Governing Body

349th *bis* (Special) Session, Geneva, 10 November 2023

Warning: this document is a draft and may contain omissions or errors. It is made available solely for the purpose of verification and correction. Persons referred to in this document are not to be regarded as bound by statements attributed to them. The ILO declines all responsibility for any errors or omissions which this document may contain, or for any use which may be made of it by third parties. Governing Body members may send corrections to their own interventions by 25 January 2024 to rodis@ilo.org.

Draft minutes of the 349th *bis* (Special) Session of the Governing Body of the International Labour Office

Contents

Page

Institutional Section

1. 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 (GB.349*bis*/INS/1/1 and GB.349*bis*/INS/1/2) 3

Committee of the Whole 3

Governing Body 17

Decision 34

▶ Institutional Section

1. 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 (GB.349*bis*/INS/1/1 and GB.349*bis*/INS/1/2)

Committee of the Whole

1. **The Chairperson** recalled that the 349th *bis* (Special) Session of the Governing Body had been convened pursuant to article 7(8) of the Constitution of the International Labour Organization and paragraph 3.2.2 of the Standing Orders of the Governing Body. At its 349th Session, the Governing Body had approved the arrangements for the special session. They included a sitting as a Committee of the Whole, in accordance with article 4.3 of the Standing Orders, to hold a broad exchange of views with the participation of governments not represented on the Governing Body, on the understanding that any decisions would be made by the Governing Body in its ordinary plenary composition after the Committee of the Whole had been concluded.

2. The 349th *bis* (Special) Session was devoted to an in-depth discussion with a view to making an informed decision on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice (ICJ) for decision in accordance with article 37(1) of the ILO Constitution. He called on participants not to address the substance of the disagreement concerning Convention No. 87 and the right to strike, but to focus on the advantages or disadvantages of referring the dispute to the ICJ for decision, which was the subject of the request under consideration.

3. He noted that the following amended draft decision and draft resolution had been proposed by a group of 44 countries from various regions and circulated by the Office: [1]

> **Further to the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution, the Governing Body decided to adopt the following resolution:**
>
> The Governing Body,
>
> Conscious that there is serious and persistent disagreement within the tripartite constituency of the International Labour Organization (ILO) on the interpretation of the

[1] Argentina, Australia, Austria, Barbados, Belgium, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Chile, Cyprus, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), with respect to the right to strike,

Recalling that at the origin of the dispute is a disagreement among the Organization's tripartite constituents concerning whether the right to strike is protected under Convention No. 87,

Noting that ILO supervisory bodies have consistently observed that the right to strike is a corollary to the fundamental right to freedom of association,

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

Affirming the necessity of resolving the dispute consistent with the Constitution of the ILO,

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

Recalling the consensual decision of the 320th Governing Body in March 2014, welcoming "the clear statement by the Committee of Experts of its mandate as expressed in the Committee's 2014 report":

> "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".

Noting that, despite protracted attempts, no consensus has been reached through tripartite dialogue,

Emphasising that Article 37.1 of the Constitution establishes that any referral to the International Court of Justice is for decision on the question or dispute referred,

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

Decides, in accordance with article 37, paragraph 1, of the Constitution of the International Labour Organization,

1. To request the International Court of Justice to render urgently an advisory opinion under Article 65, paragraph 1, of the Statute of the Court, and under Article 103 of the Rules of Court, on the following question:

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. Instructs the Director-General to:

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

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

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

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

4. **The Worker Vice-Chairperson** noted that freedom of association was at the heart of the ILO's 100-year mandate, enshrined in its Constitution and reaffirmed in the Declaration of Philadelphia. It had been further developed in Convention No. 87, and in 1951 the Committee on Freedom of Association had been established to supervise its application. It was an enabling right and, together with the right to collective bargaining, was essential for achieving all other rights. Yet, it was the most frequently violated fundamental right.

5. The right to strike had long been recognized both in the ILO and beyond as an intrinsic corollary of freedom of association. That right must be available as a last resort, providing organized workers with a countervailing power to that of their employer. However, during the 2012 session of the International Labour Conference, the Employers' group had challenged the competence of the Committee of Experts on the Application of Conventions and Recommendations to derive the right to strike from Convention No. 87 and refused to cooperate in the Committee on the Application of Standards when it discussed any cases concerning Convention No. 87 in which the Committee of Experts had made observations on the right to strike. That had caused the Committee on the Application of Standards to fail to adopt conclusions for the first time since its establishment in 1926. Despite numerous efforts by the Office and the tripartite constituents, the dispute had remained unresolved, thus calling into question the existence and protection of a fundamental right, eroding the supervisory capacity of the ILO and creating legal uncertainty for Member States that had ratified Convention No. 87. It had also engendered an atmosphere of antagonism within the ILO, hampering its effectiveness.

6. Exchanges between the Workers' group and governments in recent months had revealed a general recognition of the importance of freedom of association, with the right to strike as a corollary, and the understanding that there was indeed an urgent need to resolve the outstanding conflict in the interest of all constituents. However, positions diverged as to how. As all other attempts to resolve it had failed, the Workers' group believed that there was no alternative to referring the dispute to the ICJ. The group had therefore written to the Director-General on 12 July 2023 invoking article 37(1) of the ILO Constitution, which recognized the ICJ as the organ with exclusive jurisdiction to interpret authoritatively the ILO Constitution and Conventions, and which unambiguously established an obligation for the ILO to submit any interpretation dispute to the ICJ for decision. The Workers' group reiterated its commitment to accept, in accordance with the ILO's constitutional theory and practice, the decision of the ICJ as authoritative and final. The group expected the ICJ to confirm the law and

practice in the ILO, in which case the ILO supervisory system would continue its work, including by providing authoritative guidance to Member States and social partners at the national level on how to interpret and implement Convention No. 87. The Workers' group did not seek to change the status quo regarding the right to strike, which, it recognized, was not an absolute right.

7. In response to the argument put forward by the Employers' group and some governments that the matter should be resolved by social dialogue as a referral to the ICJ would be viewed as a failure of tripartism, the Workers' group contended that there was no realistic chance of consensus in a situation of mutually exclusive positions that were so persistent. The Employers' group's proposal to include on the agenda of the 2024 session of the Conference a standard-setting item on a Protocol to Convention No. 87 was fundamentally flawed, as it was legally, technically and politically unsound and untenable. First, it was unclear whether the legal starting point would be that the right to strike was or was not covered by Convention No. 87. Second, it was legally contradictory for the Employers' group to maintain both that Convention No. 87 did not enshrine a right to strike and that that a Protocol to the Convention could be developed to govern the right to strike. Third, in advocating such a Protocol, the Employers' group's stated aim was to annul the existing authoritative guidance of the supervisory bodies. That would create a two-tier legal system, thus reducing legal certainty. Fourth, the effect of the proposal of the Employers' group would be to eliminate fundamental rights, which it would then offer to renegotiate afresh. Fifth, the proposal of the Employers' group to include the contentious item on the Conference agenda for 2024 would violate all existing rules and procedures in the ILO designed to safeguard full tripartite involvement in the development of standards. Finally, as discussed by the Governing Body at its 344th Session (March 2022), the only way to achieve legal certainty was through legal means, which involved invoking article 37 of the Constitution. That discussion had also shown that there was very little support in the Governing Body for the further development of a possible internal tribunal on the basis of article 37(2).

8. As to the legal question or questions that the ICJ should address, the Worker Vice-Chairperson said that, as the Employers' group had challenged both the existence of a right to strike under Convention No. 87 and the opinion of the Committee of Experts that the right to strike derived from Convention No. 87, those two aspects of the conflict were closely linked. Furthermore, the interpretation dispute challenged the validity of the guidance of the supervisory bodies regarding the constitutional principle of freedom of association and the right to strike, seen as its intrinsic corollary and therefore covered by Convention 87. It was therefore sufficient that one question be put to the ICJ: whether the right to strike of workers and their organizations was protected under Convention No. 87. The Workers' group expected the Governing Body to request the ICJ to allow the autonomous participation of the International Trade Union Confederation (ITUC) and the International Organisation of Employers (IOE) in the proceedings.

9. As to whether the Governing Body had the mandate to decide on the referral, the Workers' group considered that there could be no doubt that it did, and that it was the most appropriate structure to make any such decision. Article IX(2) of the 1946 agreement between the United Nations and the ILO explicitly authorized the ILO to request an advisory opinion from the ICJ on legal questions arising within the scope of its activities. Furthermore, at its 32nd Session (1949), the Conference had mandated the Governing Body, through the Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions, to decide on requests for referral to the ICJ, and that delegated authority

remained valid. It was also the Governing Body that had been following up on the matter since 2012.

10. The proceedings since the Workers' group's submission in July had been inclusive. The dispute was also urgent, since the legal uncertainty about governments' obligations under Convention No. 87 left doubt as to the extent of the protection of workers. A referral to the ICJ by the Governing Body was the only practical, efficient, quick, decisive, inclusive, fair and reasonable way forward. The argument that the Conference should play a role by validating the decision of the Governing Body on the basis that it was purportedly undemocratic was unsound, as the Governing Body had been making decisions for over 100 years; it was inappropriate to challenge selective decisions as being undemocratic. Adding another layer of decision-making could create further confusion and delay, and the precedent thus set might erode the recognition of the authority and competencies of the Governing Body.

11. The role of the Governing Body was to govern, and a decision was needed that day. It would be preferable for the decision to be reached by consensus, but a vote might be required. In that event, Governing Body members should not vote against the protection of a fundamental workers' right and certainly not against the exercise of a constitutional obligation. Future generations would hold the members of the Governing Body accountable for their decision on the matter. For social justice to prevail, the judiciary was occasionally required to provide authoritative guidance on the legal basis underlying the Organization's important work.

12. The Workers' group supported the amended draft decision proposed by the group of 44 countries.

13. **The Employer Vice-Chairperson** said that she profoundly disagreed with how the item had found its way onto the Governing Body agenda; the special session had not been convened in accordance with established governance rules and practice. Furthermore, the information and guidance provided by the Office was biased in favour of the referral of the dispute to the ICJ, which was not the position of all constituents. The Office had failed in its duty to be impartial and had colluded with one group, which did not bode well.

14. She noted that although the Worker Vice-Chairperson had said that there was no alternative to requesting a referral to the ICJ as no solution had been found through dialogue, it was the Workers' group that had continually refused to hold a substantive discussion on the scope and limits of the right to strike. The Government group had stated during the tripartite meeting held in February 2015 that it was ready to consider discussing the exercise of the right to strike, and the Employers' group had consistently called for social dialogue on the topic. Universally applicable rules and boundaries defining the right to strike had never been discussed or adopted by the International Labour Conference. Several international legal instruments stated that a right to strike existed, but was defined by national law; there were no universally applicable definitions or rules.

15. The Employers' group strongly opposed a referral to the ICJ. According to article 37(1) of the ILO Constitution, referrals to the ICJ required an interpretation dispute. However, there could be no dispute over the interpretation of Convention No. 87, as it did not include any reference to a "right to strike" or even the term "strike". The drafters of the Convention had deliberately excluded the subject from its scope, as they considered that it had to be regulated in a separate standard.

16. At issue was the illegitimate interpretation of Convention No. 87 by the Committee of Experts, which had used the terms "activities" and "defending the interests of workers" in Articles 3 and 10 to justify its development of comprehensive and excessive rules on the scope and conditions

of the right to strike. The detail and length of the catalogue of rules – 44 paragraphs of the 2012 General Survey on Convention No. 87 – demonstrated that it was not an interpretation, but an extension of the scope of the Convention to fill a regulatory gap. However, only the Conference was competent to fill normative gaps.

17. Not only would a referral to the ICJ not resolve the dispute, it would have negative effects for the ILO and its supervisory mechanism. Any finding that Convention No. 87 did provide for the right to strike – despite the fact that its drafters had expressly excluded it and many governments had recognized that it was not included – would have implications for ratification of standards. Confidence in the reliability of obligations under ratified ILO Conventions would be lost, and constituents might be reluctant to set new standards. It would set a very bad precedent, undermining efforts to resolve differences of opinion through social dialogue and mutual agreement.

18. An advisory opinion from the ICJ would bring into sharper focus the many incompatibilities between national law and practice, on the one hand, and the excessive rules of the Committee of Experts, on the other. One example was that the Committee of Experts had stated that political strikes, sympathy strikes and strikes by public service officials must be allowed, and that essential services had to be defined extremely restrictively. Governments with national regulations and practices prohibiting certain types of strikes would face strong pressure to align their national laws, or even their constitutional law, with the so-called interpretations of the Committee of Experts or risk a complaint being brought before one of the supervisory bodies. In addition, an ICJ referral could further deter countries that had not yet ratified the Convention from doing so.

19. An ICJ referral would also send a very negative message to the public about the ILO's ability to settle divergences on important substantive matters, which could suggest that difficult matters would be decided through litigation rather than consensus. Irrespective of an advisory opinion, the Employers' group would not agree with broad, detailed and excessive opinions of the Committee of Experts on the right to strike, so the problem would remain unresolved.

20. There were also procedural questions that remained open. The Employers' group believed that the Conference played a crucial role in the governance process by ensuring the participation of all States parties to a given Convention. Although the 1949 resolution had authorized the Governing Body to request advisory opinions, fewer than one third of the current 187 Member States had been party to that decision, which therefore lacked democratic legitimacy and should be revisited. The Employers' group also expressed concern that the International Labour Standards Department might not be impartial, given that the dispute originated in a report of the Committee of Experts, which the department played a key role in preparing.

21. The group was convinced that a referral to the ICJ for an advisory option could not resolve the dispute, irrespective of the questions put to it. The right to strike was a multifaceted and complex issue that could not be separated from the widely diverging and deeply rooted industrial relations systems and practices in all ILO Member States. Any determination of international rules on the right to strike would have to take those differences into account. That could only be done by the tripartite constituents, within the framework of established ILO procedures, at the Conference.

22. Furthermore, advisory opinions from the ICJ were inherently not legally binding, and it was highly doubtful whether article 37(1) of the Constitution made them so for the ILO and its constituents. Doubts in that regard had previously been raised by the Office itself, and also by a former President of the ICJ; many governments had also shared those doubts. While the Employers' group respected the crucial role of the ICJ in settling disputes between countries

and the persuasive power of its advisory opinions, the group would not accept an advisory opinion that recognized a right to strike in Convention No. 87 and approved the interpretations of the Committee of Experts, as those had never been discussed and approved in a tripartite standard-setting process. The Employers' group would continue to refuse to adopt conclusions on the right to strike in the Committee on the Application of Standards and other supervisory bodies.

23. It would be highly problematic to impose a referral to the ICJ by means of a vote when opinion was so divided. In its note on the binding legal effect of ICJ advisory opinions, the Office had stated that the ILO should be "ready to follow or be guided by the Court's advisory opinion", otherwise "it must not ask for the opinion in the first place". Given that many constituents did not believe that a referral to the ICJ was the appropriate way to resolve the dispute, the option should be abandoned.

24. Comprehensive, inclusive social dialogue at the Conference was the only way to achieve a sustainable and legally sound solution. In the past, the adoption of a Recommendation, Convention, Protocol or resolution had been the only recognized way to develop international rules on labour matters that were clear and transparent, based on tripartite participation and support, and that respected national sovereignty by allowing Member States the choice of whether to ratify them or not. In 1992, Colombia, supported by Germany, Morocco and Venezuela, had proposed standard-setting on the right to strike. Many other Governments had voiced support for tripartite social dialogue solutions on the topic of the right to strike, as well as some workers' organizations.

25. Article 37 was intended to be used only as a last resort, once all tripartite social dialogue procedures had been exhausted, which was not yet the case. A discussion at the Conference, taking into account some of the views of the Committee of Experts, would lead to a solid tripartite consensus on universally applicable rules regarding the right to strike and its basic principles and boundaries. Such a fresh approach would be the best way forward and would provide a legal certainty that could no longer be challenged. The Governing Body could not replace the Conference, as it had limited representation. She therefore urged all constituents to reach consensus to refer the matter to the International Labour Conference as the supreme decision-making body of the ILO, and not the ICJ.

26. **Speaking on behalf of the group of 44 countries**, a Government representative of Colombia noted with appreciation the amount and quality of the work of the Office aimed at facilitating the important discussion and expressed the hope that the proposal would open a path towards resolving the dispute. As the ongoing dispute fell within the scope of article 37(1) of the ILO Constitution, the amended draft decision proposed that the Governing Body should request the ICJ urgently to render an advisory opinion on the question.

27. **Speaking on behalf of the European Union (EU) and its Member States**, a Government representative of Spain said that North Macedonia, Montenegro, Georgia, Norway and Iceland aligned themselves with her statement. She recalled that on 14 July 2023, the EU and its Member States had sent the Director-General a letter requesting that, as a matter of utmost importance, an item be placed on the agenda of the Governing Body on the referral to the ICJ of the dispute regarding the interpretation of Convention No. 87 in relation to the right to strike and indicating that legal clarity was urgently required after more than a decade of failed attempts to find a solution. The group recognized the Committee of Experts as an independent body established by the Conference to analyse the application of Conventions by Member States, and that the opinions and recommendations of the Committee were non-binding. The group agreed that the advisory opinions of the ICJ were judicial statements on the legal

questions submitted by authorized organizations and that, in the case of the ILO, such advisory opinions were binding pursuant to article 37(1) of the ILO Constitution. The group supported referral of the dispute to the ICJ to ensure legal certainty. In so doing, it also sought to uphold the authority of the Committee of Experts, as agreed by the Governing Body in 2014, and to safeguard the supervisory system. The group was thankful to the Office for all the support provided in preparation of the special session and stood ready to decide on the adoption of a resolution on the referral to the ICJ.

28. **Speaking on behalf of the Association of Southeast Asian Nations (ASEAN)**, a Government representative of Indonesia stated that her group had chosen to address the dispute through the internal mechanism provided by the ILO, rather than resorting to the ICJ. However, that should not be misconstrued as a denial of the fundamental right to strike. The provision under the ILO Constitution allowing for a referral to the ICJ in cases of differing interpretations of a Convention must be a last resort. The dispute should be resolved through internal channels to arrive at a comprehensive, agreeable and inclusive resolution. The group was confident in the collective capacity of the Conference to reach consensus internally, thereby achieving a credible solution that would enhance the ILO supervisory system.

29. Her group proposed agreeing on a time frame during which all stakeholders would seek a common and thorough understanding through tripartite meetings. Only if there was no resolution after the time frame had elapsed should the matter be referred to the ICJ. The outcomes of the two special sessions should be presented to the International Labour Conference for further deliberation and determination. There had been profound changes in the 74 years since the Conference resolution had authorized the Governing Body to request an advisory opinion of the ICJ. As the supreme and the most representative body of the tripartite constituency of the ILO, the Conference was the most suitable platform to hold a comprehensive, substantive and in-depth discussion of the interpretation of the Convention in the spirit of democratization and fair representation.

30. **Speaking on behalf of the Arab group**, a Government representative of Qatar said that the holding of two special sessions of the Governing Body on the interpretation of Convention No. 87 in relation to the right to strike reflected the importance of the matter and the intent of the ILO's tripartite constituents to resolve the long-standing dispute. Dialogue within the ILO was the best way to achieve legal certainty for any dispute on the interpretation of ILO Conventions; therefore, all internal means should be exhausted before referring the matter to the ICJ. There was still an opportunity to achieve consensus through social dialogue at the International Labour Conference. All Member States should be given the necessary time to consider the alternatives, including the option of standard-setting to be discussed the following day. In any case, the Conference should have the final word on the matter.

31. **A Government representative of Bulgaria** said that, as no consensus-based solution had been found to the long-standing dispute on the interpretation of the fundamental Convention No. 87 with regard to the right to strike, the matter should be referred to the ICJ. The ongoing dispute had a negative impact on the functioning of the ILO as a whole, especially its supervisory bodies, and the credibility of its body of standards. Adopting a Protocol to the Convention would not provide the necessary legal certainty, as it would only have legal effect on States that ratified the Protocol, thereby risking the creation of a two-tier system and greater legal uncertainty. A constructive spirit must be maintained, as the effective implementation of international labour standards was the common goal of all constituents.

32. **A Government representative of Egypt** said that it was important to have legal certainty on the interpretation of Convention No. 87 in relation to the right to strike, but tripartite dialogue

within the ILO took precedence; referring the matter to the ICJ should be a last resort, after exhausting all other means and examining all points of view discussed during both special sessions of the Governing Body. It was important to allow sufficient time for all constituents to examine the proposal, and further consultations should be conducted on the formulation of the referral and the question or questions it would include, which should then be presented to the Conference for adoption. Approval from the Conference would ensure the participation of all ratifying countries in the decision-making. The mandate granted to the Governing Body by the 1949 resolution was aimed at dealing with matters that could not wait until the next session of the Conference. Since the current dispute had been ongoing for more than 12 years, another six months should not be an obstacle.

33. **A Government representative of the Netherlands** said that, as a founding Member of the ILO, his country supported finding solutions through social dialogue. However, that had proved to be impossible in the issue at hand, so it was time to turn to the ICJ for legal clarity. It was important to prevent the ongoing dispute from undermining the ILO's credibility, its supervisory functions and its reputation as a standard-setting body. Article 37(1) of the ILO Constitution empowered the Organization to ask the ICJ for a decision on any dispute relating to the interpretation of a Convention, which was precisely what was required. Any Protocol that the Conference might adopt to address the issue would apply only to Member States that ratified it, and thus would not provide the necessary legal certainty or universality.

34. **A Government representative of Norway** said that her Government had maintained the position since 2014 that the dispute should be referred to the ICJ and that there was no need for supplementary action. Principles relating to the right to strike had been progressively developed by the Committee on Freedom of Association and the Committee of Experts, and all the ILO's supervisory bodies had operated within their mandates. To promote and defend their interests, workers required a means by which they could apply pressure in order to have their demands met. It was natural that the right to strike could be derived from Convention No. 87. In addition, the ILO and its supervisory bodies did not exist in isolation: several international covenants regulated the right to strike, providing a broader legal framework within which to interpret the Convention. It would be paradoxical if the United Nations specialized agency for labour did not recognize the right to strike in its own Conventions.

35. **A Government representative of Panama** noted that an ICJ decision would have an impact not only on the implementation of other Conventions, but also on the supervisory system as whole. Care must be taken not to set a precedent by immediately having recourse to the ICJ without first exhausting other means. Freedom of association was based on three inseparable rights: the right to organize, the right to collective bargaining and the right to strike. Strikes were a powerful instrument of trade union negotiation as a means of resolving conflicts, but should be used with care and responsibility. If there was no other way forward than to refer the question to the ICJ, the standards supervisory system must remain active at the same time.

36. **A Government representative of Paraguay** said that the right to strike or engage in work stoppages was explicitly recognized in his country's constitution for both public and private sector workers, and also for employers, but did not extend to members of the armed forces, the police or essential public services. It was important to resolve any disputes within the Organization through social dialogue. He therefore urged the Governing Body to continue efforts to promote cooperation on tripartite initiatives.

37. **A Government representative of South Africa** said that his Government was driven by the desire to rectify the legal ambiguity regarding the interpretation of Convention No. 87 with respect to the right to strike and by its unwavering commitment to strengthening the ILO's

supervisory systems. Referring the matter to the ICJ would bring legal certainty, which would in turn empower the supervisory systems to fulfil their duties without their authority being called into question. The right to strike could not be divorced from the broader notion of freedom of association.

38. **A Government representative of Switzerland** said that her Government respected the request made by the Workers' group. It was regrettable that the document submitted by the Office had not contained a critical analysis of the questions raised by that group, particularly as they were the same as those raised by the Office in 2014 in document GB.322/INS/5; her Government could not, therefore, accept that an analysis thereof threatened the Office's neutrality and impartiality. For constituents to make an informed decision, all necessary information must be provided in a transparent, objective and comprehensive manner. Neither the wording nor the substance of the question to be put to the ICJ had ever been discussed by the Governing Body. In the interest of tripartism and the cohesion of the Governing Body, the suggested questions must be discussed in an inclusive manner.

39. The first question was not sufficiently precise and did not reflect the problem at hand, as a decision on whether or not Convention No. 87 protected the right to strike would not shed light on the conditions for its exercise. If it was decided that the Convention protected the right to strike without regulating it, it would then be necessary to ask who determined how that right could be exercised, which would be a matter concerning the interpretation of the ILO Constitution, not the Convention. The ICJ should instead be asked whether it was for tripartite legislators, the supervisory bodies, the ICJ's judges or domestic court judges to make a binding decision on the conditions for the exercise, and possible limits of, the right to strike when those elements were not addressed in existing legislation. The second question did not constitute a question relating to the interpretation of the Convention as envisaged in article 37 of the Constitution.

40. If the decision of the ICJ was to be legally binding, all tripartite constituents should be involved in the discussion of the matter and in decision-making. As such, once the contents of the question to be put to the ICJ had been agreed, the International Labour Conference should have the opportunity to make the final decision on referring the matter to the ICJ.

41. **A Government representative of Tunisia** underscored the importance of permitting all Member States, in particular those that had ratified Convention No. 87, to express their views on the matter. The Governing Body should ask itself whether all avenues for dialogue had truly been exhausted and whether it was appropriate for the Organization to press for a decision from the ICJ in the light of the differences in opinion displayed and the implications of that divergence in opinion on the eventual acceptance and ownership of a decision of the ICJ.

42. Dialogue was an effective way to arrive at consensual decisions, which were more likely to be accepted and applied. The matter should therefore be included on the agenda of the forthcoming session of the International Labour Conference, which would allow discussions to continue in an inclusive manner. The Conference must have the opportunity to give its view on any Governing Body decision. While the 1949 resolution authorized the Governing Body to request an opinion from the ICJ, it did not prevent the Conference from making decisions on whether to refer matters thereto. In highlighting that fact, she was not intending to cast doubt on the legitimacy of the Governing Body's role in the process, but pointing out that some issues were of such importance that they deserved to be examined by all Member States. It would be crucial to bear in mind that it was not for the ICJ to make judgments on matters beyond the scope of article 37(1) of the Constitution.

43. **A Government representative of Türkiye** expressed satisfaction with the decision to discuss the matter in a Committee of the Whole. While his Government recognized the importance of safeguarding the right to strike as a fundamental labour right, it had reservations regarding the interpretation of Convention No. 87 in that respect. Social dialogue was a proven and effective approach to dispute resolution and ensured that robust and sustainable solutions could be achieved with the participation of all parties. His Government therefore supported the idea of resolving the dispute through the ILO's existing mechanisms and structures rather than referring it to the ICJ, which could potentially weaken the Organization's tripartite mechanisms.

44. **A Government representative of Zimbabwe** said that her Government noted the legitimate request of the Workers' group and wished to obtain legal certainty regarding the matter, which had negatively affected the smooth functioning of the ILO's supervisory system since 2012, and would be interested in hearing the advisory opinion of the ICJ, particularly since the supervisory system had not been objective in its analysis of cases for many years.

45. The legal advice provided by the Office was appreciated. However, the authority delegated to the Governing Body in the 1949 resolution was outdated, and the Organization and its membership, as well as that of the Governing Body, had evolved since its adoption. The decision-making power should therefore rest with the Conference as the body that had delegated that authority. Moreover, the Governing Body was not currently representative of the ILO membership, given that countries of chief industrial importance remained permanent members. It was concerning that some members of the Governing Body had not ratified Convention No. 87 yet had the right to vote on the matter, while some ratifying countries were not permitted to vote as they were not Governing Body members. The Conference, which comprised all Member States of the ILO, should therefore make the final decision.

46. **A Government representative of Algeria** said that engaging in tripartite dialogue on an issue of such importance would help to prevent institutional crises and ensure legal certainty within the ILO. Any question to be put to the ICJ must focus on whether the right to strike was recognized under Convention No. 87, as broadening the scope of that question would only accentuate the differences in opinion and would not reflect the essence of article 37(1) of the Constitution. Decisions to refer to the ICJ any cases concerning the interpretation of a fundamental Convention must be approved by the Conference, as that was the only way of including all Member States in decision-making and ensuring that the positions of all parties would be taken into consideration. Securing the approval of the Conference would strengthen the credibility of the referral process and restore trust among constituents.

47. **A Government representative of Australia** said that the uncertainty caused by the dispute could not continue, and referral of the matter to the ICJ was the appropriate way to deliver legal certainty. Her Government did not support consideration of standard-setting on the subject while the dispute remained unresolved.

48. **A Government representative of Bangladesh** said that, under the ILO Constitution, standard-setting was the mandate of the International Labour Conference. The 1949 resolution had not permanently delegated authority on matters relating to international labour standards to the Governing Body, and there was considerable doubt as to whether the word "activities" in the resolution included direct or indirect standard-setting. The Conference must have full jurisdiction; the Governing Body could not presume a permanent authority in that regard. Referral to the ICJ was a last resort and should not be invoked at present. The inherent authority of the Conference on matters of standard-setting must not be diluted. The 1949 resolution did not require the Conference to approve the Governing Body's decision to

refer a matter to the ICJ since the Governing Body's mandate in that regard had been bestowed by the Conference itself. The ILO's internal dispute resolution procedures had not yet been exhausted; it would therefore be necessary to resort to the supreme authority of the Conference. The right to strike was not explicitly mentioned in Conventions Nos 87 or 98. Legal obligations must be explicitly stated in legislation or in a Convention; if there was no such statement, therefore, the legal obligation did not exist.

49. **A Government representative of Barbados** said that, during consultations held earlier in the year, his Government had added its voice to the call for article 37 of the ILO Constitution to be invoked, noting that social dialogue did not always lead to consensus. It was unacceptable that the ILO could not speak authoritatively to Member States on issues relating to Conventions and on a matter as important as the right to strike. Indeed, the ILO's normative function was weakened by that shortcoming. The uncertainty surrounding the situation had lasted far too long; the matter should now be referred to the ICJ.

50. **A Government representative of Cameroon** said that tripartism, the principle at the heart of the ILO, remained the best way to resolve the dispute and secure legal certainty regarding the interpretation of Convention No. 87 and the right to strike. Her Government was convinced that there was still scope to resolve the issue internally. Referral to the ICJ should be a measure of last resort once all internal avenues for tripartite dialogue had been exhausted, and would thus be a premature move at the present juncture. In the interest of peace, social justice and democracy, all Member States – especially those that had ratified Convention No. 87 – should be able to participate in discussions and decision-making on whether to refer the matter to the ICJ. The matter should therefore be placed on the agenda of the forthcoming session of the International Labour Conference, which should make the final decision.

51. **A Government representative of Canada** expressed concern about the negative implications that the dispute was having on the functioning of the ILO's supervisory system. It would be important to have clarity on the scope of Convention No. 87 so that governments that had ratified, or were considering ratifying, the Convention were aware of the nature and extent of obligations arising from ratification and could adapt national law and practice accordingly. The dispute must therefore be resolved without further delay.

52. Her Government was a strong supporter of social dialogue and had previously advocated for a tripartite, negotiated resolution to the dispute. However, after careful consideration, it was now of the view that all avenues for social dialogue had been exhausted, given that the impasse had persisted for over a decade and the views of ILO constituents on the subject were diametrically opposed. Her Government therefore supported, on an exceptional basis and as a last resort, referral to the ICJ. An authoritative advisory opinion would allow constituents to move forward with legal clarity on the matter.

53. **A Government representative of Chile** emphasized his Government's support for the ILO's normative function. The right to strike had been recognized in Chilean legislation and jurisprudence as an integral element of freedom of association in the scope of Convention No. 87. His Government therefore believed that the ILO should request the ICJ to urgently issue an advisory opinion on protection of the right to strike in the context of Convention No. 87.

54. **A Government representative of China** said that the International Labour Conference should make the final decision on any recommendations or conclusions reached by the Governing Body at its current session. His Government maintained the position that disputes should be resolved through consultation and dialogue. Referring the dispute to the ICJ was not the only option for the Organization, much less the best option. The ILO should further improve its

internal mechanisms in a spirit of tripartism and inclusive social dialogue to reach comprehensive workable solutions that addressed the concerns of all parties.

55. **A Government representative of Colombia**, welcoming the decision to allow all governments to express their views on the matter, said that the way forward would be to refer the dispute to the ICJ. The matter had been addressed in compliance with the norms and regulations guiding the Governing Body, which was therefore within its rights to take a decision, and the Office had acted impartially in enforcing that normative framework. The Governing Body's mandate should not be called into question, nor should that of the Committee of Experts, and the legitimacy of the ILO's supervisory bodies must not be jeopardized as all constituents benefited from their decisions, considerations and recommendations. Their role was crucial to the promotion of tripartism, which contributed towards successful social dialogue and was an example to other organizations in the United Nations system. His Government was confident that the ICJ would be able to settle the dispute and that, once a decision had been handed down, the Organization would find a way to address the matter to the satisfaction of all parties and in line with international labour standards. If necessary, the Organization could then pursue other avenues.

56. **A Government representative of Eswatini** said that the right to strike had never been challenged at the national level in Eswatini. However, he recognized that the long-standing international dispute had serious repercussions on the work of the ILO's supervisory bodies. The urgency of current efforts to resolve the interpretation dispute went against the ILO's ideals of social dialogue and consultation. Furthermore, making a decision within the Governing Body excluded many who would be affected by the outcome of the discussion, especially those Member States that had ratified Convention No. 87. He urged the Governing Body to utilize all available options, including tripartite consultations, and defer its decision to March 2024.

57. **A Government representative of India** said that the matter in question was not just about freedom of association, but rather about setting precedent for future issues. She recalled that the Committee of Experts had interpreted Convention No. 87 as including the right to strike. Moreover, in terms of process, the current dispute clearly lay within the jurisdiction of the International Labour Conference; so that those who were not members of the Governing Body would not be excluded from decision-making that would affect them. She therefore called for a discussion at the International Labour Conference; the dispute should only be referred by the Conference to the ICJ if it was not resolved. The ILO must uphold the principle of democratic decision-making.

58. **A Government representative of Mexico** said that his Government had repeatedly stated the need to guarantee legal certainty and to strengthen the ILO's supervisory system. It was important to appropriately implement the provisions set out in the ILO Constitution, especially article 37(1). Referring the ongoing dispute to the ICJ would provide legal certainty and strengthen human rights, labour rights and the principles of tripartism and social dialogue. The outcome would provide a strong basis for the implementation of Convention No. 87 and protect workers' rights. He therefore supported the amendments to the draft decision proposed by the Government representative of Colombia on behalf of a cross-regional group of countries.

59. **A Government representative of Namibia** recalled that the persistent dispute over the right to strike and the interpretation of Convention No. 87 had undermined the ILO's normative mandate and the credibility of its supervisory system. No resolution had been attained through social dialogue. It was clear that the ongoing discussion constituted a "question or dispute" as

provided for in article 37(1) of the ILO Constitution, and as such should be referred to the ICJ without delay. Such a decision would be an act of good faith and would provide legal certainty for the supervisory system.

60. **A Government representative of Niger** said that it was deplorable that the long-standing dispute had not been resolved through social dialogue and had been allowed to affect the operation of the ILO's supervisory system. He supported referring the dispute to the ICJ because the resulting advisory opinion would be recognized as definitive and binding by all parties. However, given the importance of the subject matter, the decision to make such a referral should be made by the International Labour Conference in 2024, irrespective of the authority granted to the Governing Body in 1949. All constituents should agree to implement the ICJ's opinion with mutual respect. He commended the support provided to constituents by the Office of the Legal Adviser in preparing for the current discussion. In light of the differing approaches to the application of article 37(1) of the ILO Constitution, he requested the Director-General to prepare rules of procedure for the application of that provision and others of a similar nature. He supported the draft resolution but would prefer that paragraphs 2 and 3 were deleted prior to its adoption.

61. **A Government representative of Nigeria** said that embarking on a strike without following agreed procedures and without recourse to dispute resolution had a negative impact on the economy and the enterprises concerned. In his country, questions of legislative interpretation and ambiguity were referred to an independent body. Thus, the provision contained in article 37 of the ILO Constitution to refer the dispute to the ICJ could serve to resolve the current dispute. It was time for the Governing Body to decide which ILO governance body should make the decision for such a referral, and to adopt an updated version of the draft resolution originally presented in 2014.

62. **A Government representative of Pakistan** stressed the importance of tripartism and dialogue within the ILO. He asked whether an international norm recognized by one legal instrument, such as the right to strike within the International Covenant on Social, Economic and Cultural Rights, should be recognized by others without further consideration. As a human rights standard, the right to strike should be considered as a labour standard. In terms of implementation and supervision, he said that the supervisory system guided the implementation of such standards, but that the stipulations made by supervisory bodies were advisory, and they were unable to create new obligations. He expressed the hope that the current dispute could be resolved through negotiation and dialogue.

63. **A Government representative of the Russian Federation** said that the use of external measures to resolve internal differences should only be considered as a last resort, and that internal social dialogue mechanisms had not yet been exhausted in the current case. The dispute had not been considered by the International Labour Conference, and as such a majority of Member States had been unable to participate in discussions on the matter. While he recognized that the Governing Body had been authorized to request advisory opinions of the ICJ, it was also true that the membership and decision-making procedures of the ILO had evolved significantly and as such the 1949 resolution did not automatically provide grounds for such action. Moreover, no time frame had been set for dialogue, and the dispute had gone beyond interpretation to encompass institutional aspects of the functioning of the ILO. Finally, he did not agree that an advisory opinion of the ICJ would provide legal certainty. Such an opinion was, by nature, advisory, and would inevitably lead to future disputes about its legal nature. He therefore did not support the proposal to refer the dispute to the ICJ and he did not support the amendments to the draft decision proposed by the Government representative of Colombia on behalf of a cross-regional group of countries.

64. **A Government representative of Sudan** noted the request of the Workers' group to seek an advisory opinion from the ICJ on the interpretation of Convention No. 87 and the right to strike. He said that a referral to the ICJ should only be made when all other mechanisms had been exhausted, including a discussion at the International Labour Conference in which all Member States could participate. He expressed the hope that such a discussion would provide legal clarity and certainty and protect the principle of social dialogue. He proposed that the Governing Body should set a time frame for those discussions so that further steps could be taken if necessary.

65. **A Government representative of the United States of America** said that the right to strike was protected by Convention No. 87. That said, given the long-standing disagreement with respect to that interpretation, and the damaging impact of that dispute on the integrity of the ILO supervisory system, her Government was open to referring the matter to the ICJ. However, it was not necessary or appropriate to refer the question of whether the Committee of Experts was competent to determine the scope and derivation of the right to strike. Her Government fully supported the work of the Committee of Experts as a key part of the supervisory system, especially its work to provide non-binding observations and recommendations addressing the protection, scope and parameters of the right to strike. She expressed the hope that the current discussion would lead to a clear plan to resolve the dispute.

66. **The Worker Vice-Chairperson** said that she welcomed the information provided by Member States and noted the widespread commitment to finding a solution to the ongoing dispute.

67. **The Employer Vice-Chairperson** said that using the Committee of the Whole format had led to rich discussion, despite prior opposition to it. She noted that no Government had denied that the right to strike was a fundamental right and reiterated that the central issue was whether a Convention, which had explicitly excluded the right to strike, could be used as a basis for extensive interpretation of that right by one of the supervisory bodies – the Committee of Experts – and not the others. The issue was one of democratic legitimacy. Since adopting the 1949 resolution, the membership of the ILO had grown from 61 to 187 Members. Thus, in the opinion of her group, the 1949 resolution was not a democratically legitimate basis for action.

68. **The Director-General** said that disagreement between constituents and the Office was an expected part of the democratic process. However, using such disagreement as a basis for unfounded allegations of bias, partiality and even collusion by the Office was inexcusable; particularly in the light of the work done by the Office to prepare for the current discussions. He expressed the hope that those allegations would be withdrawn.

Governing Body

69. The Governing Body had before it a subamendment to the amendment to the draft resolution that had been proposed by the Government of Colombia on behalf of a group of 44 countries. The subamendment had been proposed by the Employers' group and circulated by the Office and read:

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

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

Recalling that at the origin of the dispute is a disagreement among the Organization's tripartite constituents concerning whether the right to strike is protected under Convention No. 87, and whether the Committee of Experts has exceeded its authority in providing non-binding opinions and recommendations on the right to strike.

~~Noting that ILO supervisory bodies have consistently observed that the right to strike is a corollary to the fundamental right to freedom of association,~~

Noting that the issue under consideration is about the scope of C. 87 and the opinions expressed by the CEACR on the right to strike,

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

Affirming the necessity of resolving the dispute consistent with the Constitution of the ILO,

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

Recalling the consensual decision of the 320th Governing Body in March 2014, welcoming "the clear statement by the Committee of Experts of its mandate as expressed in the Committee's 2014 report":

> "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".

~~Noting that, despite protracted attempts, no consensus has been reached through tripartite dialogue,~~

Acknowledging the role of the International Labour Conference as the supreme body of the ILO composed of tripartite delegations of its Member States, that has the authority to adopt international labour standards and provide guidance on the world of work.

Emphasising that Article 37.1 of the Constitution establishes that any referral to the International Court of Justice is for decision on the question or dispute referred,

Expressing the hope that, in view of the ILO's unique tripartite structure, not only the governments of ILO Member States but also the international employers' and workers' organizations enjoying general consultative status in the ILO would be invited to

participate directly and on an equal footing in the written proceedings and any oral proceedings before the Court, if a referral were to be decided.

The Governing Body requests the Office to place an item at the 112th session of the International Labour Conference (2024), to discuss and decide about options to provide legal certainty, including through:

(A) appropriate measures to be taken by the International Labour Conference

(B) a referral to the International Court of Justice for an advisory opinion on the interpretation of Convention No. 87 in relation to the right to strike and if so required, decide on necessary follow-up actions after receiving the advisory opinion.

~~Decides, in accordance with article 37, paragraph 1, of the Constitution of the International Labour Organization,~~

~~1. To request the International Court of Justice to render urgently an advisory opinion under Article 65, paragraph 1, of the Statute of the Court, and under Article 103 of the Rules of Court, on the following question:~~

~~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. Instructs the Director-General to:~~

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

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

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

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

70. **The Chairperson**, as required by article 4.3 of the Standing Orders and as reflected in the arrangements for the special session adopted by the Governing Body at its 349th Session, provided the following oral report on the exchange of views in the Committee of the Whole:

Pursuant to article 4.3. of the Governing Body's Standing Orders, and as reflected in the special arrangements adopted for this special session, I have the honour to report to the Governing Body on the exchange of views that took place this morning.

The Committee of the Whole offered the opportunity for a rich exchange of views that involved a total of 35 speakers, including 12 governments not represented in the Governing Body. A number of participants welcomed the Committee of the Whole format to ensure transparency and inclusiveness, which are crucial on a matter of great institutional significance.

On the principal question of whether or not the Organization should seek an urgent advisory opinion from the International Court of Justice (ICJ) under article 37(1) of the Constitution, the Employers' and Workers' groups reaffirmed their respective positions.

The Workers' group recalled that the dispute concerned a fundamental principle and right at work, and that the right to strike was an essential means – and in certain cases the only means – through which workers' organizations could defend their interests. The ILO was a fortress for the workers of the world, and the prolonged legal uncertainty was detrimental to the workers. To date, there was no other option but to refer the dispute to the ICJ. There was no realistic chance of resolving the dispute through social dialogue because the Employers' group did not recognize that the right to strike was included under Convention No. 87, nor the corresponding

authoritative legal guidance of the supervisory bodies. Settling the legal question of the scope of Convention No. 87 regarding the right to strike and affirming the authoritative guidance of the Organization's supervisory organs should be prioritized through the applicable constitutional means, namely article 37(1) of the Constitution.

With respect to the two proposed questions to be put to the Court, the Workers' group explained that the intention was to cover all aspects of the interpretation dispute. Yet, the group considered that the single question proposed by some governments on the right to strike would suffice to resolve the dispute, on the understanding that the ICJ would be provided with all relevant documentation. And finally, the 1949 delegation of authority was still valid, and thus the Governing Body had the authority to refer the dispute to the ICJ for decision. The group would accept any ICJ determination as final and authoritative.

The Employers' group reiterated its strong opposition to a referral of the dispute to the ICJ. There was no dispute of interpretation of Convention No. 87 since that Convention did not address the right to strike. The broad, detailed and extensive so-called "interpretations" of the Committee of Experts on the right to strike were the real issue at stake, as well as the fact that the Committee of Experts had filled a regulatory gap, a function that belonged only to the Conference. A referral to the Court would set a bad precedent as it would be a public admission by the ILO that it cannot resolve disputes internally.

The Employers' group reiterated the view that advisory opinions of the ICJ were inherently not binding and that they would not accept any advisory opinion of the ICJ, irrespective of its content. They would continue to disagree with the detailed and excessive views of the Committee of Experts and to refuse to discuss matters related to the right to strike in the context of the Conference Committee on the Application of Standards. The Employers' group further noted that the proposed questions were not sufficient and should include also the role of the Conference. The Conference should discuss and adopt international rules concerning the right to strike as it was the competent forum to find a solution. The right to strike was a multifaceted issue that required thorough discussion by the tripartite actors in the world of work. Standard-setting action by the Conference was the only way forward.

A wide majority of governments reaffirmed the importance of freedom of association and the right to strike, with many highlighting their national laws and practice in that regard.

An important number of governments expressed clear support for a referral of the interpretation dispute to the Court, underlining that governments needed legal certainty on the scope of the obligations resulting from the ratification of Convention No. 87. While reaffirming their support for solutions based on social dialogue, they considered that such solutions had not yielded results to resolve a dispute that had been going on for too long. The current deadlock concerning a fundamental principle and right at work should come to an end. It was necessary to prevent the ongoing dispute from further undermining the ILO's credibility, especially its standard-setting and supervisory functions. These governments expressed their strong belief that the recourse to the ICJ was the avenue for achieving legal certainty. In that connection, most recalled that the advisory opinion would be binding on the ILO. They further considered that the standard-setting proposed by the Employers' group and other governments could not provide legal certainty as non-ratifying members would still face the current uncertainty arising from the dispute under Convention No. 87. Some governments highlighted that room for social dialogue would exist in following up on the ICJ's decision, as might be necessary.

With regard to the questions to be put to the ICJ, support was expressed for the first question. No government expressed support for the second question included in the Workers' group's request. One government considered that the first question, on the right to strike, did not fully capture the dispute, while the second one, on the mandate of the Committee of Experts, could not be considered a question of interpretation under article 37(1) of the ILO Constitution.

A number of governments, while recognizing that the Constitution provided for a referral to the Court in case of an interpretation dispute, did not support a referral to the Court, which they believed should be a last resort to be contemplated only after all other means had failed.

For some of those governments, standard-setting action by the Conference was the most transparent, appropriate and logical method for formulating authoritative ILO regulations concerning the right to strike. Standard-setting reflected the ILO's core principles of tripartism and social dialogue and could deliver a well-balanced, globally acceptable outcome. Should a solution through tripartite dialogue prove impossible, the route to the ICJ remained available in accordance with article 37(1) of the ILO Constitution, in the last instance.

Regardless of whether they were in favour of, or against, the referral to the ICJ, many participants took the view that the matter should preferably be debated and decided at the International Labour Conference. They indicated that while the Governing Body was duly authorized in 1949 to request advisory opinions, changes in the ILO membership made it necessary that the issue be discussed by the supreme deliberative organ for reasons of legitimacy. An equally large number of speakers, including those sponsoring the amendment, considered that the Governing Body was an appropriate forum to take such a decision.

In closing, I think nobody would be surprised if I said that there seems to exist convergence on the diagnosis but not on the cure. The exchange of views brought to the forefront the diversity and divergence of views in this matter.

The openness of the exchange of views that the Committee of the Whole format offered was welcomed and appreciated by all participants. I hope that this report has done justice to the quality of the exchange of views and to the engagement and sense of responsibility shown by all three groups.

I trust that the Governing Body plenary will now be able to take over and engage in a constructive debate on the possible way forward.

71. **The Employer Vice-Chairperson**, responding to the oral report, clarified that although her group could not accept the Office's view that advisory opinions of the ICJ were legally binding, or accept or recognize the ICJ's approval of the opinions of the Committee of Experts on the right to strike, that did not mean that it would not accept any of the ICJ's advisory opinions. Moreover, her group had not stated that standard-setting was the only viable solution, although the International Labour Conference, as the Organization's supreme body, should have the freedom to decide on the forum for deliberations and decisions.

72. There were questions surrounding the Office's impartiality. As had been noted by the Government of Switzerland, although the referral questions proposed by the Workers' group were identical to those contained in document GB.322/INS/5, the Office had refused to undertake a legal analysis of them, citing reasons of neutrality. In recent months, the Office had bypassed procedural and governance rules to assist the Workers' group in its aims, sidelining the Employers' group and disregarding the ILO's tripartite balance. For example, the Office had allowed the Workers' group to place an item on the Governing Body's agenda without first submitting it to the Screening Group, while denying a similar request made by the Employers' group. Similarly, the background documents relating to the Employers' and Workers' groups did not contain the same level of detail; while the document relating to the proposal from the Workers' group contained letters of support from governments, such letters had been excluded from the document on her group's proposals. The Office had also sidelined the governments by failing to share all relevant information with them. The Office's unfair treatment of its constituents, which owed to its political leadership rather than unprofessionalism on the part of its staff, was completely unacceptable.

73. The original draft resolution was inappropriate and biased, reflecting only the position of the Workers' group and seeking to pre-empt the Governing Body's discussions. In the past, many governments had voiced the opinion that such a serious issue should be dealt with by the International Labour Conference, rather than the Governing Body. She disagreed with the assertion in the original draft resolution that the dispute's origins lay in a disagreement among

the tripartite constituents regarding whether the right to strike was protected under Convention No. 87; rather, it had been triggered by the gradual and unsolicited development by the Committee of Experts of rules on the right to strike that had referred to that Convention, despite the Conference's intentional exclusion of the right to strike from it during the drafting and adoption process. She also strongly disagreed with the statement in the that "the Court's authoritative legal guidance [was] the only viable option" and on "the final and binding nature of any advisory opinion so obtained". Although the amendments proposed by the group of 44 countries omitted those phrases, they had been used by governments in their statements.

74. The amendments to the draft resolution proposed by the group of 44 countries also made reference to the mandate of the Committee of Experts, and she wished to highlight that the Committee had exceeded its mandate by providing extensive opinions on the right to strike that could not be considered interpretation because they went beyond the scope of Convention No. 87. Furthermore, the proposed replacement of the reference to the Committee on Freedom of Association with "ILO standards supervisory bodies" was factually incorrect since those bodies included the Committee on Freedom of Association, which did not supervise the application of standards such as Convention No. 87, and the Committee on the Application of Standards, which did not agree that the right to strike was covered by that Convention.

75. While she supported the removal of the reference to restoring legal certainty, as proposed by the group of 44 countries, she disagreed with the proposed wording "despite protracted attempts, no consensus has been reached through tripartite dialogue" since there had been no attempts to discuss the right to strike at the Conference owing to the persistent refusal by the Workers' group to place a substantive discussion on its agenda. The resolution concerning the procedure for requests to the ICJ for advisory opinions was outdated because the Organization had changed significantly since its adoption in 1949. The Conference retained the right to request advisory opinions at any time, particularly with regard to such important matters as the right to strike. Her group could therefore not support the original resolution or the amendments proposed by the group of 44 countries. Her group's subamendments reflected the majority view in the Committee of the Whole that the matter should be put to the Conference.

76. **The Worker Vice-Chairperson** recalled that the task that faced the Governing Body was to decide whether it would refer the outstanding dispute to the ICJ, recognizing the relevance of article 37 in that context. She also recalled that the Director-General had launched a strong appeal to refrain from certain language, to wide support. He had requested the Employers' group to withdraw its allegation of collusion. That had not happened; quite the contrary. It was extremely problematic to challenge the stated impartiality of the Office simply because certain constituents adhered more closely to a certain view than others.

77. The Employers' group had stated earlier that the question to be resolved was not a matter of interpretation. However, the contribution of the IOE on 24 October 2023 had proposed standard-setting in 2024 with a view to the adoption of a Protocol. The Office had accordingly prepared a report on the proposal. More importantly, the document submitted by the Employers' group had expressed the conviction that solid and sustainable dialogue should be pursued to resolve the long-standing dispute on the interpretation of the right to strike, in the context of Convention No. 87. The Employers' group had therefore started with the recognition of an interpretation dispute, going on to state that standard-setting was the most obvious means of resolving the dispute. The Employers' group had then expressed a desire for a quick resolution rather than resorting to external means. That implied an awareness of urgency.

78. The Workers' group was not expecting the ICJ to create more obligations than were intended by the text of Convention No. 87. For over 70 years, the supervisory bodies had found that the right to strike was a corollary of freedom of association, embodied in the ILO Constitution and in Convention No. 87. The Workers' group merely wished the ICJ to affirm that long-standing view without amendment. Some countries had strong concerns that if a question were asked as to whether the right to strike was protected under Convention No. 87, it would create an absolute right to strike. The Workers' group asserted that, in its view, the ICJ would never overstep the practice in the ILO itself. The ICJ was simply being requested to affirm the propriety of the action of the ILO and the supervisory bodies on the basis of Convention No. 87. The ICJ was unlikely to create an absolute right to strike or grant more power to the Committee of Experts. The mandate of the Committee of Experts was decided by the ILO itself and not by the ICJ. The amendment proposed by the group of 44 countries referred to it solely to clarify that the mandate had been agreed to by all and underpinned current work in the supervisory system.

79. The Employers' group continued to refer to the fact that the right to strike had not been included in, or had been explicitly excluded from, the preparatory work prior to the adoption of Convention No. 87. According to that logic, the preparatory work of any legal text could be used to clarify and find evidence of the intent of its drafters. Nonetheless, the Vienna Convention on the Law of Treaties stated, and the ICJ had recently affirmed, that the history of a legal text only became relevant for the purposes of interpretation if the ordinary meaning of the provision in its context and in light of its object and purpose led to absurd results. The ICJ had also used the preparatory work as a secondary source to confirm its interpretation of a text where needed. The negotiating history of Convention No. 87 showed that the preparatory work was not conclusive. It could not help to resolve the dispute because it provided no evidence of whether the delegates to the Conference had expressly intended to exclude the right to strike from Convention No. 87. In contrast, the questionnaires administered by the Office had indicated that several governments, certainly not the majority, had preferred that Convention No. 87 only relate to freedom of association and not to the right to strike. The delegates to the Conference who had raised an issue in that regard were only concerned by the possible exercise of a right to strike in the public sector and not with a right to strike of workers in general. The Conference had finally decided to adopt general principles regarding freedom of association without any further detail. Accordingly, since the preparatory work did not show that the delegates to the Conference had intended to exclude the right to strike from Convention No. 87, it was not considered dispositive. Therefore, according to the Vienna Convention it was important primarily to consider the subsequent practice in the ILO and its Member States, as foreseen by the Vienna Convention. The subsequent practice in the ILO was the work of the supervisory bodies. Moreover, at the time of adopting Convention No. 87, the Constitution of the ILO and the Declaration of Philadelphia had already enshrined freedom of association. Furthermore, according to the Committee on Freedom of Association, whose mandate was based on the Constitution of the ILO, the right to strike was protected under the constitutional principle of freedom of association as well as under Convention No. 87. The jurisprudence contained in the *Compilation of decisions of the Committee on Freedom of Association* should be consulted.

80. The Worker Vice-Chairperson expressed concern that the issue of democratization or the level of democracy of the Governing Body was seeping into other debates, including that of the legal mandate to refer disputes to the ICJ. The Workers' group was strongly committed to democracy in general and to democratization as a process in the ILO. All other avenues having been exhausted, the time had come to refer the dispute to the ICJ. Tripartite debates should be engaged after a decision by the ICJ. As its social partner, the Workers' group was the

counterpart of the Employers' group for further dialogue, if that were desired, and consensus-seeking. There had been extensive debate on the issue, without resolution. Further debate was pointless.

81. The Employers' group had stated during the sitting of the Committee of the Whole that it would not respect the decision of the ICJ – which was an outrageous statement contrary to the principle of the rule of law – but it had fortunately later qualified its position. The Workers' group disagreed with all the amendments tabled by the Employers' group.

82. **Speaking on behalf of a majority of Asia and Pacific group (ASPAG) countries**, a Government representative of the Islamic Republic of Iran urged the Office and Governing Body to consider the fact that the States most affected by the potential consequences of any decision on the right to strike were not Governing Body members; her group would therefore prefer such a decision to be made by the Conference, and any outcome from the current meeting should be submitted for further consideration by the Governing Body before submission to the Conference for a final decision.

83. Tripartite consensus built on social dialogue should, nevertheless, remain the first port of call for resolving disputes linked to the world of work. Moreover, internal solutions, which were the only way to ensure that all ILO constituents engaged actively in the process, should be prioritized and exhausted before referrals were made to the ICJ. Internal ILO processes and tripartism must therefore be strengthened. Her group proposed that tripartite meetings should be convened urgently to reach a fair solution that addressed the request of the Workers' group as well as the concerns of the Employers' group and the Governments. A voluntary Protocol to Convention No. 87 could be developed to ensure that States that had adopted the Convention in 1948 were not obliged to accept new interpretations. Her group would not accept any amendments or decisions that were inconsistent with its position.

84. **Speaking on behalf of Argentina, Brazil, Chile and Colombia**, a Government representative of Chile expressed surprise that more than 100 years since its founding, the ILO continued to discuss whether the right to strike was covered by its normative framework. That right was inextricably linked to freedom of association, a universal right that protected both employers and workers. Although social dialogue should be used to resolve disputes linked to the interpretation of labour standards, the tripartite constituents had the right to make use of all available mechanisms to seek a solution when the limits of such dialogue were reached, including referrals to the ICJ. He supported such a step in the interests of gaining vital legal certainty on the right to strike. The Office had always acted professionally and impartially and in line with the Standing Orders of the Governing Body.

85. **Speaking on behalf of a group consisting of the Arab group countries, a majority of ASPAG countries, 17 African countries and 3 European countries**, a Government representative of Sudan said that tripartite dialogue within the ILO remained the best means of resolving the dispute. While referral to the ICJ was a constitutional right after all internal processes and tripartite dialogue had been exhausted, legal certainty should be reached through an inclusive process. Since it was necessary for all Member States to participate in discussions and in the decision-making process with regard to the proposed referral, that decision must be approved by the Conference. Moreover, the resolution that allowed for such referrals to be made by the Governing Body had been adopted in 1949, when there were significantly fewer Member States, and did not negate the Conference's right to adopt such decisions. Discussions of the issue should therefore continue at the Governing Body's next session, and the Office should convene tripartite meetings on the subject in the meantime. His group did not support the draft decision.

86. **Speaking on behalf of the EU and its Member States**, a Government representative of Spain expressed full support for the Office's exhaustive work to prepare for the discussions. The amendments proposed by the group of 44 countries were the way to garner the broadest possible support. The referral to the ICJ might result in confirmation that the right to strike was covered by Convention No. 87, in accordance with the interpretation of the ILO supervisory bodies. The involvement of the International Labour Conference in the referral decision risked prolonging an already long-standing dispute without providing new solutions, and he did not support, therefore, the subamendments proposed by the Employers' group.

87. **A Government representative of Argentina**, noting that the matter at hand was long standing and affected the functioning of the ILO supervisory bodies, supported the request of the Workers' group for an advisory opinion from the ICJ. That step was permitted under the ILO Constitution, which took precedence over all other normative or procedural provisions. Although there was no doubt that such an important right as the right to strike was covered in Convention No. 87, legal certainty on the matter was required to better uphold collective rights. He welcomed the recognition by the Workers' group that it was no longer necessary to address the second of its questions, and he supported the draft decision.

88. **A Government representative of Barbados** said that, until there was a change in the Constitution or the rules governing the Governing Body, the rules remained in place, including that of delegated authority. There was an inescapable inequality of power between employers and workers. The weaker party's right to associate would be essentially meaningless if that right did not also include the right to use the available tools to be seen, heard and respectfully engaged. Whether or not the Convention as it stood, and as many Member States had assumed, included the right to strike was a matter on which the ILO should provide guidance to its Member States.

89. The representative expressed concern about the credibility of the ILO's supervisory system. The ILO and its Member States should clearly understand the tenor of the ILO Conventions. The ILO had endeavoured in vain to resolve the dispute for many years. It therefore had to have recourse to the methods envisaged in its Constitution, unless the dispute resolution envisaged had clearly proven to be unreasonable, unreliable or unjust. Barbados did not believe that to be the case. It believed that the matter should be referred to the ICJ and supported the draft decision proposed by the group of 44 countries.

90. **A Government representative of Brazil** expressed his understanding that there was no doubt under article 37 of the ILO Constitution as to the legality of referring the dispute to the ICJ. The opposing views of the Workers' and Employers' groups appeared to be entrenched. However, obtaining legal certainty and clarity on the scope of Convention No. 87 was urgent. The draft resolution in the Office document focused on two crucial questions: the interpretation of Convention No. 87 and the mandate of the Committee of Experts. The referral to the ICJ was a last resort to guarantee legal certainty to all tripartite constituents and was consistent with the ILO's Constitution. Social dialogue, which Brazil favoured, had failed after 11 years. The essence of Convention No. 87 was closely related to democracy in the workplace establishing a balance of power between workers and employers. By not taking a decision on the right to strike, constituents had been perpetuating violations of that fundamental principle. The right to strike was interlinked with the right to freedom of association and collective bargaining, undeniable values that protected both workers and employers and ensured normative and social stability to governments. Brazil endorsed the amended resolution presented by Colombia on behalf of the group of 44 countries and strongly supported the mandate of the special session of the Governing Body.

91. **A Government representative of Colombia** said that the right to strike was intrinsic to freedom of association, the right to organize and collective bargaining – a principle upheld by the courts and legislation in democratic societies. It was an enabling right, to be used when there were no other options. In his country, various aspects governing strikes took into account the recommendations of the ILO. Governments therefore required legal certainty with regard to their obligations under Convention No. 87. The Committee of Experts was independent, impartial and objective and had to interpret standards as part of its supervisory duties. Questioning the mandate or findings of the Committee of Experts would undermine the credibility of the ILO and create a lack of legal certainty, in turn reducing its persuasive effect over States for the effective application of international labour standards. As various means to resolve the dispute had been attempted over several decades, the ILO must now have recourse to the procedure under article 37(1) of the ILO Constitution and request the ICJ to urgently issue an advisory opinion on whether the right to strike was protected under Convention No. 87. He had therefore submitted an amendment on behalf of a group of 44 countries with a resolution to that effect, and did not support the subamendment proposed by the Employers' group.

92. **A Government representative of Ecuador** said that, prior to referring the dispute to the ICJ if the Governing Body democratically decided to do so, all efforts to resolve it within the ILO through social dialogue must first be exhausted. Another option would be to establish a temporary quasi-judicial body to supervise the application of the provisions of Convention No. 87. Ecuador could also support the adoption of a Protocol for Member States to ratify. That would allow for more flexibility concerning Convention No. 87 or broaden its obligations.

93. **A Government representative of Gabon** said that her country supported the referral to the ICJ in order to obtain a definitive ruling on the long-running dispute. However, given the particular nature of such a procedure and the potential consequences for countries' legislation, a referral should be made only following a consideration of the matter at the next session of the International Labour Conference so as to secure a specific mandate from all constituents. She therefore supported a referral to the ICJ if the Conference, not the Governing Body, so decided.

94. **A Government representative of India** said that the fundamental disagreement had global implications and far-reaching consequences. As such, it would be neither equitable nor fair for the Governing Body to take the decision on a referral to the ICJ. The discussion should be widened to allow all Members of the ILO to participate, at the International Labour Conference. She therefore supported the statement made by the Government representative of Sudan on behalf of a group of countries.

95. **A Government representative of Japan** said that tripartite discussions should be exhausted before any referral to the ICJ. The ICJ should be a last resort, as a referral would set a precedent. Nevertheless, the dispute had been exhaustively discussed, as demonstrated by the statement of the Workers' group and in the amended draft decision introduced by Colombia on behalf of a group of countries. The right to strike was not an absolute right, as it was restricted for certain categories of workers and certain situations. Moreover, no provisions concerning the right to strike had been included in Convention No. 87 when it was adopted, and even after 158 Member States had ratified the Convention, there was still no consistent agreement among them on the scope of the right to strike. He sought clarification from the Office on whether the discussion was proceeding on the principle, outlined in the Government group statement at the 2015 tripartite meeting on Convention No. 87 in relation to the right to strike, that the right to strike was not absolute and that the scope and conditions of the right were regulated at the national level.

96. **A Government representative of Malaysia** supported an internal solution to resolving the dispute, with a referral to the ICJ only as a last resort. She urged the Office to establish an internal independent tribunal to provide for the expeditious determination of the dispute. The uncertainty had led to difficulties for constituents in regulating strikes. If the dispute continued, it could affect the supervisory system and the credibility of the ILO as a body that set international labour standards, as well as efficacy in the application of international standards.

97. **A Government representative of Mexico** emphasized the importance of implementing article 37(1) of the ILO Constitution, because it would provide legal certainty with regard to a long-standing controversy. An advisory opinion would strengthen international law, human rights, tripartism and social dialogue by providing a sound basis for the implementation of Convention No. 87, benefiting the rights of workers. The Governing Body was authorized to refer the dispute to the ICJ through the 1949 resolution, therefore it was unnecessary to channel the referral through the Conference. Mexico supported the amendment proposed by the group of 44 countries, without the subamendment proposed by the Employers' group.

98. **A Government representative of Namibia** said that the dispute over the interpretation of Convention No. 87 with respect to the right to strike had undermined the Organization's normative mandate and the credibility of its supervisory system. As the issue was legal, rather than political, it was appropriate to invoke article 37(1) of the ILO Constitution for a legal settlement. He therefore supported the amendment proposed by the group of 44 countries, but rejected the subamendment proposed by the Employers' group.

99. **A Government representative of Niger** supported a referral to the ICJ, while highlighting the importance of ensuring the participation of all parties concerned, in particular, States that had ratified Convention No. 87. He sought clarification on the potential consequences in the event that an advisory opinion recognized that the right to strike was protected by Convention No. 87 on States that had ratified the Convention but did not recognize the right to strike and, conversely, the potential consequences for States that had ratified the Convention and recognized the right to strike if the ICJ considered that the right was not protected under Convention No. 87.

100. **A Government representative of Nigeria** acknowledged the advantages of further dialogue, but stressed the need to resolve the current uncertainty by finding a way forward. He therefore suggested holding consultations with a view to continuing the discussion at the 350th Session (March 2024) of the Governing Body and the 112th Session (June 2024) of the International Labour Conference. His Government could be flexible on the modalities, as long as an agreement could be reached on how to resolve the issue. He requested more information on whether the Conference had the mandate to decide on a referral to the ICJ, and guidance on the potential intended and unintended consequences of the proposed resolution.

101. **A Government representative of the Russian Federation** said that, given the clear division within the Governing Body on the matter, continued social dialogue was the only way forward. He therefore did not support any decision on a referral to the ICJ that was not supported by at least a substantial proportion of participants, and agreed with the statements made on behalf of members of ASPAG, ASEAN and the group of countries represented by Sudan.

102. **A Government representative of the United Kingdom of Great Britain and Northern Ireland** agreed on the importance of social dialogue. However, in exceptional cases where repeated attempts at tripartite dialogue had proven unsuccessful for a long period of time, alternatives should be considered to move forward as an Organization. He therefore reiterated

his Government's support for the amendment proposed by the group of 44 countries, namely to pursue a referral to the ICJ under article 37(1) of the ILO Constitution.

103. **The Director-General**, replying to the question from the Government representative of Niger, said that it was not possible to speculate on the content or implications of any advisory opinion from the ICJ. As to the comments made by the Employers' group on what it viewed as a lack of impartiality by the Office, he said that the Office would provide a written and detailed response to all members of the Governing Body.

104. **A representative of the Director-General** (Director, International Labour Standards Department), responding to the question from the Government representative of Japan, confirmed that the Committee of Experts had always stated that the right to strike was not an absolute right.

105. **Another representative of the Director-General** (Legal Adviser), in response to the queries from the Government representative of Nigeria, explained that there were two concurrent legal bases, or "titles of jurisdiction", for seeking advisory opinions from the ICJ. The first was article 37(1) of the ILO Constitution – originally Article 423 of the Treaty of Versailles – which made provision for the Organization to seek advisory opinions from the ICJ regarding the interpretation of the Constitution or of international labour Conventions. The second was Article IX(2) of the 1946 Agreement between the United Nations and the International Labour Organization (also known as the UN–ILO relationship agreement), which provided that the UN General Assembly authorized the Organization to request advisory opinions of the ICJ on legal questions arising within the scope of its activities. Paragraph 3 of the same article provided that such requests could be addressed either by the International Labour Conference or by the Governing Body acting in pursuance of an authorization by the Conference. That authorization had been granted three years later, in 1949. The Conference and the Governing Body had, therefore, a standing authorization by the UN General Assembly, under article 96 of the UN Charter, to seek advisory opinions from the ICJ.

106. As to the implications of the amendment and subamendment, he said that the amendment proposed by the group of 44 countries, if adopted, would imply an immediate referral of the legal question or questions to the ICJ for an urgent advisory opinion. The subamendment proposed by the Employers' group, however, sought to place an item on the agenda of the 112th Session of the Conference (June 2024). Unless a decision to place an item on the Conference agenda achieved consensus, paragraph 5.1.1 of the Standing Orders required that a second discussion be held at the subsequent session of the Governing Body.

107. Concerning the query from the Government representative of Niger, he echoed the Director-General's view that it was not possible to speculate on the impact or legal ramifications of a future advisory opinion, especially when the Governing Body had not finalized the question or questions to be put to the ICJ. Once an advisory opinion had been issued, it would need to be analysed and to be brought before the Governing Body, which would be the requesting organ – or to the Conference – for debate and decision on possible next steps. The ICJ had clarified on numerous occasions that its role was to render legal assistance to the requesting organ, and that it was for each requesting organ to decide on the actions to be taken subsequently.

108. **The Worker Vice-Chairperson** said that the decision to request a referral to the ICJ had not been taken lightly. Indeed, a great deal of work had been done since the Employers' group had first started to challenge the interpretation of Convention No. 87 in 2012, including the development of the work plan on the strengthening of the supervisory system. Some Governments had expressed concerns regarding the impact of making such a referral to the

ICJ, but consideration should also be given to the enormous harm the ongoing dispute was causing to the exercise of a fundamental right by workers, and the insecurity that that generated in terms of union protection. In addition, the supervisory bodies had faced huge restrictions in giving guidance on that fundamental right. Since an agreement could not be reached, it was only natural to go to the ICJ. Nothing in the Constitution suggested that all other avenues must be exhausted before a referral to the ICJ; in any case, the issue had been under discussion for many years already. It was time for the Governing Body to take a decision, although that would not preclude any further discussions, as the democratic approach of the Organization could always be improved. She therefore requested that the amendment of the group of 44 countries containing a draft resolution be put to a vote.

109. **Speaking on behalf of the Arab group**, a Government representative of Morocco noted the explanation that the Conference, as well as the Governing Body, could decide to refer a matter to the ICJ. The Conference was a more inclusive forum than the Governing Body, so it made sense to submit such a fundamental issue there first; to refuse to take the issue to the Conference went against the image of the ILO as a place of dialogue.

110. The group therefore proposed a subamendment, to add at the beginning of the first operative paragraph of the resolution, the wording "to submit to the 112th Session of the International Labour Conference, for consideration, in accordance with article 37, paragraph 1, of the Constitution of the ILO, the question of whether", which would then continue "to request the International Court of Justice…"; and to subamend the chapeau of the second operative paragraph to read "According to the result obtained at the International Labour Conference, instructs the Director-General, if it is so decided, to:". The group was not calling into question the ILO Constitution or any other established legal basis for its governance, but merely seeking a way to move closer to consensus. In that context, he asked the Office what conditions would need to be fulfilled to place the item on the agenda of the Conference.

111. **The Worker Vice-Chairperson** asked whether subamendments could still be proposed, given that she had called for a vote.

112. **A representative of the Director-General** (Legal Adviser) clarified that requests for a vote were noted by the Chairperson, but, as per established practice, did not require an immediate decision. While it was the Chairperson's prerogative under the Standing Orders to determine if and when to put a question to a vote, the usual ILO practice was for the Chairperson to continue seeking convergence where possible, which might involve the submission of further subamendments, as in the current case.

113. **The Employer Vice-Chairperson** also noted that, as the Legal Adviser had made clear, the authorization granted to the Governing Body to request advisory opinions of the ICJ in 1949 did not take away the power of the Conference to do the same. The reason for the long-standing dispute was the consistent refusal of the Workers' group to discuss the matter at the Conference, even though it had been the intention of the drafters of Convention No. 87 to have a separate standard to regulate the right to strike, and proposals had been made throughout the years to hold a standard-setting exercise. Everyone recognized the value of the principle of freedom of association, and the Employers' group and the Workers' group had issued a joint statement in 2015 stating that the right to strike was a legitimate instrument to defend the interests of workers. The Employers' group had not sought a referral to the ICJ as it believed the matter should be settled in a standard-setting exercise through social dialogue at the Conference, which would allow all constituents to express their views. If the subamendment proposed by the Arab group would achieve consensus, the Employers' group

could support it. She urged other Governing Body members to support it in order to avoid further division and to prevent further harm to the work of the Organization.

114. **Speaking on behalf of a majority of ASPAG countries**, a Government representative of the Islamic Republic of Iran expressed support for the subamendment proposed by the Arab group and the call for a vote.

115. **The Worker Vice-Chairperson** said that the proposed subamendment appeared to suggest that all the work leading up to the special session had not been sufficient. Having an open discussion on the matter at the Conference would not produce a clear outcome. The dispute concerned a fundamental issue eroding the protection of a fundamental workers' right. The Governing Body had the responsibility and the mandate to decide to refer the matter to the ICJ. She therefore urged the Chairperson to call a vote.

116. **Speaking on behalf of the Arab group**, the Government representative of Morocco clarified that the subamendment that he had proposed simply requested that the decision be taken in the most inclusive way possible. He asked why the Governing Body was against an inclusive approach. Referring the decision to the Conference for approval would send a positive message to the outside world that the decision had been taken by a majority.

117. **The Worker Vice-Chairperson** said that the notion of inclusivity was highly complex. The ILO was a tripartite Organization, and the voices of workers and employers of all Member States were represented on the Governing Body by the spokespersons. While Governments wanted to participate in the discussion, the format of the Committee of the Whole was not necessarily more inclusive for workers. No consideration was being given to the serious concerns that the Workers' group had been voicing for the past 11 years.

118. Article 37(1) of the ILO Constitution obliged all bodies – whether the Governing Body or the Conference – to refer interpretation disputes to the ICJ. There would be no added value in asking the same question to the Conference. While the Workers' group was committed to discussing measures to improve inclusivity, it was not a good reason to further delay a decision by deferring the discussion to the Conference. She would therefore not support the subamendment proposed by the Arab group.

119. **The Employer Vice-Chairperson** said that the International Labour Conference was the only place where all governments, employers and workers were present and had a vote. Although the Committee of the Whole had been useful, only additional governments could speak, not additional representatives of the social partners; it could therefore not replace the Conference. She did not understand the Workers' group's objection to having the item discussed in the most representative forum.

120. There were now two proposals on the table to place an item on the agenda of the Conference, and, according to paragraph 5.1.1 of the Standing Orders of the Governing Body, when a proposal to place an item on the agenda of the Conference was discussed for the first time by the Governing Body, it could not, without the unanimous consent of the members present, take a decision until the following session. Therefore, if there was a divergence of views, there would need to be a further discussion at the next session of the Governing Body.

121. **A Government representative of India** first asked for clarification from the Legal Adviser as to whether the authorization from the Conference for the Governing Body to refer legal questions to the ICJ was an overarching approval for all cases and for all time, with no scope for any constitutional exceptions. Second, she noted that the jurisprudence suggested that when an issue impacted the principal organ, decisions taken in its absence by any body to which it delegated power might not be entirely valid or even ethical. The Governing Body could

not presume that ILO Members would not want to be part of the wider, more inclusive decision-making at the Conference. Moreover, if discussions at two sessions of the Governing Body were required before an item could be placed on the agenda of the Conference, she asked whether the discussion held at the March 2023 session of the Governing Body on a procedural framework for referral of interpretation disputes to the ICJ under article 37(1) of the Constitution would count as the first discussion. She supported the subamendment proposed by the Arab group.

122. **A representative of the Director-General** (Legal Adviser) said that Article IX of the UN–ILO relationship agreement of 1946 was very clear: the UN General Assembly authorized the ILO to request advisory opinions of the ICJ on legal questions arising within the scope of its activities and that such requests could be addressed to the ICJ by either the International Labour Conference or by the Governing Body acting in pursuance of an authorization by the Conference. There was no other qualification, so both bodies had explicit authorization and could validly refer interpretation disputes or questions to the ICJ. As to whether it could be presumed that the tripartite delegates at the annual session of the Conference would like to be part of the decision-making process, that was not a legal question and he should therefore refrain from expressing any view.

123. He confirmed that, according to paragraph 5.1.1 of the Standing Orders of the Governing Body, when a proposal to place an item on the agenda of the Conference was discussed for the first time by the Governing Body, the Governing Body could not, without the unanimous consent of the members present, take a decision until the following session. The discussion by the Governing Body at its 347th Session (March 2023) on the procedural framework set out in Appendix I to document GB.347/INS/5 for the referral of interpretation questions or disputes to the ICJ – which proposed non-binding guidelines for future use – did not address at all the possibility of referring to the ICJ the concrete dispute around the interpretation of Convention No. 87 in relation to the right to strike and could thus not qualify as the first discussion of the proposal to place an item on that matter on the agenda of the Conference.

124. Referring to the subamendment proposed by the Arab group, he observed that it was inaccurate to say that the Governing Body could decide, in accordance with article 37(1) of the Constitution, to submit a question for consideration by the Conference. That article related to the referral of questions for decision by the ICJ. As he understood it, the intention of the subamendment was to place an item on the agenda of the Conference and he therefore suggested that the text be redrafted accordingly.

125. **The Worker Vice-Chairperson** said that, since her group had first written to the Director-General in July 2023 invoking article 37(1), all Member States had been informed of the situation and invited to comment on the Office background report, in what could only be described as an inclusive process. The Committee of the Whole had been organized so that any Member State that wished to participate could do so. However, the whole of the ILO's constituency did not need to be involved in all the complexities of the Governing Body's work. Acknowledging that the Chairperson could continue to seek convergence following a request for a vote, she said that the continued discussions on the subamendment proposed by the Employers' group – which her group could not accept – were not leading to convergence.

126. **Speaking on behalf of the Arab group**, a Government representative of Morocco proposed that the subamendment put forward by his group could be edited to take into account the comments made by the Legal Adviser.

127. **A representative of the Director-General** (Legal Adviser) suggested that, for the sake of accuracy, the words "in accordance with article 37, paragraph 1, of the Constitution of the ILO" should be placed after the word "request".

128. **A Government representative of Namibia** noted that, according to paragraph 5.7.3 of the Standing Orders of the Governing Body, the Chairperson had the right to determine the order in which amendments would be discussed and decided upon. Taking a vote on the subamendment proposed by the group of 44 countries would be the most efficient way to proceed. It was important to avoid undemocratic manoeuvres that did not respect the procedures of the Governing Body. The cost for governments of sending delegations to meetings at which the substance of a matter was not discussed should be taken into consideration.

129. **A Government representative of Brazil** said that, although a decision by the Conference would no doubt be more democratic, the decision was on the agenda of the Governing Body and needed to be taken by the Governing Body. Given the high cost of his participation in the sessions of the Governing Body for his Government, he could not return to his country without a decision having been made. The matter should be put to a vote.

130. **The Employer Vice-Chairperson** said that the process to date had been far from inclusive; the Workers' group had written to the Director-General on the matter in July – when many people had been on holiday – giving her group and the Governments very little time to consult and take decisions. She recalled that taking a vote should be a mechanism of last resort. Indeed, taking a vote on such an important substantive matter would undermine the house. It would also not be a mechanism of last resort, because social dialogue on the matter had never taken place, as the Workers' group had refused to allow an item to be put on the agenda of the Conference to discuss the substance of the right to strike. It was precisely in the interest of social dialogue that the Employers' group now wanted to refer the matter to the Conference. She was opposed to the principle of voting on the matter and requested the Chairperson to continue working towards a convergence of views, even if that was not achieved until the 350th Session (March 2024) of the Governing Body.

131. **Speaking on behalf of a majority of ASPAG countries**, a Government representative of the Islamic Republic of Iran said that many Governments had not yet finalized their internal tripartite consultations on the matter. The Governing Body should refer the matter to the Conference for a final, inclusive, decision.

132. **Speaking on behalf of the group of 44 countries**, a Government representative of Colombia said, with reference to the subamendment proposed by the Arab group, that it would be a waste of time to include the item on the Conference agenda, as the only possible outcome would be for the Conference to refer the matter to the ICJ. He was not opposed to inclusivity or democratization. There had been enough discussion to take the decision under consideration and the Governing Body should not continue going around in circles. He therefore called for a vote.

133. **A Government representative of Bangladesh** said that, as the outcome of the dispute on interpretation would be applicable to all countries, an inclusive approach of taking the matter to the Conference would be preferable.

134. **A Government representative of China**, emphasizing that the principle of tripartism should be upheld, expressed support for the subamendment proposed by the Arab group, which was constructive, practical, impartial and inclusive, and likely to be the most acceptable solution.

135. **The Chairperson** observed that the Governing Body had before it one amendment and two subamendments and that, following lengthy discussions and unfruitful attempts to seek convergence or flexibility, the Workers' group and a number of Governments had called for a vote. Under the circumstances, taking a decision by vote appeared inevitable.

136. **The Clerk of the Governing Body** reiterated that, according to paragraph 5.7.3 of the Standing Orders, it was for the Chairperson to determine the order in which the amendments and subamendments should be discussed and decided upon. He suggested that the Governing Body could first decide on the subamendment proposed by the Employers' group. If that was not accepted, it could then decide on the subamendment proposed by the Arab group. If that was not accepted, it could then decide on the original amendment.

137. **The Chairperson** called a vote by show of hands on the subamendment proposed by the Employers' group.

138. **The Clerk of the Governing Body** explained the voting procedure, noting that no regular Government members were disqualified from voting by reason of arrears in the payment of contributions.

(The subamendment proposed by the Employers' group was rejected, with 14 votes in favour, 29 votes against and 10 abstentions.)

139. **The Clerk of the Governing Body** said that the Governing Body should proceed with a vote by show of hands on the subamendment proposed by the Arab group.

(The subamendment proposed by the Arab group was rejected, with 23 votes in favour, 29 votes against and 4 abstentions.)

140. **The Employer Vice-Chairperson** asked the Office to verify the number of votes in favour of the subamendment proposed by her group; she was under the impression that it had received a higher number of votes in favour.

141. **The Chairperson** said that, in the light of the concern raised by the Employers' group, the vote on the subamendment proposed by that group would be retaken in order to protect the integrity of the process.

142. **A Government representative of the United States**, raising a point of order, said that retaking the vote on the subamendment proposed by the Employers' group could prejudice the results of the votes on the amendment and other subamendments, and requested clarification on the process.

143. **The Legal Adviser** indicated that, according to paragraph 6.1.2 of the Standing Orders of the Governing Body, the Chairperson had the prerogative to request that a vote be retaken in case of doubt as to the result. However, if the Chairperson was satisfied that there was nothing demonstrably problematic in the manner in which the vote had been conducted or the votes had been counted, he could confirm the results already announced.

144. **The Worker Vice-Chairperson** requested clarification on the status of the vote on the subamendment proposed by the Employers' group.

145. **The Clerk of the Governing Body** said that, as per the Chairperson's decision, the Governing Body would proceed to retake the vote by show of hands on the amendment proposed by the Employers' group so that there would be no doubt about the transparency and integrity of the voting process.

(The subamendment proposed by the Employers' group was rejected, with 16 votes in favour, 30 votes against and 8 abstentions.)

146. **The Clerk of the Governing Body** said that the Governing Body would next proceed to take a vote by show of hands on the amendment proposed by the group of 44 countries.

(The amendment proposed by the group of 44 countries was accepted, with 33 votes in favour, 21 votes against and 2 abstentions.)

Decision

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

The Governing Body,

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

Recalling that at the origin of the dispute is a disagreement among the Organization's tripartite constituents concerning whether the right to strike is protected under Convention No. 87,

Noting that the ILO's supervisory bodies have consistently observed that the right to strike is a corollary to the fundamental right to freedom of association,

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

Affirming the necessity of resolving the dispute in a manner consistent with the Constitution of the ILO,

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

Recalling the consensual decision of the Governing Body at its 320th Session (March 2014), welcoming "the clear statement by the Committee of Experts of its mandate as expressed in the Committee's 2014 report":

> **"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",**

Noting that, despite protracted attempts, no consensus has been reached through tripartite dialogue,

Emphasizing that article 37(1) of the ILO Constitution establishes that any referral to the International Court of Justice is for decision on the question or dispute referred,

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

Decides, in accordance with article 37(1) of the ILO Constitution,

1. **To request the International Court of Justice to render urgently an advisory opinion under Article 65, paragraph 1, of the Statute of the Court, and under Article 103 of the Rules of Court, on the following question:**

   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. **Instructs the Director-General to:**

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

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

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

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

(GB.349*bis*/INS/1/1, paragraph 27, as amended by the Governing Body)

148. **The Employer Vice-Chairperson** thanked the Governments that had participated in the discussion, in particular those that had spoken in favour of social dialogue. It was disappointing that the Chairperson had forced a vote on the matter, despite the fact that the Governing Body would discuss a very similar matter at its 349th *ter* Session the following day. Furthermore, the vast majority of countries that had taken the floor earlier that day in the Committee of the Whole had spoken in favour of social dialogue and against referral of the matter to the ICJ. Many had also voiced doubts as to whether it was appropriate for the Governing Body to take a decision on the matter in the light of concerns regarding the democratic nature of its composition.

149. The 33 votes in favour of referring the matter to the ICJ represented a very small percentage – she estimated 4 or 5 per cent – of the number of potential votes that could have been cast had the decision been put to the International Labour Conference. The vast majority of the ILO's constituents had therefore been deprived of the opportunity to engage in dialogue and to take a decision on the matter with full legitimacy and inclusivity.

150. She noted with deep regret that the Governments that had led social dialogue in the past had lost the legitimacy to do so, as they had not involved the Employers' group in their

consultations or tried to achieve tripartite consensus, setting a new precedent in that regard. The adoption of the decision by force would prove to be a disaster for the Organization.

151. **The Worker Vice-Chairperson** objected to the suggestion that only the Governments supporting the position of the Employers' group were in favour of social dialogue. Neither did she accept that the Chairperson had been forced to call for a vote; the Workers' group had been within its right to ask for a vote to be taken in a situation where consensus had been unachievable. The members of the Governing Body had been delegated by those that they represented to speak and take decisions on their behalf. While it was clear that further discussion on the democratization of the Governing Body was needed, she disagreed with the suggestion that it lacked decision-making authority, which in effect constituted a challenge to the Organization's governance structure.

152. For the ILO to maintain its credibility, it was important not to allow conflicts to remain unresolved. She expressed hope that constituents on all sides of the debate would participate in an appropriate manner in the examination of the matter by the ICJ and that, after the conclusion of those proceedings, the Governing Body would hold serious discussions on how to follow up on the outcome of that process.

153. She thanked all Governments that had participated in the discussion and expressed appreciation for the commitment of those that had proposed the amendment. She welcomed the professionalism, expertise and commitment demonstrated by the Office and its staff in its efforts to organize and manage the special session, and thanked the Chairperson for leading the debate to a solid outcome.

154. **A Government representative of Pakistan**, speaking in explanation of vote, said that his delegation's position on the amendment proposed by the group of 44 countries should be viewed in the context of the declaration made by his Government on its acceptance of the jurisdiction of the ICJ regarding disputes arising under a multilateral treaty.

DRAFT