



24 October 2023

Comments to the Background report prepared by the Office titled “*Action to be taken on the request of the Employers’ group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*”

Executive Summary

The Employers are convinced that to resolve the long-standing dispute on the interpretation of the right to strike in the context of Freedom of Association and the Right to Organise Convention (C87), a solid and sustainable social dialogue-based solution determined by the ILO tripartite constituents should be strived for, rather than resorting to external means for the quickest possible solution.

The Employers are not challenging the right to strike at national level which is a reality in most countries. However, the Employers firmly believe and have consistently argued in the past that the right to strike is not provided for or regulated in C87 or any other ILO Convention. Other ILO constituents as well as ILO standards supervisory bodies, including the Committee of Experts (CEACR), have acknowledged that the right to strike is not explicitly stated or recognised in C87 or any other ILO instruments. This means that there may be a regulatory gap in the ILO body of standards on the right to strike and the only way to address this gap would be through standard setting in the International Labour Conference (ILC). So far, the ILC has not attempted to set standards for the right to strike or industrial action.

The Employers consider standard setting is the most obvious, appropriate and logical step towards defining authoritative ILO rules on the right to strike, and thus resolving the dispute over interpretation. Standard-setting is linked to the ILO's core mandate and reflects the ILO's core values of tripartism and social dialogue. Only standard-setting will ensure that all ILO constituents can actively engage in the process, that any solution achieved is based on consensus or at least a broad majority, and that any outcome adopted is universally relevant and accepted.

More concretely, the Employers propose that the International Labour Conference adopt a legally binding instrument on the right to strike or more broadly on industrial action, in particular a Protocol to C87. The objective of this Protocol would be to authoritatively determine a right to strike in an international labour standard, and its scope and limits and in this way put an end to the ongoing dispute about the interpretations on the right to strike.

Any inconvenience or difficulties for standard setting at an early date should not be a reason for not pursuing the standard-setting option and leave the definition of rules on the right to strike to external institutions such as Committee of Experts and the International Court of Justice (ICJ). While the Employers have proposed standard-setting on the right to strike at the earliest possible date, i.e. at the ILC in 2024, they would not oppose a later ILC on the condition that there is no referral to the ICJ. It is important that no decision on a referral to an external solution should be taken without proper consideration and discussion on this present proposal.

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I. Introduction

On 13 September 2023, the Chairperson of the Governing Body decided that on 10 November the 349th *bis* special session of the Governing Body would be held to discuss the Workers' proposal for a referral to the International Court of Justice (ICJ). This decision was made despite concerns regarding the agenda of this special session expressed by several groups. Consequently, the Vice-Chair of the Employers' Group announced to the Chairperson of the Governing Body a letter signed by 14 regular members of the Employers' Group for another special session of the Governing Body under Article 3.2.2 of the ILO Governing Body Standing Orders. The purpose of this special session would be to discuss the urgent inclusion of a standard setting item on the right to strike or more broadly on industrial action on the agenda of the 112th session of the International Labour Conference (ILC) in 2024.¹

On 11 October 2023, the ILO Director General sent to all ILO Member States, along with an invitation to provide comments, a background report prepared by the Office entitled "*Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*".

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 reserve the possibility of updating and supplementing our position in light of any subsequent consultations with and feedback received from the Employers' group and the discussions that will take place during the 349th *bis* special session on the Workers' proposal on 10 November and the 349th *ter* special session on Employers' proposal on 11 November 2023.

II. General Remarks

At the outset, the **IOE would like to point out that the title of the background report is inaccurate**. The Government of Türkiye sent a letter to the Director General on the 22 September 2023 indicating their support to the Employers' request. Therefore, like the

¹ Employers Letter to Chair of the Governing Body, [Request by 14 regular members of the Employers' Group for a special meeting of the Governing Body under Article 3.2.2 of the ILO Governing Body Standing Order for the urgent inclusion of a standard setting item on the right to strike on the agenda of the 112th session of the International Labour Conference agenda](#), 12 September 2023.

Background Paper for the Worker's proposal² which indicates the supporting governments, the Background Paper for the Employers' proposal should have been titled as follows "*Action to be taken on the request of the Employers' group and the government of Türkiye to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*".

Furthermore, the **IOE notes the unequal treatment of the two background reports and the two special sessions**. In particular, unlike the background report on the Workers' Proposal³ which explicitly invites ILO member States to transmit comments before the set deadline of 6 October 2023, the background report on the Employers' Proposal does not invite comments from ILO tripartite constituents. Only the letter from the Director-General, sent out separately on the same day, indicates that any comments should be addressed to the NORMES department.⁴ However, the letter did not include a specific deadline, and indicated that the comments would only be made available in their original language without a summary. The Employers consider that, despite the short time available before the special session of the Governing Body, a deadline should have been set for comments on the Employers' proposal, and that the Office should in any case prepare a summary of the comments received. The Employers would stress that the Governing Body must be equally informed of the ILO constituents' views on both proposals in order to be able to take a meaningful decision, in particular because both proposals represent related, but mutually exclusive approaches to the issue of the right to strike.

III. Proposed standard-setting on the right to strike

1. Standard-setting is part of ILO's core mandate and has been the preferred way to create clear and binding rules on labour and social topics

The ILO Centenary Declaration declares that "[t]he **setting, promotion, ratification and supervision of international labour standards is of fundamental importance to the ILO. This requires the Organization to have and promote a clear, robust, up-to-date body of international labour standards** and to further enhance transparency."⁵

Almost every year, the ILC deals with standard setting, either the revision or the adoption of new international standards related to the world of work. Over the past centenary, ILO has adopted in total 405 instruments comprising of 191 Conventions, 6 Protocols and 208 Recommendations. **Standard setting is considered a well-established procedure for creating authoritative rules on important topics in the world of work.**

² 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.

³ 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 24.

⁴ ILO, Director General Letter to all member States of the ILO dated 11 October 2023.

⁵ ILO, [ILO Centenary Declaration for the Future of Work](#), p. 8.

All tripartite constituents and the ILO standards supervisory bodies have acknowledged that there is currently no ILO instrument providing for the right to strike.⁶ This means that there may be a regulatory gap to be filled in the ILO body of standards on the right to strike, and the only way to address this gap is through standard setting in the ILC.

In line with this understanding, the Government of Colombia proposed standard setting on the right to strike for the first time in 1992. The Government of Morocco agreed stating that “[s]ince no instrument existed on the subject, there was a legal gap which had to be filled. [...] 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.”⁷ Similarly, the Government of Venezuela stated that “An international instrument on the right to strike was therefore essential.”⁸

Moreover, the experience with the Night Work (Women) Convention, 1919 (No. 4) indicates that **standard setting is the first and logical step to address interpretation disputes**. In this case, there was a divergence of views regarding the meaning of the term “women” in Article 3 of the Convention, regarding whether the protection provided in the Convention applied to women manual workers only or to all women, including salaried employees. To solve the dispute, a standard setting item was placed on the agenda of the 15th session of the ILC in 1931 to discuss a revising Convention. Ultimately, the revising Convention failed to be adopted as it did not reach the two third majority in the final vote.⁹ Only after the ILC had tried to find a solution in this way, the matter was then referred for an advisory opinion to the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ.¹⁰

⁶ ILO, [Agenda of the 81st \(1994\) Session of the Conference](#), GB.253/2/3(Rev.), Appendix I, p. 21-22; ILO, [Minutes of the 253rd Session](#), GB. 253/PV(Rev.), 28 May 1992, p. I/12- I/13; ILO, [Minutes of the 253rd Session](#), GB. 253/PV(Rev.), 28 May 1992, p. I/16; ILO, [Record of Proceedings](#), ILC 54th Session, 22 June 1970, p. 580 & 583, paras 12 & 25; ILO, [Record of Proceedings](#), ILC 58th Session, 22 June 1973, p. 544, para 26-27; ILO, [Minutes of the 251st Session](#), GB.251/PV(Rev.), 12 November 1991, p. III/8; ILO, [Record of Proceedings](#), ILC 72nd Session, 21 June 1986, p. 31/33; ILO, [Freedom of Association and Protection of the Right to Organise: Report VII](#), ILC 31st Session, 29 June 1948, p. 87; ILO, [Freedom of association and collective bargaining](#), ILC 81st Session, 1994, p. 62, para 142; ILO, [Minutes of the 131st Session of the Governing Body](#), 1956, Appendix XXII, p. 188. Regarding the Fact-Finding and Conciliation Commission see 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. See also ILO, [Action to be taken on the request of the Workers’ group and of 36 governments to urgently refer the dispute on the interpretation of Convention No 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37\(1\) of the Constitution – Summary of the comments received from constituents](#), GB.349bis/INS/2, 10 November 2023, p. 4, para 14.

⁷ ILO, [Minutes of the 253rd Session](#), GB. 253/PV(Rev.), 28 May 1992, p. I/12- I/13.

⁸ ILO, [Minutes of the 253rd Session](#), GB. 253/PV(Rev.), 28 May 1992, p. I/16.

⁹ League of Nations, [International Labour Conference](#), 15th Session, 1931, p. 478.

¹⁰ ICJ, [Advisory Opinion Interpretation of the Convention of 1919 concerning Employment of Women during the night, 15 November 1932](#), p.366. The question asked to the PCIJ was whether the Convention concerning employment of women during the night, adopted in 1919 by the International Labour Conference, apply, in the industrial undertakings covered by the said Convention, to women who hold positions of supervision or management and are not ordinarily engaged in manual work.

2. Only standard setting can provide legal certainty and set out legally binding rules on the right to strike for ratifying countries.

The Employers firmly oppose the Office's view that

*"the only two mechanisms that can offer such certainty are explicitly set out in article 37. A consensus-based modality involving standard-setting cannot and does not generate the legal certainty provided by article 37 of the ILO Constitution as the consensus-based outcome of a Convention or Protocol would be binding only for those Member States which have eventually ratified these. Legal uncertainty would therefore continue to prevail in respect of Member States having ratified the Convention subject to a legal dispute for as long as they are not in a position to ratify the newly adopted Convention or Protocol."*¹¹

Referral to the ICJ is not a solution as **Article 37(1) is silent on the binding nature of ICJ advisory opinions**. Article 37(1) reads as follows: "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." Nowhere in the provision is provided that specifically ICJ advisory opinions are legally binding.

Moreover, Article 37(2) provides that "Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph." From the absence of a corresponding formulation in Article 37(1) can be concluded that the binding nature of an ICJ advisory opinion is limited to any established tribunal under Article 37(2), and there is no binding effect for ICJ advisory opinions in the case of Article 37(1). This is also the view of the former ICJ President, Roberto Ago, who states that "As regards the ILO, however, the tribunal in question has never seen the light of day, and any request by the ILO Governing Body to the International Court of Justice could accordingly lead only to an advisory opinion, which, as such, would not have decisive effect."¹²

Furthermore, the Office itself has questioned the binding effect of ICJ advisory opinions for the ILO and its constituents back in 2007. In particular, the Office pointed out that

*"However, apart from a question relating to the interpretation of the Convention, there are other questions that the Governing Body may wish to consider in the event that an advisory opinion is sought from the International Court of Justice. The first would concern the interpretation of the ILO Constitution. To the extent that the Governing Body decides to refer any question of interpretation to the International Court of Justice, **it would be logical to submit the complementary question as to whether such interpretation sought in the form of an advisory opinion could or should be recognized as binding for all Members under article 37(1) of the Constitution.** This question, which has for some time posed a theoretical issue, would immediately become of great practical significance*

¹¹ ILO, [Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference](#), GB.349ter/INS/1, 11 November 2023, Appendix, para 57.

¹² Roberto Ago, "Binding" Advisory Opinions of the International Court of Justice, p.449, footnote 44.

should the Governing Body decide to submit a request for an advisory opinion to the Court.”¹³

On another occasion, the Office also noted that “[t]hought could also be given to **whether the Court could interpret article 37(1) as providing a basis for an advisory opinion on a question of interpretation to be considered as binding on the ILO and on the States parties to the Convention involved**”.¹⁴

These remarks demonstrate the uncertainty regarding a binding effect of ICJ advisory opinions for the ILO and its constituents, and thus put into question the ability of an ICJ advisory opinion to bring about an effective resolution to the dispute over the right to strike in C.87.

On the other hand, through the adoption of a Convention or Protocol, the ILC can authoritatively provide legal certainty on a particular issue. The Protocol to the Forced Labour Convention (P29) is an excellent example on this point. Article 7 of P29 determined that “*The transitional provisions of Article 1, paragraphs 2 and 3, and Articles 3 to 24 of the Convention shall be deleted.*”.¹⁵ Accordingly, when P29 entered into force, these transitional provisions were deleted from the text of C29. In other words, P29 clarified with legal certainty that the transitional provisions no longer apply to any country, neither to countries that have ratified P29, nor to countries that have only ratified C29.

It is therefore suggested that the proposed Protocol to the Convention 87 (P87) could contain language either in the Preamble or in a subsequent Article explicitly stating that the purpose of the Protocol is to settle definitively the dispute over the interpretation of C87 on the right to strike and that the right to strike is regulated by P87 and not by C87 or any other ILO Convention. In this way, a P87 could provide with authority and legal certainty that with the entry into force of P87, namely i) only the rules on the right to strike in P29 apply to countries that have ratified P29 and ii) the interpretations on the right to strike in C29 cease to exist at the same time.

It can be assumed that the CEACR would need to follow the new provisions on the right to strike in C87. The CEACR itself argued that it developed its rules on the right to strike to fill a regulatory gap.¹⁶ With the adoption of P87, this gap would be filled and even in the CEACR’s logic the justification for its own interpretations would no longer apply.¹⁷

Finally, it is also not unreasonable to assume that a well-designed P87 on the right to strike would be ratified quickly by many member States, given its high visibility due to its linkage to the fundamental Convention C87.

¹³ ILO, [Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 \(No. 29\)](#), GB 298, March 2007, INS/5/2, para. 5.

¹⁴ ILO, [Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 \(No. 29\)](#), GB 297, November 2006, INS 8/2, para 9.

¹⁵ ILO, [Protocol of 2014 to the Forced Labour Convention, 1930](#).

¹⁶ International Labour Conference, 81st Session, 1994, Report III (Part 4B), Freedom of association and collective bargaining, para. 145 “*In the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject.*”

¹⁷ Similarly, when P29 entered into force, the Committee of Experts in essence ended its interpretation on human trafficking in the context of C29 as the topic was from then on covered by P29.

3. Standard setting aligns with the ILO fundamental values of social dialogue and tripartism

The ILO Centenary Declaration declares that it is incumbent on the ILO to strengthen the capacity of its **tripartite constituents** to “address all fundamental principles and rights at work, at all levels, as appropriate, through ***strong, influential and inclusive mechanisms of social dialogue***.” Given that C87 expresses and develops in the form of specific rights and obligations one of the fundamental principles and rights at work in the 1998 Declaration, namely freedom of association, it is imperative that the solution to resolve the interpretation dispute must be based on social dialogue.¹⁸ **Standard-setting is the most advanced and developed form of social dialogue at the ILO.**

Many governments also agree that social dialogue is the preferred option to resolving the right to strike. For example, during the 2014 GB discussion, the Government representative of Lesotho also noted that social dialogue as “a central pillar of the ILO” should be given a chance and emphasized that “[r]eferring the matter to the ICJ would signal the erosion of the spirit of tripartism. Existing mechanisms should be used, and internal solutions exhausted before turning to external remedies”.¹⁹ Similarly, the Government representative of Botswana supported “an approach that would emphasize social dialogue as the ideal means of resolving disputes”.²⁰ Similarly, the Government representative of China speaking on behalf of ASPAG also indicated that dispute resolution was best achieved through tripartite discussion in the Governing Body or the ILC.²¹ Furthermore, the Government of India supported for the continuation of a tripartite process considering that decisions regarding the Organization should be taken by ILO Constituents. The Government representative of Indonesia also noted that “[p]roblems within the ILO should be resolved using available mechanisms and the Organization should avoid creating a precedent by referring the question of the right to strike in relation to C87 to the ICJ”.²² The Government representative of Iran and the Government representative of Jordan also stressed that tripartism should be given a real opportunity based on mutual trust and willingness among constituents.²³

Special reference should be also made to the Statement of the Government Group in 2015, whereby governments indicated their readiness to discuss the right to strike within the ILO framework.²⁴ It reads as follows:

¹⁸ ILO, [Social dialogue](#) “All types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy”.

¹⁹ ILO, [Draft minutes of the 322nd Session of the Governing Body of the International Labour Office](#), GB.322/PV, 30 October-13 November 2014, p. 29, para 114.

²⁰ ILO, [Draft minutes of the 322nd Session of the Governing Body of the International Labour Office](#), GB.322/PV, 30 October-13 November 2014, p. 28, para 112.

²¹ ILO, [Draft minutes of the 322nd Session of the Governing Body of the International Labour Office](#), GB.322/PV, 30 October-13 November 2014, p. 21, para 70.

²² ILO, [Draft minutes of the 322nd Session of the Governing Body of the International Labour Office](#), GB.322/PV, 30 October-13 November 2014, p. 28, para 108.

²³ ILO, [Draft minutes of the 322nd Session of the Governing Body of the International Labour Office](#), GB.322/PV, 30 October-13 November 2014, p. 26, para 101, and p. 29, para 116.

²⁴ Other frameworks in the ILO include tripartite meetings, expert meetings, technical meetings, informal consultations etc.

“We are ready, right from this Tripartite Meeting, to consider discussing, in the forms and framework that will be considered suitable, the exercise of the right to strike. We believe that the complex body of recommendations and observations developed in the past 65 years of application of Convention 87 by the various components of the ILO supervisory system constitutes a valuable resource for such discussions, which will also be informed by the multi-faceted regulations that States and some regions have adopted to frame the right to strike.”²⁵

It is important to highlight that while a background report on the right to strike and the modalities and practices of strike action at national level was prepared by the Office in 2014, a substantive discussion to determine the common ground on the scope and limits of the strike never took place. Therefore, contrary to the arguments of some groups, **social dialogue has not yet been exhausted.**

Most recently during the March 2023 GB session, the Government of China speaking on behalf of majority of countries in ASPAG stated that any dispute in the world of work should be resolved through tripartite social dialogue where possible, including matters relating to the interpretation of ILO Conventions. Article 37 was a last resort and should only be used with caution.²⁶ The Government representative of China also reiterated that **social dialogue was the only channel for resolving disputes** and ensuring the functioning of the supervisory mechanism, by strengthening cooperation and avoiding confrontation.²⁷

Moreover, the Government of Brazil noted that while the ILO Constitution provided for alternatives to that process, social dialogue had long been the preferred method of dispute resolution at the ILO and no attempts should be made to block that process.²⁸

Similarly, in their comments to the background report on the Workers’ proposal, some governments have indicated their preference for continuing social dialogue, namely the Governments of Indonesia, Kenya and Turkey.²⁹

IV. Standard-setting in the form of a Protocol

The Employers propose a Protocol as a supplementary treaty to C87 to definitively end the interpretation dispute on the right to strike in the context of C87. The purpose of this Protocol is not to amend C87, which does not have language on the right to strike, but rather to define in a separate instrument the scope and the limits of right to strike from a global perspective. Like other protocols, only ratifying member States of C87 would be able to ratify P87 and only those ratifying P87 would be bound by its provisions.

²⁵ 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 II, para 5.

²⁶ ILO, [Minutes of the 347th Session of the Governing Body of the International Labour Office](#), GB.347/PV, 13–23 March 2023, p. 61, para 251.

²⁷ ILO, [Minutes of the 347th Session of the Governing Body of the International Labour Office](#), GB.347/PV, 13–23 March 2023, p. 62, para 258.

²⁸ ILO, [Minutes of the 344th Session of the Governing Body of the International Labour Office](#), GB.344/PV, March 2022, p. 46, para 155.

²⁹ ILO, [Summary of the comments received from constituents](#), GB. 349th bis/INS/1/2, 13 October 2023, para 4.

Although none of the existing ILO Protocols adopted so far was aimed at settling a dispute with respect to the interpretation of provisions of the related Convention,³⁰ this does not mean that the Governing Body cannot adopt a new Protocol to C87 that would do just that.

In fact, the Employers consider that the experience with the Protocol to the Forced Labour Convention (P29) are similar to the present situation concerning the right to strike and the lessons learnt should be considered by the Governing Body for the following reasons.

First, the Forced Labour Convention (C29) was adopted in 1930 and it does not contain expressly or impliedly any reference to human trafficking in the preamble or the body of the text.³¹ Despite the absence of any references to human trafficking in C29, the CEACR over time made comments on human trafficking when examining the Convention.³² Similar to this case, over time the CEACR developed detailed interpretations on the right to strike when examining C87 even though the right to strike is not mentioned in the text and expressly excluded by the drafters of the instrument.

Second, P29 was proposed to fill a gap identified in the body of ILO standards by adding regulatory content to the standards of C29. During the Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation in February 2013 ('2013 Tripartite Meeting of Experts'), the experts agreed that there was a gap in the ILO body of standards to address human trafficking and agreed the adoption of supplementary measures to address effectively eradication of forced labour in all its forms.³³ Similarly, there is agreement by all ILO stakeholders that C87 nor any ILO instruments provide for the right to strike.³⁴ In other words, there may be a gap in the ILO body on standards on the right to strike. This gap should not be filled by CEACR interpretations, but rather through standards that are negotiated and adopted by the ILC.

Third, P29 showed that standard setting is the normal internal approach to address gaps in the ILO body of standards. During the 2013 Tripartite Meeting of Experts, the Experts agreed that gaps should be addressed through standard setting action by the ILO.³⁵ In particular, the Workers' spokesperson stressed that *"This standard-setting approach was essential and could contribute to the adoption of systematic, coherent and coordinated methods at the international level."* Furthermore, the Workers' spokesperson stated that *"It would be damaging to the ILO, as a tripartite organization, not to act in a field which came within its mandate, thereby running the risk of having obligations imposed on States by other*

³⁰ ILO, [Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference](#), GB.349ter/INS/1, 11 November 2023, Appendix, para 62.

³¹ ILO, [Final report](#), TMELE/2013/7, 11-15 February 2013, p. 11-12, para 47.

³² ILO, [Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation](#), TMELE/2013, 11-15 February 2013, p. 39, para 138.

³³ ILO, [Final report](#), TMELE/2013/7, 11-15 February 2013, p. 41, paras 26-27.

³⁴ ILO, [Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37\(1\) of the Constitution – Summary of the comments received from constituents](#), GB.349bis/INS/2, 10 November 2023, p. 4, para 13.

³⁵ ILO, [Final report](#), TMELE/2013/7, 11-15 February 2013, p. 41, para 27.

international or regional organizations outside of the tripartite framework."³⁶ Applying the same logic, the solution for filling a gap on the right to strike in the ILO body of standards is not through referral to the ICJ and running the risk of having obligations imposed on member States by the ICJ, but rather through standard setting by the ILC.

V. Placing a standard-setting item on the agenda of the ILC

1. Placing a standard-setting item in 2024 ILC is legally feasible under the statutory framework

To respond to the sense of urgency expressed by the Workers and regional government groups for solving the dispute on the right to strike to the ICJ, the Employers have proposed that the Governing Body place an item on the right to strike on the agenda of the ILC at the earliest possible date, which is 2024. This may be difficult to realize in practice but contrary to the Office's analysis of the statutory framework,³⁷ there are no legal obstacles for doing so.

First, the decision to place a standard setting item on the right to strike on the agenda of the ILC can be taken by simple majority and does not require unanimous consent. Article 5.1.1 of the Governing Body Standing Orders does not apply. It reads as follows:

*"When a proposal to place an item on the agenda of the Conference is discussed for the first time by the Governing Body, the Governing Body cannot, without the unanimous consent of the members present, take a decision until the following session."*³⁸

This is not the first time the Governing Body is proposing a standard setting item on the right to strike in the Governing Body. Already at the 253rd session of the Governing Body in 1992, on the proposal of the Government of Colombia, the possible inclusion of an item on the right to strike in the agenda of the ILC was discussed.

Second, the Governing Body can approve a standard-setting item with a programme of reduced intervals like past practices for other protocols under two provisions,³⁹ if a question has been included in the ILC agenda for a standard setting under the double discussion procedure less than 18 months before the opening of the ILC session.⁴⁰ Therefore, it is entirely feasible for the Governing Body to decide on a programme of reduced intervals for a standard-setting item to be placed for the 2024 ILC session.

³⁶ ILO, [Final report](#), TMELE/2013/7, 11-15 February 2013, p. 31, para 122.

³⁷ ILO, [Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference](#), GB.349ter/INS/1, 11 November 2023, Appendix, paras 1-4.

³⁸ It should be noted that Article 5.1.1 does not require that a proposal "*must be discussed at two successive sessions*" of the Governing Body. Paragraph 54 of the Introductory note, which contains such wording cannot overrule Article 5.1.1 given that the Introductory note itself provides that it "*reflects certain practices without fixing them as legal rule*", See ILO, [Governing Body Standing Order](#), Introductory Note, para. 1.

³⁹ ILO, [Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference](#), GB.349ter/INS/1, 11 November 2023, Appendix, para 10. See Protocol of 2014 to the Forced Labour Convention 1930 (No. 29) and Protocol to the Seafarers' Identity Documents Convention 1958 (No. 108).

⁴⁰ See ILO, [International Labour Conference Standing Orders](#), Article 46(5) and similar Article 45(4).

Third, Article 5.1.1 of the Governing Body Standing Orders seems only relevant in case an urgent item is to be referred to the ILC for a single discussion.⁴¹ However, it appears that if the Governing Body decides to refer an urgent standard-setting item to the ILC for a double discussion, a majority of three fifths of votes would not be required, so simply majority would suffice.

If the Governing Body considers that the right to strike needs to be addressed as a matter of priority and urgency, it could place it on 2024 ILC agenda and defer an item already on the ILC agenda to a subsequent ILC. For instance, the Governing Body could decide to postpone the standard setting item on the occupation safety and health protection against biological hazards until a later date (ie 2026). Unlike the right to strike issue that may require urgent attention to end the interpretation dispute, none of the groups have expressed an urgent need for standards on biological hazards. It is important to indicate that the Governing Body always has the prerogative to make changes to its past decisions where it deems necessary.

2. A referral of the right to strike to the ICJ would hardly bring earlier results

For a referral to the ICJ of the complex issue on right to strike, the Governing Body would also need time to carry out possibly several rounds of consultations, collection and assessment of various documents. Following this, for proper governance, the ILC would also need to approve the referral questions either in June 2024 or 2025. Based on advisory procedure before the ICJ which the Office prepared, the ICJ procedure would also take some time, probably 12 – 18 months.⁴² Following this, the ILC may then need to discuss again appropriate steps to take following this opinion, which the earliest opportunity would then be 2025 or 2026 ILC. It is important to note that there has been no agreement for this advisory procedure to date.

3. In order to enable thorough preparation, placing an item on the right to strike on the agenda of a later ILC could be considered

If the Governing Body decides that more preparation time is necessary, then placing a standard-setting item in a later conference could also be considered. For instance, the Governing Body could, at its March 2024 session, place an item on the right to strike on the 2025 or 2026 ILC agenda for standard setting under the double-discussion procedure, which would provide sufficient time for preparation, and which could be done without having to remove items already on the ILC agenda.

In any case, any difficulties of placing the matter on the 2024 ILC agenda must not be used as a pretext to discard this option altogether and to decide in favour of a referral to the ICJ under Article 37(1) of the ILO Constitution.

⁴¹ ILO, [Governing Body Standing Orders](#), Article 5.1.5 reads “In the cases of special urgency or where other special circumstances exist, the Governing Body may, by a majority of three fifths of the votes cast, decide to refer a question to the Conference for a single discussion with a view to the adoption of a Convention or Recommendation.”

⁴² ILO, [Action to be taken on the request of the Workers’ group and of 36 governments to urgently refer the dispute on the interpretation of Convention No 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37\(1\) of the Constitution – Summary of the comments received from constituents](#), GB.349bis/INS/2, 10 November 2023, Annex III.

VI. Concluding observations

The Employers firmly believe that standard setting is the most appropriate tripartite social dialogue-based solution that will 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.

The aim and purpose of the proposed protocol to C87 would be to determine the scope and limits of the right to strike at the international level, as far as is possible and fill the regulatory gap that currently exists in the ILO body of standards. In doing so, the Protocol would make it clear that rules on the right to strike are only contained in P87 and not in C87.

In the same way as the tripartite constituents can decide on the scope and limits of the right to strike, they can determine the sources for their consideration. The Employers would stress that the starting point and most important source should be, as is the case for any standard-setting discussion, the national law and practice on the right to strike in ILO member States.

Once the ILC decides to adopt a Protocol on the right to strike, it can be expected that the CEACR faithfully follows the authoritative decision of the ILC and the intentions of the drafters of P87. There would be no room whatsoever for the CEACR to maintain its own views on the right to strike in C87.

There are no legal obstacles to putting a standard-setting item on the right to strike on the 2024 ILC agenda under a programme of reduced intervals. The Employers proposed standard setting in 2024 to accommodate the urgency of the requests from certain groups. However, the Employers have not opposed to a later standard-setting on the condition that there would be no referral to the ICJ on the interpretation dispute and if preference is given to the standard-setting option on a later date could facilitate the preparations.

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