention”. [142]

88. Similarly, the Inter-American Court of Human Rights has stated that it would take into consideration, in its interpretation of the American Convention on Human Rights, additional sources of international law, “as well as opinions and recommendations from the ILO Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations, to develop a harmonious interpretation of international obligations established under these [international instruments of labor law]”. [143] Observations of the Committee of Experts have also been used by different human rights treaty bodies [144]

[135] ILC, 77th Session, 1990, *Labour standards on merchant ships: General Survey of the Reports on the Merchant Shipping (Minimum Standards) Convention (No. 147) and the Merchant Shipping (Improvement of Standards) Recommendation (No. 155), 1976*, Report III (Part 4B), paras 65–79.

[136] ILC, 100th Session, 2011, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), pp. 783–788.

[137] ILC, 89th Session, 2001, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), paras 82–146.

[138] ILO, *Official Bulletin*, Vol. LXXXI, 1998, Series B, Special Supplement, para. 203.

[139] ILO, GB.300/20/6, paras 65–72.

[140] *Demir and Baykara v. Turkey, Judgment*, 12 November 2008, para. 85.

[141] *Enerji Yapi-Yol Sen v. Turkey, Judgment*, 21 April 2009, para. 24.

[142] *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, Judgment, 8 April 2014, para. 97.

[143] Inter-American Court of Human Rights, Advisory Opinion OC-27/21, *Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and their Relation to other Rights, with a Gender Perspective*, 5 May 2021, paras 52, 98. See also *Former Employees of the Judiciary v. Guatemala*, Judgment of 17 November 2021, (Preliminary Objections, Merits and Reparations), paras 107, 109.

[144] United Nations Human Rights Committee, *Views*, 31 October 2005, CCPR/C/85/D/1036/2001, paras 4.7 and 4.8; United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 27 April 2016, E/C.12/GC/23, para. 19, footnote 15.

and National Contact Points for the OECD Guidelines for Multinational Enterprises, [145] while views of the Committee on Freedom of Association have been used by arbitrators, among others. [146]

89. Informal opinions have always been considered part of the administrative assistance that Member States may receive from the Office, subject to the understanding that the Constitution does not confer upon the secretariat any special competence to interpret international labour Conventions. [147] As such, informal opinions have no binding legal effect and are without prejudice to the views of the ILO supervisory bodies. [148] Until 2002, a total of 147 unofficial interpretations by the Office were communicated to the Governing Body and published in the *Official Bulletin*, but this practice has since been discontinued. Informal opinions of the Office have sometimes been taken into account or confirmed by the Committee of Experts. [149]

II.2.3. Implied powers of human rights monitoring bodies: A broader debate

90. The dispute over the interpretative powers of the ILO Committee of Experts is reminiscent of a much broader debate concerning the supervision of international human rights law, and in particular the role and function of the UN human rights treaty bodies.

91. At present, there are ten international human rights treaty bodies (committees) tasked with monitoring compliance with their respective treaties. These committees are composed of independent experts and are responsible for examining reports from States parties and adopting “General Comments” and country-specific “Views”. The General Comments of the committees that monitor compliance with the two international covenants on human rights – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – have given rise to highly diverging views on their legitimacy. In the relevant literature, some authors consider that the committees’ authority is part of their inherent competence, or “implied powers”, in accordance with the dictum of the

[145] See, for instance, Norwegian National Contact Point, *Norwegian United Federation of Trade Unions (Fellesforbundet) v. Kongsberg Automotive*, Final Statement, 28 May 2009; French National Contact Point, *SHERPA and European Centre for Constitutional and Human Rights v. Devcot*, Final Statement, 21 September 2012.

[146] See, for instance, Arbitral Panel Established Pursuant to Chapter Twenty of the Dominican Republic–Central America–United States Free Trade Agreement in the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Final Report, 14 June 2017, para. 427; Report of the Panel of Experts: Proceeding constituted under article 13.15 of the EU–Korea Free Trade Agreement, 20 January 2021, para. 138.

[147] See C.W. Jenks, “The interpretation of international labour Conventions by the International Labour Office”, *British Yearbook of International Law*, 20, 1939, pp. 132–141; C.H. Dillon, *International Labor Conventions – Their Interpretation and Revision,* 1942, pp.135–149.

[148] It has been argued, however, that continuous, unchallenged practice has established the Office as the principal organ for rendering authoritative opinions concerning the interpretation of international labour standards and that those opinions, once communicated to the Governing Body and published in the Official Bulletin, are tacitly accepted and presumed binding; see J.F. McMahon, “The legislative techniques of the International Labour Organisation”, *British Yearbook of International Law*, 41, 1965–66, pp. 90, 99; E. Osieke, *Constitutional Law and Practice in the International Labour Organisation*, 1985, pp. 207–210. The practice was reviewed on two occasions, with a view to enhancing the formality of Office interpretations, including through the approval of the Governing Body, but no change was introduced; see *Minutes of the Ninth Session of the Governing Body*, October 1921, p. 309, and *Minutes of the 57th Session of the Governing Body*, April 1932, p. 345.

[149] One recent example is the Committee of Experts’ general observation, published in 2019, that under the Maritime Labour Convention, 2006, as amended, a seafarer’s continuous shipboard service without leave may not exceed 11 months, which draws upon an informal opinion provided by the Office in 2016. See also ILC, 87th Session, 1999, *General Survey on the reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975*, Report III(Part 1B), para. 168; ILC, 93rd Session, 2005, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), p. 387; ILC, 97th Session, 2008, *General Survey concerning the Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and Recommendation (No. 84)*, Report III(Part 1B), para. 70.

International Court of Justice in the *Reparations for Injuries* case of 1949, while critics regard General Comments as an attempt to attribute to treaty provisions a meaning which they do not have. [150]

92. An important aspect of this debate concerns the limits of "functional" interpretation, that is, any interpretation exercise necessary for the meaningful discharge of supervisory responsibilities, or, in other words, tracing the boundaries between interpretation *stricto sensu* and law-making through interpretation. [151] This aspect is gaining in importance as international and domestic courts are increasingly referencing the pronouncements of expert bodies, often according them determinative legal weight. [152]

III. The question(s) to be put to the Court

93. As indicated above, the last time the ILO considered in detail the procedure for referring the dispute to the International Court of Justice for an advisory opinion was in November 2014. The document submitted to the Governing Body at that time noted:

> There are clearly two questions that dominate the relevant discussions: (1) the substantive question as to whether the Convention concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87), can be interpreted as protecting the right to strike; and (2) whether the Committee of Experts' mandate gives it the authority to make such interpretations and, if so, whether such interpretations can go beyond general principles by specifying certain details regarding the application of the principle. It would appear that both of those questions need to be answered to settle the current dispute and create the legal certainty necessary for the supervisory system to fully function again. [153]

[150] The extensive literature on the subject includes: Dinah Shelton, "The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies" in *Coexistence, Cooperation and Solidarity*, 2012; Philip Alston, "The Historical Origins of the Concept of 'General Comments' in Human Rights Law", in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality,* Liber amicorum *Georges Abi-Saab*, pp. 763–776; Laurence R. Helfer, "Pushback Against Supervisory Systems: Lessons for the ILO from International Human Rights Institutions" in George P. Politakis, Tomi Kohiyama, Thomas Lieby (eds), *ILO100: Law for Social Justice*, pp. 257–278; Linos-Alexandre Sicilianos, "Le dialogue entre la Cour européenne des droits de l'homme et les autres organes internationaux, juridictionnels et quasi-juridictionnels" in Linos-Alexandre Sicilianos, Iulia A. Motoc, Róbert Spanó, Roberto Chenal (eds), *Intersecting Views on National and International Human Rights Protection*, Liber amicorum *Guido Raimondi*, 2019, pp. 871–893; Helen Keller and Leena Grover, "General Comments of the Human Rights Committee and their legitimacy" in Helen Keller, Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy*, 2012, pp. 116–133.

[151] It has been observed that, while there are limits marking the difference between norm interpretation and norm creation that need to be respected, "international human rights law is formulated invariably as principles and general norms, which necessarily require further development when applying them to specific circumstances. Thus it is inherent in the interpreter's task to elaborate, detail, and develop the norm."; Cecilia Median, "The role of international tribunals: Law-making or creative interpretation?" in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law,* 2013, p. 651. For others, "disregard for rules of interpretation raises the question of where a committee draws the line between interpreting a treaty and developing new law for which it does not have a mandate. Although playing a general promotional role is part of a treaty body's overall mandate …, a conflation of the promotion and the interpretation of rights and obligations endangers the credibility and significance of the treaty body monitoring system, which depends on the persuasiveness of its output." Kerstin Mechlem, "Treaty Bodies and the Interpretation of Human Rights", in *Vanderbilt Journal of Transnational Law* 42(3) (2009): 946.

[152] For more on the use of treaty body findings by international courts and tribunals, see International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies,* 2004, pp. 29–38. The International Law Commission has found that expert pronouncements could be considered as subsequent agreement or subsequent practice within the meaning of article 31(3) of the Vienna Convention on the Law of Treaties, as judicial decisions or teachings for the purpose of identifying customary international law, or as subsidiary means for the determination of rules of international law; see International Law Commission, Draft conclusions on identification of customary international law, with commentaries, 2018; International Law Commission, *First report on subsidiary means for the determination of rules of international law*, 13 February 2023, A/CN.4/760.

[153] GB.322/INS/5, para. 49.

94. These key aspects of the interpretation dispute do not appear to have changed substantially over the past ten years. Indeed, the proposed questions in the referral request presented by the Workers' group on 12 July 2023 retain the same wording of those proposed for the purposes of the Governing Body's discussion in November 2014:

    1. Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?
    2. Was the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the ILO competent to:
        (a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and
        (b) in examining the application of that Convention, specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?

95. Recent position statements of the Workers' and Employers' groups seem to confirm that the contentious issues remain the same. For instance, at the March 2023 session of the Governing Body, the Worker spokesperson affirmed that "[t]here was currently only one serious and persistent problem of interpretation within the Organization, namely on Convention No. 87, in relation to the right to strike, and the competence of the Committee of Experts to provide guidance on the matter", [154] while the Employer spokesperson declared that her group's objective was "to ensure that the Committee of Experts did not create new obligations beyond those intended by the tripartite constituents at the Conference. The Committee of Experts should refer difficult questions or gaps in a Convention to the constituents for them to resolve; its failure to do so in the case of the right to strike had led to the current dispute". [155]

96. Without prejudice to the Governing Body's decision on the question or questions to be put to the Court, a number of observations may be made at this juncture. First, from a procedural point of view, the question must be legal in nature and must have arisen within the sphere of competence of the Organization. As the Court has noted, questions framed in terms of law and raising problems of international law are by their very nature susceptible of a reply based on law and are questions of a legal character. [156] The case law of the Court confirms that the term "legal question" is not to be interpreted narrowly and that the Court may give an advisory opinion on any legal question, whether abstract [157] or even purely academic or historical. [158] To date, there has been only one case in which the Court has declined to give the requested opinion, on the ground that the question fell outside the competence of the organization concerned and that, therefore, "an essential condition of founding its jurisdiction in the present case [was] absent". [159]

97. Second, the question needs to capture the different aspects of the dispute concisely and directly. The Court has taken the view that a lack of clarity in the drafting of a question does

[154] GB.347/PV(Rev.), para. 238.

[155] GB.347/PV(Rev.), para. 230.

[156] *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion, ICJ Reports 1996*, para. 13, citing *Western Sahara*, *Advisory Opinion, ICJ Reports 1975*, para. 15.

[157] *Admission of a State to the United Nations*, *Advisory Opinion, ICJ Reports 1948*, p. 61.

[158] *Western Sahara,* paras 18–19.

[159] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *Advisory Opinion, ICJ Reports 1996*, para. 31.

not deprive it of jurisdiction and has recalled, in this respect, that it has often been required to broaden, interpret and even reformulate the questions put. [160]

98. Third, the fact that a referral may be politically motivated is not in itself an obstacle to the Court's jurisdiction. The Court has observed on several occasions that "the fact that a legal question also has political aspects (as, in the nature of things, is the case with so many questions that arise in international life) does not suffice to deprive it of its character as a 'legal question'". [161] It has also considered that "the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction". [162] The Court has even taken the view that "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate". [163]

99. Fourth, while the Court may, at its discretion, decline to reply to a question put to it for reasons of judicial propriety, it has noted that it is mindful that its answer to a request for an advisory opinion represents its participation in the activities of the organization, and that it should not, in principle, refuse to give an advisory opinion unless compelling reasons dictate otherwise. [164] In recent cases, the Court has not accepted as a compelling reason any of the arguments supporting the view that the Court should decline to give an advisory opinion. For instance, the Court has dismissed arguments concerning the motives behind the request; the vague or abstract nature of the question asked; and the fact that the opinion might adversely affect ongoing negotiations, could impede a negotiated solution, or would lack any useful purpose.

IV. Possible next steps

100. The advisory jurisdiction of the Court is open to those specialized agencies authorized to this effect by the United Nations General Assembly. This includes the ILO, which received such authorization under article IX(2) of the 1946 Agreement between the United Nations and the International Labour Organization. The question put to the Court must be legal in nature, directly related to the activities of the organization and refer to issues falling within its sphere of competence.

101. As has been explained on previous occasions, advisory proceedings are initiated by a request for an advisory opinion, which has to be made in writing and transmitted to the Court. [165] According to article 65(2) of the Statute of the Court, "[q]uestions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and

[160] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, ICJ Reports 2004*, para. 38; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion, ICJ Reports 2010*, para. 50.

[161] *Threat or Use of Nuclear Weapons*, para. 13; *Wall*, 2004, para. 41; *Kosovo*, 2010, para. 27.

[162] *Threat or Use of Nuclear Weapons*, para. 13.

[163] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *Advisory Opinion, ICJ Reports 1980*, para. 33.

[164] *Threat or Use of Nuclear Weapons*, para. 14; *Wall*, 2004, para. 44.

[165] ILO, GB.322/INS/5, paras 14–15 and GB.347/INS/5, para. 10. General information on the advisory jurisdiction of the International Court of Justice can be found in *The International Court of Justice: Handbook*, 2019, pp. 81–93, and the Registry's Note for States and international organizations on the procedure followed by the Court in advisory proceedings. See also Khawar Qureshi, Catriona Nicol and Joseph Dyke, *Advisory Opinions of the International Court of Justice*, 2018; Hugh Thirlway, "Advisory Opinions" in *Max Planck Encyclopedia of Public International Law*, 2006.

accompanied by all documents likely to throw light upon the question”. [166] To date, all requests submitted to the Court have taken the form of a formal resolution adopted by the competent organ of the requesting organization. These resolutions follow a common pattern consisting of preambular paragraphs providing the context of the problem on which advice is sought, followed by the question or questions to be answered by the Court. [167]

102. Accordingly, if the Governing Body decides to proceed with the request for an advisory opinion, it would need to adopt in the normal manner – either by consensus or by a majority vote – a resolution formally submitting to the International Court of Justice the legal question or questions on which its authoritative guidance is requested. A draft Governing Body resolution is included in Annex I. The request would be addressed to the Court by the Governing Body pursuant to the 1949 resolution authorizing the Governing Body to request advisory opinions of the Court on legal questions arising within the scope of the activities of the Organization. [168]

103. Participation in advisory proceedings consists in submitting written statements and, if the Court decides to hold hearings, presenting oral arguments. The Court is prepared to expedite the advisory proceedings in accordance with Article 103 of the Rules of Court, if expressly requested to do so. In deciding which States, international organizations or other entities should be invited to participate in advisory proceedings under article 66(2) of its Statute, the Court seeks to ensure that all actors likely to provide information that may not otherwise be available to the Court are involved in the proceedings. Adopting a pragmatic approach, the Court is prepared to accept the participation of actors other than intergovernmental organizations and States, if this is in the interest of obtaining the most accurate and factual information possible or if the special circumstances of the case necessitate it. Requests for advisory opinions carry very limited costs (document reproduction and mission costs for participation in any oral proceedings), as the expenses of the Court are borne by the United Nations.

104. In the event that the matter is referred to the International Court of Justice, it would be the seventh time that the Organization has had recourse to the procedure provided for in article 37(1) of the Constitution with a view to resolving an interpretation dispute and the second time that an advisory opinion has been requested with respect to the interpretation of a Convention. A summary of the six requests made to the Permanent Court of International Justice under article 14 of the Covenant of the League of Nations in the period 1922–32 is in included in Annex II. A graphic representation of the advisory procedure before the International Court of Justice is included in Annex III.

[166] According to Rule 104, the documents, or dossier, must be transmitted to the Court at the same time as the request or as soon as possible thereafter, in the number of copies required by the Registry. The Court is not officially seized of the case until the transmission letter is received by the Registry.

[167] From 1948 to 2022, the International Court of Justice rendered a total of 27 advisory opinions in response to requests submitted by the United Nations and four specialized agencies: the United Nations Educational, Scientific and Cultural Organization; the International Maritime Organization; the World Health Organization and the International Fund for Agricultural Development. The full text of all advisory opinions is available at https://icj-cij.org/decisions. The most recent request for an advisory opinion was made by the United Nations General Assembly through resolution 77/276 of 29 March 2023, which was transmitted to the President of the Court by letter of the United Nations Secretary-General dated 12 April 2023.

[168] ILC, 32nd Session, 1949, Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions.

V. Concluding observations

105. As indicated in the introduction, the purpose of the present report is not to address the substance of the dispute, but merely to set out the various aspects of it, with a view to assisting constituents in making an informed decision as to whether, on account of the institutional importance of the question, a referral to the International Court of Justice for an advisory opinion in accordance with article 37(1) of the Constitution is warranted. In the light of the preceding analysis, a number of concluding observations may be made:

(a) There is a serious and persistent disagreement within the ILO’s tripartite constituency concerning the interpretation of Convention No. 87 with respect to the right to strike, and as a result, legal uncertainty prevails in this respect. Constituents’ positions are entrenched and there are no prospects for convergence.

(b) The long-standing dispute may be summed up in two questions: whether Convention No. 87 may be interpreted as recognizing or protecting the right to strike; and whether, and to what extent, the Committee of Experts may, in the discharge of its supervisory functions, engage in incidental interpretation of Convention No. 87, in particular regarding the permissible conditions for the exercise of the right to strike.

(c) Both questions are legal in nature, are directly related to the activities of the Organization and refer to issues falling within its sphere of competence.

(d) Authoritative guidance may be requested from the International Court of Justice on both questions, under article 37(1) of the ILO Constitution and article IX(2) of the Agreement between the United Nations and the International Labour Organization. The authoritative legal answers of the Court could have implications beyond the ILO, as they would address questions such as treaty interpretation and the system of monitoring of compliance with international human rights instruments.

(e) The request for an advisory opinion may be validly addressed to the Court by the Governing Body pursuant to the delegated authority it has received from the Conference.

(f) In considering a possible referral, constituents may wish to pay particular attention to:

(i) the advantages and disadvantages of maintaining the status quo;

(ii) the impact of the current state of affairs on the supervisory system;

(iii) the prospect for ensuring legal certainty through judicial settlement;

(iv) the potential for the governments of all Member States and for the secretariats of the two non-governmental groups to participate fully and autonomously in the advisory proceedings of the Court;

(v) the significance of having recourse to article 37 of the Constitution some 90 years after having last done so, in particular having regard to governance and the principle of the rule of law.

Annex I

Draft Governing Body resolution

The Governing Body,

Conscious that there is serious and persistent disagreement within the tripartite constituency of the International Labour Organization (ILO) on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), with respect to the right to strike,

Recalling that at the origin of the dispute is a disagreement among the Organization's tripartite constituents concerning the long-standing position of the Committee of Experts on the Application of Conventions and Recommendations that the right to strike is protected under Convention No. 87, and whether the Committee of Experts has exceeded its authority in taking such a position,

Noting that not only the Committee of Experts but also the tripartite Committee on Freedom of Association have maintained the view that the right to strike is a corollary to the fundamental right to freedom of association, and that the findings of these supervisory bodies have been widely echoed in judgments of international human rights courts,

Seriously concerned about the implications that this dispute has on the functioning of the ILO's supervisory machinery and the credibility of its system of standards,

Affirming the necessity of resolving the dispute definitively and restoring legal certainty in accordance with the Organization's constitutional theory and practice,

Recalling that under article 37, paragraph 1, of the ILO Constitution, "[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice",

Convinced that seeking the Court's authoritative legal guidance is the only viable option available, since attempts to reach a generally acceptable understanding through tripartite dialogue have failed,

Acknowledging the final and binding nature of any advisory opinion so obtained,

Expressing the hope that, in view of the ILO's unique tripartite structure, not only the governments of ILO Member States but also the international employers' and workers' organizations enjoying general consultative status in the ILO would be invited to participate directly and on an equal footing in the written proceedings and any oral proceedings before the Court,

1. Decides, in accordance with article 96, paragraph 2, of the Charter of the United Nations; article 37, paragraph 1, of the Constitution of the International Labour Organization; article IX, paragraph 2, of the Agreement between the United Nations and the International Labour Organization, approved by resolution 50(I) of the General Assembly of the United Nations on 14 December 1946; and the Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions, adopted by the International Labour Conference on 27 June 1949, to request the International Court of Justice to render urgently an advisory opinion on the following questions:

[1. Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?

2. 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), and

(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?]

2. Instructs the Director-General to:

(a) transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the questions, in accordance with article 65, paragraph 2, of the Statute of the Court;

(b) respectfully request that the International Court of Justice allow for the participation in the advisory proceedings of the employers' and workers' organizations that enjoy general consultative status with the ILO;

(c) respectfully request that the International Court of Justice consider possible steps to accelerate the procedure, in accordance with Article 103 of the Rules of Court, so as to render an urgent answer to this request;

(d) inform the United Nations Economic and Social Council of this request, as required under article IX, paragraph 4, of the Agreement between the United Nations and the International Labour Organization, 1946.

Annex II

Interpretation requests filed with the Permanent Court of International Justice (1922–32) under article 14 of the Covenant of the League of Nations

1. Designation of the Workers' delegate for the Netherlands at the third session of the International Labour Conference

Advisory opinion of 31 July 1922

Request introduced by a Conference resolution of 18 November 1921.

Referral decided by unanimous Governing Body agreement (January 1922).

Duration of proceedings: 2.5 months (from 22 May to 31 July 1922).

Three international organizations were invited to participate:

- International Association for the Legal Protection of Workers;
- International Federation of Christian Trades Unions;
- International Federation of Trades Unions.

Two organizations provided oral statements.

2. Competence of the ILO in regard to international regulation of the conditions of labour of persons employed in agriculture

Advisory opinion of 12 August 1922

Request introduced through a motion submitted by the Government of France directly to the Council of the League of Nations (January 1922).

Request discussed by the Governing Body based on an oral report from the Director, but no decision was made.

Duration of proceedings: 3 months (22 May to 12 August 1922).

Eight international organizations were invited to participate:

- International Federation of Agricultural Trades Unions;
- International League of Agricultural Associations;
- International Agricultural Commission;
- International Federation of Christian Unions of Landworkers;
- International Federation of Land-workers;
- International Institute of Agriculture;
- International Federation of Trades Unions;
- International Association for the Legal Protection of Workers.

Several organizations submitted written statements and also participated in the oral proceedings.

3. Competence of the ILO to examine proposals for the organization and development of the methods of agricultural production

Advisory opinion of 12 August 1922

Request introduced by the Government of France through a letter addressed directly to the Secretary-General of the League of Nations on 13 June 1922.

The Office submitted a report to the Governing Body (July 1922) but there was no discussion or decision.

Duration of proceedings: 24 days (from 18 July to 12 August 1922).

One international organization was invited to participate: the International Institute of Agriculture, which sent a separate communication.

4. Competence of the ILO to regulate, incidentally, the personal work of the employer

Advisory opinion of 23 July 1926

Request introduced by the Employers' group to the Governing Body through a letter of 8 January 1926.

Referral was discussed by the Governing Body and decided by vote (30th Session, January 1926).

Duration of proceedings: 4 months (from 20 March to 23 July 1926).

Three international organizations were invited to participate:

- International Organization of Industrial Employers;
- International Federation of Trades Unions;
- International Confederation of Christian Trades Unions.

Two submitted written memoranda and all three participated in the hearings.

5. Free City of Danzig and the ILO

Advisory opinion of 26 August 1930

Request introduced by the Office following a letter from the Government of Poland of 20 January 1930 requesting that the Free City of Danzig be admitted to the ILO.

Referral was discussed by the Governing Body and decided by vote (48th Session, April 1930).

Duration of proceedings: 4.5 months (from 15 April to 26 August 1930).

No international organizations were invited to participate.

6. Interpretation of the Night Work (Women) Convention, 1919 (No. 4), concerning employment of women during the night

Advisory opinion of 15 November 1932

Request introduced by the Government of the United Kingdom of Great Britain and Northern Ireland through a letter addressed to the Governing Body Chairman on 20 January 1932.

Referral was discussed by the Governing Body and decided by vote (57th Session, April 1932).

Duration of proceedings: 6 months (from 10 May to 15 November 1932).

Three international organizations were invited to participate:

- International Federation of Trades Unions;
- International Confederation of Christian Trades Unions;
- International Organization of Industrial Employers.

Two submitted written statements and also participated in the oral proceedings.

The full text of the advisory opinions of the Permanent Court of International Justice and the pleadings, oral arguments and documents submitted to the Court may be consulted on the International Court of Justice website.

Annex III

Advisory procedure before the International Court of Justice