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ITUC/Lex

6 October 2023

Re: Action to be taken on the request of the Workers' group and 36 governments to urgently refer the dispute on the interpretation of Convention 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

Dear Director General,

We refer to your letter dated 31 August 2023 addressed to all Member States of the ILO regarding the request, by the Workers' group letter of 12 July 2023, for the urgent referral of the dispute over the interpretation of ILO Convention 87 in relation to the right to strike to the International Court of Justice (ICJ) for decision in accordance with article 37(1) of the ILO Constitution.

We welcome the Office Background report, attached to your letter, as a good basis for discussion at the special meeting to be held in conjunction with the 349th Session (October-November 2023) of the Governing Body, scheduled for 10 November 2023 (as the 349th bis session).

Pursuant to your request that any comments on the Office Background report from Governments or Employers' and Workers' organizations concerned should be addressed to the Office of the Legal Advisor not later than Friday 6 October 2023, please find below the commentary of the International Trade Union Confederation (ITUC) in this regard. In addition, we also refer to the ITUC's 2014 [legal analysis](#) on the legal basis of the right to strike in international law and a Background Note (Questions and Answers) by the Workers' Group in the ILO (see attached). We also draw the attention of the Office and ILO constituents, with the permission on the authors, to the 2020 book, *The Right to Strike in International Law*¹.

We expect, in due course, that you will bring this to the attention of Governing Body and further processes in relation to this dispute.

Yours sincerely,



Luc Triangle
Acting General Secretary

¹ Jeffrey Vogt, et. al., THE RIGHT TO STRIKE IN INTERNATIONAL LAW (Hart Publishers, 2020).

Comments of the International Trade Union Confederation (ITUC) on the Office Background report regarding the request of the Workers' group to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organize 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

Introduction

This document is sent to the Office of the ILO as per the request of its Director General, in response to the background report published by the Office on 31 August 2023. The aim is to provide the perspective of the ITUC and its affiliates, representing over 191 million workers, to enable the Governing Body take a decision to refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice in accordance with article 37(1) of the ILO Constitution.

Summary of the facts and the nature of the dispute on the right to strike under ILO Convention 87

1. In 2012, the Employers' group created an institutional crisis for the ILO when it prevented the Conference Committee on the Application of Standards (CAS) from performing its institutional function. The group disrupted the CAS because it disputed the long-standing authoritative guidance of the supervisory bodies of the ILO, including the Committee of Experts on the Application of Conventions and Recommendations (CEACR/Committee of Experts), regarding the right to strike and the scope of Convention 87. Since then, the ILO, governments, and the social partners have engaged in several efforts to resolve this dispute through social dialogue. These efforts have proven unsuccessful, and there is no reason to believe that further dialogue will break this impasse.
2. The dispute and the confusion and lack of legal certainty it has created has served to undermine the proper functioning of the supervisory system² and has damaged the ILO as a whole³. Fortunately, the ILO Constitution provides an efficient and ready mechanism to resolve this legal dispute through article 37.1 in accordance with the rule of law.

² Since 2012, for example, the Conference Committee on the Application of Standards (CAS) has been unable to reach conclusions on the exercise of the right to strike and therefore not been able to provide guidance to Member States in this regard.

³ We do not here attempt to address the merits of the dispute of interpretation, but only to note that one exists, and that the ILO constitution obliges us to resort to the ICJ for an advisory opinion.

It makes clear that such disputes of interpretation must be referred to the International Court of Justice (ICJ) for an advisory opinion⁴. The ICJ, one of the principal organs of the United Nations, with its competent judges of high repute on matters of international law, is well placed to provide the ILO, and its constituents, the needed legal clarity and certainty to robustly fulfil its mandate of social justice.

3. As was indicated in a previous Office paper on the subject⁵, “Disagreement on the scope or meaning of certain provisions may arise without necessarily calling into question the validity of comments, conclusions or recommendations of the supervisory bodies or interfering with their authority to formulate such comments, conclusions or recommendations.” The current dispute regarding the right to strike under Convention 87 does not fall into such a category. As already stated, this dispute has created an institutional crisis for the ILO since 2012 by calling into question the validity of comments, conclusions and recommendations of the supervisory bodies and interfering with their authority to formulate such comments, conclusions and recommendations with respect to the right to strike and the scope of Convention 87.
4. According to article 37(1) of the ILO Constitution, when a question or dispute arises regarding the interpretation of a Convention, it is the International Court of Justice (ICJ) that has the power of final determination or settlement. Settling the legal interpretation of the scope of Convention 87 regarding the right to strike and as a result affirming the authoritative guidance of the supervisory system in this regard, including the Committee of Experts, must be prioritized as the most reasonable, efficient and effective way to proceed. No other path will provide the requisite legal clarity and certainty upon which the constituents depend, and which is necessary for the functioning of the ILO as a normative organization.
5. Other options, such as recourse to article 37(2) of the ILO constitution will not provide finality to the dispute, as an award of a tribunal under article 37(2) could nevertheless be “appealed” to the ICJ. Additionally, there is no such tribunal in existence ready to receive and determine a dispute, there is no agreement about whether or how to set up such a tribunal, and as such the process would be cumbersome and further delay resolution of the dispute. Further, where the dispute is significant, rather than merely technical, and has wider implications for the obligation of Member States within the broader supervisory system of the ILO as well as the stability of international human rights law generally, then it stands to reason that the ICJ is the best judicial forum to settle the interpretation dispute.

⁴ Noting, in line with para 104 of the Office Background report that “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”.

⁵ See para 14 of GB.343/INS/INF/5(Rev.1)

6. Any attempt to use the legislative power of the ILO (through standard setting) is also not appropriate. There is a 70-year record of expert, bipartite and tripartite conclusions and recommendations on the subject of a right to strike. The body of legal guidance resulting from this 70-year record has informed, and indeed, is embedded in the law and practice of governments, national and international courts, multilateral organizations, national, international and regional human rights bodies and has been relied upon by workers and their organizations for the defence of their rights and interests. It cannot be wished away. If the Employers group in the ILO have doubts about the legal interpretation that make up this body of legal guidance on the right to strike as a fundamental and intrinsic corollary of freedom of association and the right to organize, this should be confirmed or otherwise through an authoritative legal opinion that will provide the legal clarification and certainty for the way forward. And it is the ICJ, through an advisory opinion, that can provide such an authoritative legal clarification and certainty. Moreover, it is difficult to comprehend the idea that it will be easier to achieve consensus on a standard setting item regarding this issue than on referring the matter to the ICJ. The same opposite and mutually exclusive views on the legal scope of Convention 87 as regards the right to strike and the authoritativeness of the long standing body of legal guidance provided by the supervisory bodies, would be an obstacle to such consensus. Past attempts at addressing this issue through standard-setting have failed as was the case in 1991 when, according to the Office Background report, the Governing Body attempted to place a standard-setting item on the conference agenda on this issue “but ultimately decided against it”⁶.
7. At the heart of this interpretation dispute is the refusal by **one group only**, the Employers group, to accept that the ILO’s supervisory system has for more than 70 years found that Convention 87 protects a right to strike. It must be emphasised that this is not a dispute between the workers and employers. This dispute is arising because the Employers’ group is disputing the legal validity of the guidance of the supervisory system of the ILO regarding the right to strike and the scope of Convention 87. This is based in the long-standing view, indeed one which was held when freedom of association was included in the 1919 Constitution, that the right to strike for workers and their organizations is an a fundamental and intrinsic corollary of freedom of association and the right to organize. The right to strike is an essential trade union action or means (program and activity) by which workers and their organizations defend their interests and rights. To that extent, any measure(s) or action(s) taken in the application of Convention 87 which impairs, restricts, impedes or otherwise interferes with the exercise of the right to strike for the defence of workers’ rights and interests falls within the scope and meaning of the Convention.

⁶ See para 44 of the Office Background report and further comments with reference to this issue below.

Once within the scope of the Convention, it is subject to the normal supervision by the supervisory bodies of the ILO including the Committee of Experts, the Committee on Freedom of Association (CFA) and the Conference Committee on the Application of Standards (CAS).

8. It is worth recalling that this legal interpretation and the body of legal guidance resulting from it, has been recognized and coherently applied by the Supervisory Bodies of the ILO in a manner consistent with the legal rules for the interpretation of treaties. It has also been relied upon by ILO constitutional complaint mechanisms such as those set up under article 24 and 26 of the ILO Constitution. This intrinsic corollary between the right to strike and freedom of association has also been recognized and relied upon by the Fact-Finding and Conciliation Commissions on Freedom of Association of the ILO. Indeed, the UN and other human rights bodies have affirmed it has achieved the status of customary international law.
9. It should also be recalled that no group has questioned the existence of the right to strike as protected by the Constitution of the ILO, which is also derived from the very same legal principle of freedom of association and the right to organize. This is one basis for the supervision of the principles of freedom of association by the Committee on Freedom of Association (CFA). The basic principles of the hierarchy of norms and the need for institutional consistency and coherence in the application of legal principles (a cornerstone of the rule of law) would necessitate an equal application of this Constitutional principle regarding the right to strike within the supervisory system of the ILO and must guide its normative actions (including standard setting). In this regard, there will be legal uncertainty and confusion for any normative action of the ILO on the very same subject to not protect the same right, and to the same extent, which is agreed to be protected by the Constitution.
10. To reject this widely recognized legal interpretation and the body of legal guidance it has produced in the supervisory system of the ILO and beyond would deny workers and their organizations the protection relied on for, at least, over 70 years for the defence of their rights and interests including under Convention 87. It would also undermine the legal foundations upon which other UN organizations, regional human rights courts and the high court decisions of several Member States of the ILO have relied to interpret their own instruments and laws, all of which have understood that freedom of association protected in Convention 87 also protects the right to strike.⁷ It is upon this foundation, that an international rights-based industrial relations approach has been functioning with the ILO as its fulcrum⁸.

⁷ Id.

⁸ See the ILO 1998 Declaration “... Whereas the ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards, and enjoys universal support and acknowledgement in promoting fundamental rights at work as the expression of its constitutional principles; 9 Whereas it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application...’

Rationale for proposing recourse under article 37.1 of the ILO Constitution

11. Article 37.1 of the ILO Constitution provides:

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.

There is a dispute relating to the interpretation of a convention.

12. At the commencement of the International Labour Conference in 2012, the Employers' group spokesperson in the Committee on the Application of Standards (CAS) announced that his group would refuse to agree to a short list of cases for supervision unless the Workers' group refrained from proposing any case on Convention 87 where the Committee of Experts had made observations concerning the right to strike. In addition, the Employers' Group demanded a 'disclaimer' on the Committee of Experts' General Survey, which that year had confirmed its longstanding view that ILO Convention 87 protects the exercise of the right to strike. These two pre-conditions, which were contrary to established law and practice, were rejected by the Workers' group. In response, the Employers' Group refused to participate in the supervisory work of the CAS and, as a result, the CAS failed adopt a list of cases to examine and therefore did not examine any cases during the Conference. Since then the dispute has persisted and continues to affect the smooth function of the supervisory system.

It is a dispute for which the ICJ, and not an in-house tribunal, was meant to resolve.

13. As the INS 5 report for the 344th Session of the Governing Body explains, in the Conference discussions leading up to the 1946 constitutional amendment, the nature of questions that could be brought to the tribunal was distinguished from those which should be referred to the ICJ. While, in principle – should a tribunal be established – any question or dispute could be submitted to either body at the discretion of the Governing Body, it was generally accepted that some questions about the scope or meaning of provisions of international labour Conventions might not merit to be brought before the principal judicial organ of the UN.

Accordingly, it may be assumed that questions with broader systemic implications for the Organization and beyond could be referred to the ICJ whereas questions of a narrowly technical nature with limited repercussions outside the confines of the Convention in question could be in the first instance transmitted to the tribunal.⁹

14. The right to strike has been repeatedly defined as “an intrinsic corollary” of the fundamental right to freedom of association protected by Convention No 87.¹⁰ The interpretation dispute here relates to the *existence* of a fundamental right. This can hardly be classified as one of a narrow or technical nature. The outcome of the dispute obviously has significant implications both inside and outside of the organization. As the former Special Rapporteur on Freedom of Peaceful Assembly and Association has explained, “*The right to strike has been established in international law for decades, in global and regional instruments, and is also enshrined in the constitutions of at least 90 countries. The right to strike has, in fact, become customary international law.*”¹¹ One can imagine few disputes more consequential for the ILO and its social justice agenda and for the world of work than this one.

15. Setting aside the obvious fact that no such tribunal exists, such a dispute would not be properly lodged there even if it did. Any suggestion that the current dispute should be allowed to continue for the several years necessary to agree to the modalities of an in-house tribunal and then submit the dispute there, though may be proposed in good faith, are wholly without merit. And, as we have seen, there is currently no consensus that such a tribunal should be established and its award final. On the contrary, faced with such an interpretation question of a legal nature which will impact the exercise of a fundamental right and the smooth functioning of the supervisory system of the ILO and beyond, the most prudent and appropriate recourse for settlement is by means of article 37.1. Article 37.1, in stating that a dispute “shall be referred” to the ICJ, creates a direct legal obligation to refer this dispute over the interpretation of a convention¹².

⁹ ILO, *Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty and information on other action points in the work plan*, 16 Feb 2022 (GB344/INS/5), para 41.

¹⁰ ILO, *Compilation of decisions of the Committee on Freedom of Association* (Geneva, 6th edition, 2018), para 754.

¹¹ Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, para. 56, U.N. Doc. A/71/385 (Sept. 14, 2016).

¹² See para 21 of GB.343/INS/INF/5(Rev.1)

The dispute will not be resolved by other means

A. Further Dialogue Will Not Resolve the Matter

16. As already stated above, since 2012 in particular, the ILO, governments, and the social partners have engaged in several efforts to resolve their differences through social dialogue (refer to the Background Note (Question and Answer) by the Workers' group), specifically with regard to the right to strike, as well as the mandate and functioning of the various bodies of the ILO supervisory system. These efforts have not resolved the issue concerning the right to strike. There is no reason to believe that further social dialogue will break this impasse. Standard setting would be inappropriate and in any case will also not resolve this dispute, as the legal basis of any such standard setting activity would still have to be based on the existing body of legal guidance by the supervisory system which the Employers' group fundamentally opposes. The employers' group continue to challenge the position of the Committee of Experts with regard to Convention 87 (and indeed now other conventions).
17. It is clear, from all the efforts so far, including the 2015 tripartite meeting on the right to strike, that the nature of the dispute is not amenable to dialogue as the primary and first means for its full and final settlement and that, unless the Employers' group recognizes the widely held legal interpretation and principle regarding the fundamental link between the right to strike and freedom of association and right to organize and their protection under Convention 87 as well as the authoritativeness of the body of legal guidance of the supervisory bodies including the CEACR, legal clarity and certainty by recourse to article 37(1) will of necessity be required¹³.
18. Also, it is important to recall the discussion in the GB of March 2022 and its outcomes. There was a general understanding of the correctness of the analysis in the Office paper that the only way to provide for legal certainty when it comes to the interpretation of a Convention (or the Constitution itself) is through judicial means, i.e. through article 37 (para 1 or para 2) of the Constitution, and that social dialogue cannot provide for that.

¹³ The Office Background report mentions in para 15 the "firm and uncompromising positions".

Alternatives Suggested by the Employers Group are Not Appropriate

19. On repeated occasions, the Employers' group has suggested that the dispute should be discussed at the International Labour Conference, and that the Conference could provide an interpretation of Convention 87, or otherwise produce guidelines.¹⁴ This idea however has no constitutional basis and in practice will not provide the legal certainty required to settle this legal dispute.

20. The question as to whether the Conference was best placed to both adopt and interpret conventions was discussed in a report submitted by the ILO to the Governing Body in 1993. The report noted that no conference can bind another. The report also questioned whether interpretation by the Conference could result in a 'clandestine modification of meaning'. The report concluded that 'an interpretation by the Conference, if it is to be perfectly legitimate, should logically be recast – that is, through a revision'.¹⁵ This is to say, if the Conference does not like how an instrument has been interpreted, it is free to amend that instrument through its legislative function. Thus, the Conference has the right to revise conventions to express exact meanings, subject to ratification of the revised instruments. The paper goes on to discuss that the process for revision was set up more for adapting conventions to new situations (modernizing) rather than to address views on differences of interpretation.¹⁶

21. Indeed, the legislative power of the Conference should be used prospectively to address gaps in coverage and protection of workers and not retrospectively to limit already elaborated rights being exercised by workers. It is important to recall, that prior to and since 2012, the Supervisory system, the Government group and the Workers group have been on the side of supporting the long standing authoritative guidance of the CEACR and the supervisory bodies regarding this issue and the Employers' group are the only group still challenging the fundamental legal validity of this body of legal guidance. There is therefore no role for the Conference in this regard.

¹⁴ ILO, Draft minutes of the Institutional Section, 347th Session, Geneva, March 2023, paras 228-29.

¹⁵ ILO, Article 37, Paragraph 2, of the Constitution and the Interpretation of International Labour Conventions, Governing Body, 256th Session, May 1993, GB256/2/2, paras 22-4.

¹⁶ A 2009 GB paper in para 31-33 restates the 1993 paper.

22. The Employers group has recently – in its letter of 13 September to the Chair of the Governing Body asking to organize a special meeting of the GB to discuss this - proposed the discussion and adoption of a protocol as an alternative means of addressing the interpretation dispute. For all the reasons provided already regarding the fundamental legal nature of the dispute and the primary need for legal clarification and certainty in the first instance, any effort to use the legislative power of the Conference to resolve this dispute will lead to more division and confusion regarding the legal obligations of Member States and constituents under Convention 87, taking also into account that the legal views and perspectives on the subject matter are diametrically opposite, mutually exclusive and irreconcilable, so there cannot be any expectation of easier consensus on such a legislative exercise.¹⁷
23. This is not the place to specifically address the Employers' group request for a special meeting which has been scheduled¹⁸, save to repeat that standard setting (and by way of a protocol which will require new ratifications) will be a fruitless exercise in this regard as it is not clear at all how a protocol on the right to strike could take out from the scope of Convention 87 (concerning freedom of association and the right to organize) measures taken by Member States which impact the exercise of the right to strike as a means (action/activity/program) by which workers or their organizations defend or further their interests and rights. It is only the interpretation of Convention 87, with fidelity to the meaning of its text, object and purpose, in line with the Vienna Convention on the Law of Treaties that legal clarity and certainty can be authoritatively secured. In any case, there already exists an elaborate body of authoritative guidance on the scope, meaning and content of the right to strike concerning Convention 87 which has been relied upon for protecting human rights, for at least the last 70 years, and which cannot be wished away. Legally and practically, any effort to address this interpretation dispute through a standard setting activity, while the legal unclarity, and uncertainty brought on by the Employers' challenge remains, cannot and will not effectively address the scope of Convention 87 in relation to the right to strike and therefore will not address the nature and extent of the current interpretation dispute.
24. Additionally, commencing standard setting on this issue will lead to further legal uncertainty and lack of coherence resulting in more confusion regarding the obligations of Member States which will be a recipe for a very divisive exercise that, rather than leading to more consensus, will undermine consensus and also undermine the human rights and social justice reputation and mandate of the

¹⁷ In addition to the legal and policy reasons to reject a protocol, the Employer proposal for standard setting on this issue in 2024 is both legally, technically and politically impossible. The procedures for placing an item on a standard setting track have not been followed, and it is inconceivable how the Office could possibly prepare for such an exercise without recourse to the rules and normal consideration of the ILO in this regard.

¹⁸ See <https://www.ilo.org/gb/GBSessions/GB349bis/lang--en/index.htm>

ILO. In this regard, recalling a previous advice per the Minutes of the Governing Body in 1930, is instructive;

“The Director said that he hoped there would not be, in connection with this question, a recrudescence of the discussions with which the Governing Body was familiar concerning the power of interpretation of the Governing Body and the Conference, and the functions of the Office in giving information concerning the interpretation of Conventions. It had, however, been thought useful, in connection with the question now under consideration, to recall the fact that, according to Article 423 of the Treaty of Peace, the Permanent Court of International Justice alone was qualified to give authoritative interpretations of Conventions. All other interpretations, even those given by the Conference, might give rise to dispute. It might therefore be well to remind States of the possibility of appealing to the Permanent Court of International Justice. It had been said that this was an expensive and cumbrous procedure, but even if the procedure were slow and costly, it was better to apply to the Court than to remain in a state of uncertainty.¹⁹(Emphasis added).

25. The post-war ILO constitution does not differ on this point. Article 37.1 is clear: “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.” There is as such no role for interpretation assigned to the members of the Conference.

Rationale for proposing the questions or legal issues to be put to the court

Borad jurisdiction of the ICJ to render advisory opinions with respect the ILO

26. The ILO may request an advisory opinion of the International Court of Justice (ICJ) on the basis of its own Constitution as well as on the basis of the agreement between the United Nations (UN) and the ILO. The Agreement between the UN and the ILO allows the world court, if requested, to pronounce on legal questions arising within the scope of ILO activities. Article 9 provides at subsection 2: *“The General Assembly authorises the International Labour Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies.”*(Emphasis added).

¹⁹ ILO Governing Body, Minutes, 50th Session, Oct. 1930, pp. 656-57.

The question(s) should lead to the full settlement of the legal issues

27. In 2014, the Office proposed the following questions when the ILO Governing Body was considering the question of the referral of this dispute to the ICJ;

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 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?**

28. An objective consideration of the debate that has taken place since 2012 will show that the legal determination of these two questions cover all the necessary aspects of this interpretation dispute. Though answering the first question in the affirmative would necessarily give support to the work of the ILO supervisory system, a clear statement of the mandate to supervise and provide guidance on the application of the Convention would go far to prevent further attacks on the system. Obtaining legal certainty on the mandate of the ILO supervisory system, and in particular the Committee of Experts, is therefore critical to resolving the dispute. The Employers' challenge, while initially focused on the right to strike, has been to persistently and fundamentally challenge the ability of the organization to effectively apply its conventions to Member States through its supervisory system – which has always required a measure of interpretation. The final question(s) must therefore have a clear view towards also addressing the mandate of the Committee of Experts regarding their guidance on the application of the Convention.

29. It is equally noted that the final determination of the question(s), as is the referral itself, is subject to a decision by the Governing Body. The question(s) that will be finally adopted by the Governing Body must be such that, if successful, will settle, by way of confirmation, the long-standing view, since freedom of association was included in the 1919 Constitution, that the right to strike for workers and their organizations is an intrinsic corollary of freedom of association and the right to organize, as it is an essential means (action/program/activity) by which workers and their organizations defend their interests and rights which, also therefore, means that any measure(s) or action(s) taken in the application of Convention 87 which impairs, restricts, impedes or otherwise interferes with the exercise of the right to strike for the defence of workers interests and rights, falls within the scope and meaning of the Convention and therefore comes under the normal supervision by the supervisory bodies of the ILO including the Committee of Experts, CFA and the CAS.

30. It recognized that regardless of these questions raised, the ICJ's practice show that: *"It is for the Court itself to determine on an objective basis the subject matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the applicant's claims. In doing so, the Court examines the application, as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant. It takes account of the facts that the applicant presents as the basis for its claims. The matter is one of substance, not of form"²⁰. (Emphasis added).*

The long standing authoritative guidance of the CEACR regarding the right to strike as protected under C87

The mandate of the Committee of Experts of the ILO

31. Paragraph 29 of the 2015 report of the Committee of Experts outlines the mandate of the Committee of Experts, thus,²¹

"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."

²⁰ See para 41 and 42 of the Qatar v UAE case (2018) and reference to ..."(Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II), p. 575, para. 24; Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), pp. 308-309, para. 48 <https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf>. The ICJ's practice and rulings must also be read in light of the specific agreement between the United Nations (UN) and the ILO regarding the ICJ's jurisdiction.

²¹ See also the 23 February 2015 Joint Statement of the Workers' and Employers' Groups https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351479.pdf

Respect and support for the authoritative guidance of the CEACR

32. The ITUC and its affiliates respect and support the long-standing authoritative guidance of the supervisory bodies of the ILO on the right to strike as protected under ILO Convention 87 and the interpretation approach adopted by the CEACR to arrive at its determination as articulated in the 2012 General Survey²².
33. According to the Committee of Experts, the right to strike derives from Convention 87. The Committee reaffirmed this inevitable legal conclusion in line with a purposive reading (considering the text, object and purpose of the instrument under interpretation) of the scope and meaning of the Convention. The Committee's well considered view outlines that *"Strikes are essential means available to workers and their organizations to protect their interests, but there is a variety of opinions in relation to the right to strike. While it is true that strike action is a basic right, it is not an end in itself, but the last resort for workers' organizations, as its consequences are serious, not only for employers, but also for workers, their families and organizations and in some circumstances for third parties. In the absence of an express provision in Convention No. 87, it was mainly on the basis of Article 3 of the Convention, which sets out the right of workers' organizations to organize their activities and to formulate their programmes, and Article 10, under which the objective of these organizations is to further and defend the interests of workers, that a number of principles relating to the right to strike were progressively developed (as was the case for other provisions of the Convention) by the Committee on Freedom of Association as a specialized tripartite body (as of 1952), and by the Committee of Experts (as of 1959, and essentially taking into consideration the principles established by the Committee on Freedom of Association)"*²³. This must also be applied in light of Article 8 of the Convention which while recognizing that organizations are bound, in the exercise of these rights, to respect the law of the land, the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the rights protected under the Convention.
34. It is worth pointing out that the 1959 General Survey, the first on Convention 87, about a decade after its adoption, found that in addition to running counter to Articles 8 and 10 of the Convention, *"prohibition of strikes by workers other than public officials acting in the name of public powers... may sometimes constitute a considerable restriction of the potential activities of trade unions"*... contrary to Article 3.

²² See paras 117 – 127 of the 2012 General Survey of the ILO CEACR https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf

²³ See para 117 of the 2012 General Survey

35. On the much-debated question of the preparatory work and whether or not it supports the protection of the right to strike under Convention 87, we echo the position of the Committee of Experts that *“... the absence of a concrete provision is not dispositive, as the terms of the Convention must be interpreted in the light of its object and purpose.”* As the Experts copiously stated, the preparatory work, as an interpretive source in its work regarding the application of the Convention by a Member State, *“... 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) and that “...the process of determining whether there is compliance with a general right to strike invariably involves consideration of the specific circumstances in which the Committee is called upon to determine the ambit and modalities of the right.”* This interaction and dialogue occurring between ratifying Member States and the CEACR, strongly and uniquely and on an ongoing basis, integrates the authoritative guidance of the CEACR with the subsequent practice of ratifying Member States which lead to changes or amendments in law and practice, regarding their legislation and labour market institutions, in line with specific recommendations, comments, and conclusions of the Committee of Experts.
36. Additionally, the 2014 legal analysis of the ITUC on this subject already cautioned regarding the over-reliance on the preparatory work on Convention 87 indicating that *“The question put to the constituents in the questionnaire related only to whether the right of association of public officials would prejudge the question of the right of such officials to strike. There was a presumption of the existence of the right to strike inherent in this question, which was intended to address only the right of public officials to strike and not to address the right of all workers to strike.”* In any case, there was no vote called on this question therefore affirming that the preparatory work is not dispositive.
37. Regarding the issue of subsequent practice and the nature of the guidance provided by the CEACR in line with its mandate, the Committee have stated that each year it supervises *“...many individual cases relating to national provisions regulating strikes, most frequently without being challenged by the governments concerned, which generally adopt measures to give effect to the comments of the Committee of Experts. Over the years, the supervisory bodies have specified a series of elements concerning the peaceful exercise of the right to strike, its objectives and the conditions for its legitimate exercise, which may be summarized as follows: (i) the right to strike is a right which must be enjoyed by workers” organizations (trade unions, federations and confederations); (ii) as an essential means of defending the interests of workers through their organizations, only limited categories of workers may be denied this right and only limited restrictions may be imposed by law on its exercise; (iii) the objectives of strikes must be to further and defend the economic and social interests of workers and; (iv) the legitimate exercise of the right to strike may not result in sanctions of any sort, which would be tantamount to acts of anti-union discrimination.*

Accordingly, subject to the restrictions authorized, a general prohibition of strikes is incompatible with the Convention, although the supervisory bodies accept the prohibition of wildcat strikes. Furthermore, strikes are often called by federations and confederations which, in the view of the Committee, should be recognized as having the right to strike. Consequently, legislation which denies them this right is incompatible with the Convention.”²⁴

38. As has already been stated, the Committee undertakes its functions on a country-by country assessment of the application of the Convention in law and practice. In a case when the Committee was approached following some decisions of the Court of Justice of the European Communities (CJEC) concerning the exercise of the right to strike, the Committee recalled... that its mandate is limited to reviewing the application of Conventions in a given member State²⁵.

39. The CEACR have also highlighted regarding the broad reference of the right to strike in the legislation of the great majority of countries and by a significant number of constitutions, as well as by several international and regional instruments and by that justifying its own approach on the matter, that it had “...never considered the right to strike to be an absolute and unlimited right, and that it has sought to establish limits to the right to strike in order to be able to determine any cases of abuse and the sanctions that may be imposed...”²⁶

40. It is therefore worth noting, that the CEACR and the supervisory bodies will have to continue to supervise the application of Convention 87 to ensure that measures taken in its implementation does not result in abusing, by way of impairing, prohibiting, impeding or otherwise interfering with, freedom of association concerning the right to strike.

²⁴ See para 127 of the 2012 General Survey

²⁵ See para 128 of the 2012 General Survey regarding comments on decisions of the Court of Justice of the European Union (Viking, Laval, Ruffert and Luxembourg) on freedom of association rights and the effective recognition of collective bargaining.

²⁶ See para 119 of the 2012 General Survey

Opinions of other international and regional human rights instruments regarding freedom of association and the right to strike

41. International and regional human rights instruments and bodies have also had occasion to pronounce on and/or give guidance regarding freedom of association and the right to right to strike for workers and their organizations.
42. The African Commission on Human and Peoples' Rights (ACHPR) adopted a resolution on Economic, Social and Cultural Rights in Africa with respect to articles 14, 15, 16, 17, 18 21 and 22 of the African Charter on Human and Peoples' Rights stating regarding article 15 on the right to work as including *"The right to freedom of association, including the rights to collective bargaining, strike and other related trade union rights"*²⁷.
43. The Inter-American Court of Human Rights has held in a recent advisory opinion that *"... the right to strike... is one of the fundamental rights of workers and their organizations, as it constitutes a legitimate means of defending their economic, social, and professional interests. States must therefore protect the exercise of this right by law."*²⁸
44. The General Comment No. 23 (2016) on article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that *" The right of everyone to the enjoyment of just and favourable conditions of work is recognized in the International Covenant on Economic, Social and Cultural Rights and other international and regional human rights treaties, as well as related international legal instruments, including conventions and recommendations of the International Labour Organization (ILO). It is an important component of other labour rights enshrined in the Covenant and the corollary of the right to work as freely chosen and accepted. Similarly, trade union rights, freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work..."* (Emphasis added).
45. The legal interpretation and body of legal guidance on principle the right to strike is an essential means (activity/program) linked to freedom of association and the right to organize for the defence and furthering of the rights and interests of workers and their organizations is also protected under the European human rights instruments and decision of the European Court of Human Rights.

²⁷ <https://africanlii.org/akn/aa-au/statement/resolution/achpr/2004/73/eng@2004-12-07/source.pdf>

²⁸ https://corteidh.or.cr/docs/comunicados/cp_47_2021_eng.pdf

Conclusion

46. First, we appreciate the Office report as an important and valuable background report to the discussion pursuant to the Workers' group letter of 12 July 2023 requesting the referral of the longstanding dispute on the right to strike to the ICJ under article 37(1).
47. In that regard, procedural fairness and the necessity to be thorough regarding the preparation of information and time for proper consideration would require that our request tabled on 12 July is treated separately from any subsequent requests, such as the one tabled by the Employers' group on 13 September which proposes alternatives diametrically opposed to our request. For the same reasons, it is important that our request, pursuant and akin to a constitutional complaint is not blocked by procedural considerations including considerations of convenience. Each proposal must be considered separately and treated on the basis of their own merit.
48. In this light, we agree with the resolution proposed in the report as a good basis for discussion.
49. Secondly, the long-standing view, as was held when freedom of association was included in the 1919 Constitution, that the right to strike for workers and their organizations is fundamental and intrinsic corollary of freedom of association and the right to organize has found expression in the scope of various national, international and regional human rights instruments providing authoritative guidance and decisions to protect workers. The practice of the ILO and its supervisory bodies in this regard, including the CEACR, the CFA and CAS, is consistent with such interpretation. The challenge posed by the Employers' group to this legal interpretation, and the institutional crisis this has caused in the ILO necessitates legal clarity and certainty. It is only the ICJ that can settle this issue of legal certainty and clarity with such broad implications.
50. The court has said regarding treaty interpretation that "... *Article 31, paragraph 1, of the Vienna Convention provides that "[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 the light of its object and purpose" and therefore "The Court's interpretation must take account of all these elements considered as a whole.*²⁹ The court has also said that "... *in its jurisprudence, it has taken into account the practice of committees established under human rights conventions, as well as the practice of regional human rights courts, in so far as this was relevant for the purposes of interpretation...*"³⁰.

²⁹ See para 78 of the Qatar v UAE case and references to (Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 29, para. 64) <https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf>

³⁰ See para 77 of the Qatar v UAE case including the following references (Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I), p. 331, para. 13; pp. 334-335, para.

Only if the means of interpretation under Article 31 lead to ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result will it “... *turn to the supplementary means of interpretation provided for in Article 32, such as reference to the preparatory work.* (Emphasis added).

51. The Committee of Experts and the supervisory system of the ILO have properly relied upon the rules of interpretation to interpret Convention 87 and authoritatively derive therefrom the protection of the right to strike. In the face of the challenge to the validity of their authoritative guidance, it is for the ICJ, which has been given an integral role in the ILO Constitution to determine such consequential interpretation disputes to finally settle it to ensure that the ILO continues to undertake its social justice mandate. The ICJ has played this role credibly in the past. Any attempt to use the legislative power of the ILO through standard setting to settle this interpretation dispute will be contrary to article 37(1) and will be inappropriate, and even more so if any such standard setting activity is launched prior to obtaining the necessary legal clarity and certainty on this issue. Forcing such an effort will merely be an obvious attempt to bypass a 70-year record of expert, bipartite and tripartite conclusions and recommendations on the subject of the right to strike which will not be in the interest of the ILO and its constituents, nor will provide for the necessary legal clarity and certainty.

24; p. 337, para. 33, and pp. 339-340, para. 40; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (II), pp. 457-458, para. 101; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II), pp. 663-664, para. 66; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 179, para. 109, and pp. 192-193, para. 136)