

ILO-Office of the Legal Adviser
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Comments on the Office Background Paper on referral to the ICJ matters in relation to right to strike

The Confederation of Danish Employers (DA) wants to comment on the back-ground report that the Office of ILO distributed the 31 August 2023 on an urgent referral to the International Court of Justice of a matter of interpretation of the ILO Convention No. 87 in relation to the right to strike.

DA has closely and actively followed the discussions in ILO for many years in relation to Convention No. 87 and right to strike and in that regard the role and deliberations of the Committee of Experts on the subject.

However, we are astonished how this dossier has evolved in the last months and with what haste a referral to the ICJ is pursued from some of the members leaving aside any room for further dialogue. Therefore, we fully share the observations and frustration of the procedures that have been expressed from the employers' benches and some governments.

We share the view of the employers' group that Convention 87 neither explicitly nor implicitly includes within its scope the right to strike. DA firmly underlines that it is clearly and explicitly documented that the right to strike intentionally was excluded when the constituents drafted and adopted Convention 87.

We also find that the Committee of Experts has no mandate to change the Convention in relation to right to strike or to interpret the Convention to contain such a provision and create a body of interpretations out of the hands of governments, workers, and employers. The Committee on Freedom of Association does not have any mandate to interpret the scope or supervise Convention 87.

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For DA having full respect for the overall mandate of the ICJ and its function the rules of interpretation in the Vienna Convention articles 31 and 32 shall strictly apply. The framework for right to strike in ILO is of a true tripartite nature that should be discussed by social dialogue in ILO and not determined by an external body such as the ICJ.

DA further underlines that workers' right to strike as well as employers' right to lock-out are part of the Danish labor market and mainly defined and regulated by the social partners themselves, Danish law and/or practices due to nationally defined situations, requirements, and limitations. However, this is not a regime that origins or is governed by Convention 87.

A referral to ICJ of ILO Convention 87 and the question of the mandate of the Committee of Experts or even the Committee of Freedom of Association will not create legal certainty or even "social peace" within ILO but risks creating new issues of discussions in ILO. A referral can have impacts beyond the dossier of Convention 87.

DA believes that the only way forward is further tripartite social dialogue-based solution among the ILO constituents.

Yours sincerely,
CONFEDERATION OF DANISH EMPLOYERS

(Signed) Flemming Dreesen