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Avenue Louis-Casaï, 71
CH-1216 Geneva

T +41 22 929 00 00
F +41 22 929 00 01

ioe@ioe-emp.com
ioe-emp.org

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Comments to the Background report prepared by the Office titled “Action to be taken on the request of the Workers’ group and 34 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”

Table of Contents

I. Introduction	2
II. General Remarks	3
III. Understanding the long-standing dispute.....	4
IV. Employers’ Position on the Right to Strike in the Context of C87	5
V. The Core Elements of the Dispute	7
VI. The mandate of the CEACR	12
VII. The questions to be put to the Court	14
VIII. Possible next steps	14
IX. Conclusion.....	14

I. Introduction

On 31 August 2023, the ILO Director General sent to all ILO Member States, along with an invitation to provide comments before 6 October 2023, the background report prepared by the Office entitled *“Action to be taken on the request of the Workers’ group and 34 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 ILO Constitution”*.

As the secretariat of the Employers’ group in the ILO, the International Organisation of Employers (IOE) hereby provides preliminary comments on the background report. We note that a slightly revised version of the background report was published on the ILO Governing Body website on 18 September 2023 as an Appendix to a document for the 349th bis (Special) Session of the Governing Body, scheduled for 10 November 2023.¹ Furthermore, we reserve the possibility of updating and supplementing our position in the light of the second content of the background report that the Office is currently preparing for the 349th (Special) Session of the Governing Body requested by the Employers and scheduled for 11 November, as well as in light of any subsequent consultations with and feedback received from the Employers’ group and the discussions that will take place during the special meetings on 10-11 November 2023.

At the outset, the **IOE considers that the title of the background report, which refers to “34 governments” is misleading**. Article 7(8) of the Constitution² and paragraph 3.2.2 of the Standing Orders of the Governing Body,³ which the Workers’ group rely on to call for a special meeting, mean only governments represented on Governing Body. We note that the first version of the background report sent by the Office on 31 August 2023 contains in Appendix I the letters received from supporting Governments. However, the letter from the European Union (EU) and its member States, Iceland and Norway was only signed by the Permanent Representative of the EU to the United Nations (UN) in Geneva and the Permanent Representative of Spain to the UN in Geneva. There were no signatures and thus no “written requests” from other EU member States. Apart from the fact that the EU is not an ILO member State, not all the member States to the EU or EFTA countries (Iceland) are members of the

¹ ILO, [*Action to be taken on the request of the Workers’ group and 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*](#), GB.349bis/INS/1, 18 September 2023.

² [ILO Constitution](#), Article 7(8) reads “The Governing Body shall regulate its own procedure and shall fix its own times of meeting. A special meeting shall be held if a written request to that effect is made by at least sixteen of the representatives on the Governing Body.” (emphasis added)

³ ILO, [Standing Orders of the Governing Body](#), p. 34-35, para 3.2.2, reads “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.”

Government group of the Governing Body.⁴ Likewise, South Africa, which also sent a supporting letter, is not a member of the Government group of the Governing Body. The Office should have only counted those member States that are members of the Governing Body. In total, it seems **only 23 members of the Workers' and the Government groups of the Governing Body out of those that made the request for a special meeting of the Governing Body were actually entitled to do so,**⁵ not 34 as indicated in the title of the Background report or 36 as indicated in the version published on 18 September 2023.⁶

II. General Remarks

The Employers wish to the lack of objectivity and impartiality shown by the Office in preparing the background report. Although the background report states that **"its aim is not to provide substantive answers to the long-standing controversy concerning the right to strike, to assess the merits of the opposing views, or to express any views on the advisability of a referral to the Court"**,⁷ the Office partly provides a one-sided narrative that supports the referral to the ICJ.

In particular, **the background report does not reflect the views expressed by the Employers regarding the Workers' proposal in the recent letters they sent to the ILO Director General; neither are these letters attached to the background report.** There were in total seven letters received by the ILO Director General at the time the background report was sent on 31 August 2023.⁸ These letters are highly relevant in providing ILO tripartite constituents with a complete view of the various positions on this topic and align with the principles of transparency and inclusivity.

Furthermore, **the background report goes beyond providing information on the dispute, but also seeks to pre-empt the outcome of the Governing Body discussions.** This concerns in

⁴ EU member States that are GB titular members are Germany, France, Romania, Italy and Czechia, and GB deputy members are Croatia, Belgium, Croatia, Spain, Lithuania, Portugal, Sweden and Slovenia. EU member States that are not GB members are Austria, Bulgaria, Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Luxemburg, Malta, Netherlands, Poland and Slovakia.

⁵ (Undated) Response from the Office to the "Note on procedural matters regarding the inclusion of an urgent item in the agenda of the Governing Body" submitted by the IOE on 20 August 2023, p.2.

⁶ ILO, [Action to be taken on the request of the Workers' group and 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](#), GB.349bis/INS/1, 18 September 2023.

⁷ ILO, Action to be taken on the request of the Workers' group and 34 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, 31 August 2023, para 4.

⁸ ILO, Action to be taken on the request of the Workers' group and 34 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, 31 August 2023, Appendix I, which contains only the letters received by the Workers and Governments.

particular the Draft Governing Body resolution in Appendix II⁹ and the chart advisory procedure before the ICJ in Appendix IV.¹⁰ The draft resolution in Appendix II is misleading as it presents the referral of the dispute on the right to strike to the ICJ under Art 37(1) of the ILO Constitution as “*the only viable option available*” to end the dispute. In this way, the draft resolution seeks to preclude the forthcoming discussions on this contentious point. Appendices II and IV do not take into account the views that were previously expressed by the various groups, nor do they recognise that no consensus was reached during the March 2023 Governing Body session. This is totally unacceptable.

III. Understanding the long-standing dispute

The background report depicts the interpretation dispute on the right to strike as a “*dispute between the ILO Employers’ and Workers’ group, which has lasted more than 30 years*”.¹¹ However, this is not accurate as it does not provide the full picture of the long-standing dispute.

The dispute has its origin in ILO Committee of Experts on the Applications of Conventions and Recommendations (CEACR)’s broad, detailed and extensive interpretation on the right to strike in its observations on the application of C87 in its annual report. These interpretations were subsequently supported by the Workers and challenged by the Employers and some governments. The very fact that the CEACR has continued to further develop these interpretations year after year against all the concerns expressed by constituents has resulted in the ongoing dispute, which has now lasted for more than three decades.

In that regard, the influential role of the Office on the CEACR interpretations should be noted. The Office in that it prepares the drafts for the CEACR observations has ensured the continuity and consistency of the interpretations over time irrespective of changes in the composition of the CEACR.

It is clear that without the Office assisting the CEACR, the dispute between the Employers and the Workers on the right to strike would not have arisen in the first place. The Employers would recall once more that the CEACR, in line with its mandate and past practices, whenever it identifies divergences in the interpretation of Conventions could bring these divergencies

⁹ See also ILO, [Action to be taken on the request of the Workers’ group and 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](#), GB.349bis/INS/1, 18 September 2023, Annex I.

¹⁰ See also ILO, [Action to be taken on the request of the Workers’ group and 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](#), GB.349bis/INS/1, 18 September 2023, Annex III.

¹¹ ILO, [Action to be taken on the request of the Workers’ group and 34 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](#), 31 August 2023, para 7.

to the attention of the Governing Body and the International Labour Conference (ILC) so that they can take the necessary action.¹²

IV. Employers' Position on the Right to Strike in the Context of C87

It is important to clarify that the Employers recognise that the right to strike is guaranteed in most jurisdictions and that countries have established diverse ways to determine its scope and limits under national law. The Employers have also acknowledged that the right to take industrial action by workers and employers in support of their legitimate industrial interests is jointly recognised by the constituents of the ILO.¹³ Therefore, the **Employers are not challenging the right to strike at national level which is a reality. However, the Employers firmly believe and have consistently done so in the past that the right to strike is not provided for or regulated in C87 or any other ILO Convention.** The recognition and regulation of the right to strike in an ILO standard would require the implementation of a standard-setting process with all its participatory approach, its procedural guarantees and its established decision-making rules, which alone could adequately take into account the great diversity of industrial relations systems in ILO member States.

The legislative history of C87 is indisputably clear that the right to strike was not overlooked but that the tripartite constituents who were the drafters of the Convention intentionally did not include the right to strike in any implicit or explicit way. As rightly pointed out in the background report, at the time of the adoption of C87:

*"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 VII (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**".¹⁴*

While Article 37(1) of the ILO Constitution provides that any question or dispute relating to the interpretation of the Constitution or of any subsequent Convention shall be referred to the ICJ, constituents have always favoured tripartite solutions except for one occasion: In 1932, the ILO referred a dispute over the interpretation of the term "women" in Art 3 of the Night Work (Women) Convention, 1919 (No. 4) to the ICJ.

¹² ILO, *Action to be taken on the request of the Workers' group and 34 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*, 31 August 2023, paras 79 and 86.

¹³ ILO, [*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*](#), TMFAPROC/2015/2, 23 February 2015, Appendix I, p. 2.

¹⁴ ILO, *Action to be taken on the request of the Workers' group and 34 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*, 31 August 2023, para 43. See also ILO, [*Freedom of Association and Protection of the Right to Organise: Report VII*](#), ILC 31st Session, 29 June 1948, p. 87.

More importantly, the **ICJ is not the only competent body available** to provide legal certainty.¹⁵ There is also the **ILC, which is the executive body of the ILO, and which has full authority and competence** to clarify any interpretation through standard setting.

Furthermore, it is also important to highlight that **ICJ advisory opinions are inherently not legally binding**, unless when otherwise explicitly indicated.¹⁶ While Article 37(2) of the ILO Constitution indicates that *“any applicable judgement of the ICJ shall be binding upon any tribunal established in the virtue of this paragraph”*, Article 37(1) is completely silent on the legal effect of an ICJ decision.¹⁷ In other words, the binding nature of an ICJ advisory opinion is limited to any established tribunal under Art 37(2), which to date does not exist. Considering that – beyond this very marginal and theoretical exception – *“the requesting organ, agency or organization remains free to give effect to the opinion as it sees fit, or not to do so at all”*,¹⁸ **the ICJ can only provide limited legal certainty to the interpretation dispute**. Therefore, **any legal impact of ICJ advisory opinions** for the various ILO players involved in the dispute, including the possibilities of creating a legally binding effect for ILO constituents, **needs to be carefully examined and discussed in the Governing Body or the ILC**.

On the other hand, **standard setting at the ILC can provide more legal certainty** regarding possible ILO rules on the right to strike, including legal obligations on these rules upon member States that ratify the new instrument. Furthermore, only such a tripartite social dialogue-based approach in addressing the right-to-strike issue would **ensure inclusivity and democracy**, by allowing all ILO constituents to actively engage in the process; solutions would **be based on** prior research (law and practice report) and **consensus or at least a broad majority**; and outcomes adopted would be universally relevant and accepted. More importantly, this approach is entirely consistent with the mandate of the ILO and **upholds the principles of tripartism and social dialogue**.

It may be recalled that the Governing Body had a discussion in 1992 on the proposal by the Government of Colombia to place a standard-setting item concerning the right to strike on the agenda of the ILC in 1994.¹⁹ The Colombian proposal was justified in the following terms:

*“The right to strike is one of the basic safeguards of the working class. This has been recognised in the constitutions and legislation of countries having democratic systems of government, including Colombia. However, **within the International Labour Organisation itself, 72 years after its establishment, no Convention of this kind has been adopted**. ... In reality, Convention No. 87 only deals with the right of workers and employers to establish and join organisations;*

¹⁵ ILO, *Action to be taken on the request of the Workers’ group and 34 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*, 31 August 2023, para 14.

¹⁶ ICJ, [Advisory Jurisdiction](#) “Contrary to judgments, and except in rare cases where it is expressly provided that they shall have binding force (for example, as in the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America), the Court’s advisory opinions are not binding.”

¹⁷ Article 37(1), [ILO Constitution](#) “Any 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.”

¹⁸ ICJ, [How the Court Works](#).

¹⁹ ILO, [Minutes of the 253rd Session](#), GB. 253/PV(Rev.), 28 May 1992.

the right for such organisations to draw up their constitutions and rules and elect their representatives in full freedom without being liable to be dissolved or suspended by administrative authority; and their right to establish federations or confederations.”²⁰

During the 1992 discussion, a number of countries supported this proposal recognising that the right to strike was not regulated in ILO standards.

In particular, the Government member of Morocco stated:

“Since no instrument existed on the subject, there was a legal gap which had to be filled. Though the right to strike was granted to workers in a large number of countries, only a few countries had fixed the modalities of its implementation. It was essential to define the notion of the right to strike, since there was no such thing as an absolute right to strike. It was therefore important to define its limits, which concerned in particular the essential services.”²¹

Likewise, the Government member of Venezuela, justified its position by affirming that *“the relevant ILO instruments, in particular Conventions No. 87 and No. 98, made no mention of the right to strike. [...] **An international instrument on the right to strike was therefore essential.**”²²*

In this way, governments recognised that C87 does not contain the right to strike and considered possible standard setting as the natural option to address this issue.

V. The Core Elements of the Dispute

A. Neither Convention 87 nor any ILO instruments to date provide for “the right to strike”

It is important to emphasise that Employers, Workers and Governments, as well as ILO standards supervisory bodies have all acknowledged on multiple occasions that neither C87 nor any ILO instruments provide for nor intended to include “the right to strike”.

First, at the time of the drafting and adoption of C87, **the Office concluded that the right to strike would not be included in such Convention.**²³ In line with this, the Workers’ and Governments’ members of the drafting committee for the 1970 ILO Resolution concerning trade union rights and their relation to civil liberties stated that, *“while the right to strike was provided for in certain instruments adopted by other international organisations, **no ILO instrument dealt with this right and the adoption of standards on this subject should be considered by the ILO.**”²⁴*

²⁰ ILO, [Agenda of the 81st \(1994\) Session of the Conference](#), GB.253/2/3(Rev.), Appendix I, p. 21-22.

²¹ ILO, [Minutes of the 253rd Session](#), GB. 253/PV(Rev.), 28 May 1992, p. I/12- I/13.

²² ILO, [Minutes of the 253rd Session](#), GB. 253/PV(Rev.), 28 May 1992, p. I/16.

²³ ILO, [Freedom of Association and Protection of the Right to Organise: Report VII](#), ILC 31st Session, 29 June 1948, p. 87.

²⁴ ILO, [Record of Proceedings](#), ILC 54th Session, 22 June 1970, p. 580 & 583, paras 12 & 25.

Similarly, **Governments have also acknowledged that C87 does not provide for the right to strike**. For example, during the discussion of the General Survey on C87 and 98 in 1973, the **Government of Switzerland** indicated that the right to strike was not covered under C87, as shown by the preparatory work leading to its adoption.²⁵ The **Government member of Japan** also pointed out that *“there was no Convention or Recommendation or other decision of the International Labour Conference defining the extent of the right to strike in the public sector.”*²⁶ Likewise, the **Government member of Cyprus** *“considered that the position of a number of governments on this matter was that they could not relinquish the sovereignty of the State. His own conclusion was that the Convention on freedom of association was now inadequate as far as public servants were concerned and that they should be re-examined with a view to up-dating them”*.²⁷

During the discussion of the General Survey on C87 and 98 at the ILC in 1983, the **Government member of Tunisia** challenged the Committee of Experts’ interpretations regarding a right to strike in C87 stating that *“his Government was not in agreement with the Committee of Experts concerning the interpretation which the Committee had given to the concept of essential services”*.²⁸

Likewise, in 1991 Governing Body session, the **Government member of Sweden** recognised that *“Not all aspects of Conventions were entirely clear, however, and **one grey area surrounded the right to strike, which was not mentioned in Conventions Nos. 87 and 98** and had **not been covered in the preparatory work** of the International Labour Conference when it adopted them.”*²⁹

Furthermore, during the discussion in the Conference Committee on the Application of Standards (CAS) in 1986, the **Government member of the German Democratic Republic** stated *“that no mention was made of the right to strike in any of the provisions of the Convention”* and referred to the view of the CEACR that *“the prohibition of strikes was not in conformity with Article 3 of the Convention”* as a *“personal interpretation”* which as *“a method of work should be rejected”*.³⁰

The CEACR has also itself recognised that “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”.³¹ Likewise, the **Fact-Finding and Conciliation Commission** on Freedom of Association recognised this by stating that *“while in international law the right to strike is explicitly recognized in certain texts adopted at the international and regional levels, the **ILO instruments do not make such a specific reference**.”*³²

²⁵ ILO, [Record of Proceedings](#), ILC 58th Session, 22 June 1973, p. 544, para 27.

²⁶ ILO, [Record of Proceedings](#), ILC 58th Session, 22 June 1973, p. 544, para 26.

²⁷ ILO, [Record of Proceedings](#), ILC 58th Session, 22 June 1973, p. 544, para 27.

²⁸ ILO, [Record of Proceedings](#), ILC 69th Session, 17 June 1983, p. 31/13-31/14, para 62.

²⁹ ILO, [Minutes of the 251st Session](#), GB.251/PV(Rev.), 12 November 1991, p. III/8.

³⁰ ILO, [Record of Proceedings](#), ILC 72nd Session, 21 June 1986, p. 31/33.

³¹ ILO, [Freedom of association and collective bargaining](#), ILC 81st Session, 1994, p. 62, para 142.

³² ILO, *Action to be taken on the request of the Workers’ group and 34 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*, 31 August 2023, para 67.

Moreover, **the Governing Body acknowledged that C87 does not include the right to strike.** In 1956, the Governing Body decided against revising the reporting form for C87 with a view to adding specific questions on restrictions to the right to strike for public employees, precisely because it considered that C87 did not cover the right to strike.³³ To date, the reporting form for C87 does not include any question relating to the right to strike. Likewise, the ILC also made no mention of the right to strike during the 40th anniversary of the adoption of C87, given that such right does not exist in the instrument.³⁴

To sum up, it can be said that various ILO constituents and ILO bodies at different occasions have acknowledged that C87 does not expressly or impliedly include the right to strike. The background report should have provided a complete record of all the discussions that took place on the right to strike in the ILO and in relation to C87, not only at the ILC.

B. Rules of Treaty Interpretation under Vienna Convention should be fully respected

The general rules of interpretations under Articles 31 and 32 of the Vienna Convention on Law of Treaties (Vienna Convention) are explicitly clear and should be fully respected.³⁵ There is no disagreement about the applicability of the Vienna Convention to ILO Conventions, such as C87. **Other interpretation methods not recognized by the Vienna Convention should not be accepted, as they would provide legal uncertainty and ambiguity.**

1. Dynamic or evolutive interpretation

The Workers argue that “*the possibility for ‘dynamic’ interpretation*” is afforded by Article 31 of the Vienna Convention.³⁶ Article 31(1) of the Vienna Convention reads as follows “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*” It appears that Art 31(1) clearly defines the criteria for valid interpretation and that there is no room for vague concepts such as “dynamic” interpretation. In particular, to meet the criterion “the ordinary meaning to be given to the terms of the treaty”, the words “right to strike” or similar terms would have to use in C87, which is not the case.

2. Object and purpose

Second, the Workers’ group justified that dynamic interpretation is used “*insofar as it requires treaty provisions to be interpreted in light of the object and purpose of the treaty*”. However, at the time of the drafting of C87, it was indicated that “[s]everal 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”.³⁷ Furthermore, the Chairman stated clearly “**the Convention was not intended to be a ‘code of regulations’ for the right to**

³³ ILO, [Minutes of the 131st Session of the Governing Body](#), 1956, Appendix XXII, p. 188.

³⁴ ILO, [Resolutions adopted by the International Labour Conference](#), ILC 73rd Session, 1987.

³⁵ UN, [Vienna Convention on the Law of Treaties](#), 23 May 1969, Treaty Series, vol. 1155, p. 331.

³⁶ ILO, *Action to be taken on the request of the Workers’ group and 34 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*, 31 August 2023, para 10.

³⁷ ILO, [Freedom of Association and Protection of the Right to Organise: Report VII](#), ILC 31st Session, 29 June 1948, p. 87.

organise, but rather a concise statement of certain fundamental principles".³⁸ Therefore, while it is clear that the "object and purpose" of C87 was to regulate freedom of association and the right to organize, it was also explicitly stated that its "object and purpose" was not to regulate the right to strike.

3. *Subsequent agreement between the parties regarding the interpretation and subsequent practice establishing agreement of the parties regarding the interpretation*

Third, 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."*³⁹

However, neither the Preamble nor the text of the ILO Constitution and of the Declaration of Philadelphia expressly or impliedly include the right to strike, nor even the right to organise. Therefore, the Workers' argument that C87 includes the right to strike based on this "context" is unfounded and invalid.

Concerning any subsequent agreement regarding this interpretation, **the fact that several ratifying States of C87 have at different points in time stated that neither C87 nor any other ILO instrument provide for the right to strike illustrates that there is no such a general agreement**.⁴⁰

As regards possible subsequent practice establishing agreement of the parties regarding the interpretation, the ongoing non-compliance by most ratifying countries with one or more of the CEACR's interpretations on the right to strike, as reflected in the CEACR's observations on C87 in each annual report, is proof that such practice does not exist.

Furthermore, it is important to note that while CEACR observations are influential in national courts, **only 12 countries and one regional court have applied the CEACR interpretations on the right to strike in their national court decisions**.⁴¹ Given that 158 ILO member States have

³⁸ Renate Hornung-Draus, 'The Right to Strike in the ILO System of Standards: Facts and Fiction' (2018) 39 Comp Lab L & Pol'y J 531, p. 534.

³⁹ ILO, *Action to be taken on the request of the Workers' group and 34 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*, 31 August 2023, para 10.

⁴⁰ See for example Morocco, Venezuela, Germany, and Colombia, in 1992, as well as Sweden in 1991. ILO, [Minutes of the 253rd Session](#), GB. 253/PV(Rev.), 28 May 1992, p. I/12- I/13 and I/16; ILO, [Agenda of the 81st \(1994\) Session of the Conference](#), GB.253/2/3(Rev.), Appendix I, p. 21-22; ILO, [Minutes of the 251st Session](#), GB.251/PV(Rev.), 12 November 1991, p. III/8.

⁴¹ Namely Botswana, Brazil, Burkina Faso, Canada, Colombia, European Court of Human Rights, Fiji, Kenya, Nigeria, Peru, Russian Federation, Senegal and South Africa. See ITC-ILO, [Compendium of Court Decisions](#), under "right to strike".

ratified C87,⁴² application of the CEACR interpretations by 12 member States is far from representing subsequent practice establishing agreement of the parties to C87 on the interpretation regarding the right to strike.

Moreover, the Background report also notes that the Governing Body Committee on Freedom of Association and its predecessor the Fact-Finding and Conciliation Commission on Freedom of Association have affirmed that the right to strike is intrinsically linked to the principle of freedom of association and is thus protected under C87.⁴³ It is important to note that the mandate of both of these bodies is to examine alleged infringement of the principles of freedom of association and the effective recognition of the right to collective bargaining in the ILO Constitution and Declaration of Philadelphia. The mandate does not include the supervision of the application of C87.⁴⁴ Both bodies provide recommendations and conclusions that are decided on a case-by-case basis and do not form any legal precedents. **Occasional pronouncements by the Committee on Freedom of Association on the right to strike for individual countries cannot replace a proper standard-setting process, whereby the ILO tripartite constituents negotiate and decide on the content and scope of the instruments.**

Lastly, the Conference Committee on the Application of Standards (CAS) also for many years did not make any references to the “right to strike” in its conclusions on cases concerning C87 due to the disagreement on the interpretation of C87.⁴⁵

All this considered, it cannot be argued that an agreement on the interpretation of the right to strike in C87 has been established through the subsequent practice of the parties.

4. Preparatory work of treaty

Finally, the Workers argued 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*

⁴² ILO, [Ratifications of C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 \(No. 87\)](#).

⁴³ ILO, *Action to be taken on the request of the Workers’ group and 34 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*, 31 August 2023, paras 61-67.

⁴⁴ ILO, [Compilation of decisions of the Committee on Freedom of Association](#), para 1 “The Committee on Freedom of Association (CFA) is a tripartite body set up in 1951 by the Governing Body (GB) of the International Labour Organization (ILO). The CFA examines alleged infringements of the principles of freedom of association and the effective recognition of the right to collective bargaining enshrined in the Constitution of the International Labour Organization (Preamble), in the Declaration of Philadelphia and as expressed by 1970 ILC Resolution.”

⁴⁵ ILO, [Committee on the Application of Standards](#), CAN/D.1, 5 May 2023, p. 7, para 32 “The conclusions regarding individual cases are proposed by the Vice-Chairpersons and submitted by the Chairperson to the Committee for adoption. The conclusions should take due account of the elements raised in the discussion and information provided in writing by the government. The conclusions should be short, clear and specify the action expected of governments. They may also include reference to the technical assistance to be provided by the Office. The conclusions should reflect consensus recommendations. Divergent views can be reflected in the Committee’s Record of Proceedings.”

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.”⁴⁶

On this point, the Employers agree that the application of the interpretative means under Article 31 does not leave the meaning of C87 relevant provisions ambiguous or obscure nor does it lead to a result that is manifestly absurd or unreasonable. **As argued above, C87 provisions are clear as to the non-inclusion of the right to strike.**

However, it also needs clarifying that according to Article 32 of the Vienna Convention, **recourse to supplementary means of interpretation, such as preparatory works, can be made “in order to confirm the meaning resulting from the application of article 31”.**⁴⁷ This means that it will always be possible to resort to the preparatory works as a supplementary means to confirm an interpretative outcome resulting from the application of means under Article 31.

As the background report indicates, when responding to the questionnaire on the form and content of possible international regulations concerning the right to freedom of association and the right to organise, **several governments indicated that the proposed instrument should only relate to the freedom of association and not the right to strike.**⁴⁸ As a result, the Office did not include a provision on the right to strike in the draft instrument and in the discussion at the Conference the right to strike was not even mentioned. This fact confirms the interpretation under Article 31 of the Vienna Convention that C87 does not include the right to strike.

VI. The mandate of the CEACR

The mandate of the CEACR is clear. The CEACR is to “undertake 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.”⁴⁹ The ILC clarified in this regard that the CEACR “**would have no judicial capacity**

⁴⁶ ILO, *Action to be taken on the request of the Workers’ group and 34 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*, 31 August 2023, para 10.

⁴⁷ [Vienna Convention on the Law of Treaties](#), Article 32 “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

⁴⁸ ILO, [Freedom of Association and Protection of the Right to Organise: Report VII](#), ILC 31st Session, 29 June 1948, p. 67. See Netherlands and Sweden, who considered that the Convention should not be concerned with questions relating to the right to strike.

⁴⁹ ILO, [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](#), TMFAPROC/2015/2, 23 February 2015, Appendix I, p. 2.

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.⁵⁰

It is important to note that the CEACR mentioned a right to strike for the first time in its third General Survey on the subject in 1959 in only one paragraph and only with respect to public services.⁵¹ However, the CEACR over time gradually expanded its views on the matters to seven paragraphs in 1973, 25 in 1983 and with a separate chapter of no few than 44 paragraphs in 1994 and 2012, including a number of new subjects.⁵²

Most worryingly, the CEACR in paragraph 145 of its 1994 General Survey stated that “*in the absence of an expression provision on the right to strike in the basic text, **the ILO supervisory bodies have had to determine the exact scope and meaning of the Convention on this subject.***”⁵³ This statement testifies to a completely misguided and highly questionable understanding of the CEACR of its tasks. It is by no means that the CEACR has the power or even the duty to regulate by means of interpretation matters that were deliberately not regulated in an ILO Convention. **Such a competence has never been conferred on the CEACR, neither by the Governing Body nor by the ILC.**

The Government member of Denmark, who spoke on behalf of the Nordic Governments also questioned the CEACR’s self-proclaimed authority by stating 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 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.”*⁵⁴

Based on this mistaken assumption, the CEACR has provided observations on numerous cases involving specific national provisions or practices restricting strike action.⁵⁵ In approximately 90% to 98% of these cases, the experts concluded that restrictions on strike action are not compatible with C87. **The CEACR gradually built a comprehensive body of broad, extensive and detailed interpretations that provide a far-reaching, almost unrestricted freedom to strike.** The expansion of the CEACR’s interpretation on the right to strike, overtime, led to a critical situation on which the Employers needed to become progressively vocal, at least, since 1987.

Therefore, the Employers consider that **CEACR’s interpretations cannot and should not be used as the basis for determining at the international level the scope and limits of the right to strike** nor should they be used as the basis for assessing or monitoring its implementation.

⁵⁰ ILO, [Record of Proceedings](#), ILC 8th Session, 1926, Appendix V, pp. 405–407.

⁵¹ ILO, [Freedom of Association and Collective Bargaining](#), ILC 43rd Session, 1959, p. 114, para 68.

⁵² Renate Hornung-Draus, 'The Right to Strike in the ILO System of Standards: Facts and Fiction' (2018) 39 Comp Lab L & Pol'y J 531, p. 533.

⁵³ ILO, [Freedom of association and collective bargaining](#), ILC 81st Session, 1994, p. 64, para 145.

⁵⁴ ILO, [Record of Proceedings](#), ILC 78th Session, 1991 p. 24/7, para. 33.

⁵⁵ ILO, *Action to be taken on the request of the Workers’ group and 34 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*, 31 August 2023, para 60.

VII. The questions to be put to the Court

The Employers take note that the Workers' referral questions retain the same wording of those proposed for the Governing Body discussion in November 2014.⁵⁶ However, it should have been pointed out here that the first question, **whether a right to strike is part of C87, can only be decided on the basis of the rules in Articles 31 and 32 of the Vienna Convention.**

Regarding the second question on whether the CEACR was competent to specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise in the context of C87, reference should also have been made to Articles 31 and 32 of the Vienna Convention. In fact, **the CEACR has never been given an interpretative mandate that would have dispensed it from complying with the rules in the Vienna Convention.** In other words, the competence of the CEACR to make specifications on the scope, limits and the conditions of the right to strike in the context of C87 is limited by the requirements of Articles 31 and 32 of the Vienna Convention, which the Committee needs to respect in each individual case.

In any case, the two questions proposed by the Workers' Group are insufficient as, among many other points, the ICJ should also be asked to clarify the role of the ILC in relation to the CEACR and the competence of the ILC to authoritatively settle interpretation disputes through standard-setting.

VIII. Possible next steps

The Employers consider that it would be too simplistic to have just the Governing Body as the responsible body for assessing referral requests and leave aside the State Parties to the C87. We suggest that State parties to a Convention under which there is an interpretation dispute (and their respective national social partners), as they could be directly affected by an ICJ decision, should have a priority right to be involved in Art 37(1) referral decisions. This seems necessary if only to promote their acceptance of an advisory opinion of the ICJ. Therefore, in our view, **no decision to refer an interpretation dispute to the ICJ should be made unless it is based on the support of the State parties to the Convention concerned during the ILC.**

IX. Conclusion

In conclusion, the IOE appreciates the opportunity to provide its comments to the background report and its preliminary views on a possible referral for the dispute on the interpretation of C87 in relation to the right to strike to the ICJ. The Employers have been clear: **a referral to the ICJ cannot settle the dispute on the right to strike in a conclusive manner and thus does not provide for a viable way forward, as the right to strike is a multifaceted and complex issue that cannot be separated from the widely diverging industrial relations systems and**

⁵⁶ ILO, *Action to be taken on the request of the Workers' group and 34 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*, 31 August 2023, para 100.

practices in ILO Member States. It is unclear how external and judicial bodies could possibly develop a solution that would meet the diverse realities and needs of industrial relations systems in member States and thus would be widely accepted by ILO constituents.

The Employers have expressed their firm belief that **the solution to ending this dispute and achieve legal certainty should remain in the hands of the ILO's tripartite constituents.** ILO and its tripartite constituents need the necessary room for dialogue and cooperation to move closer to consensus. While the ILO Constitution provides an avenue to referral to the ICJ to resolve interpretation disputes, this does not appear to be a suitable one for the case of the right to strike. On the contrary, **standard setting on the right to strike would ensure that all ILO constituents could actively engage in the process, that any solution achieved would be based on consensus or at least a broad majority, and finally that any outcome adopted is universally relevant and accepted.**

It follows that, **referral to external and judicial bodies, the ICJ or an ILO tribunal, should not occur unless all possibilities of dialogue between the main ILO actors competent with respect to ILO standards have been exhausted,** which is not currently the case. In particular, standard setting, which in the ILO is the most developed form of social dialogue for finding common ground on labour and social issues, has never been used with regard to the right to strike.

The Employers have expressed their commitment to social dialogue and tripartism, which are the cornerstones of the ILO, and we look forward to the substantive discussions during the Governing Body special meeting that will take place on 10 and 11 November 2023.