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AMERICA'S UNIONS

**American Federation
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Congress of Industrial
Organizations**

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Mr. Gilbert Houngbo, Director-General
International Labour Office
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c/o: jur@ilo.org

Referral of the Dispute on the Right to Strike to the ICJ

Dear Director-General,

On behalf of the 12.5 million union members of the AFL-CIO, I thank you for your letter to all ILO Member States dated 31 August that was brought to our attention. In this letter you confirmed that you have received the request from the ILO Workers' Group of 12 July 2023 for the urgent referral of the dispute over the interpretation of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87) in relation to the right to strike to the International Court of Justice (ICJ), in accordance with article 37(1) of the ILO Constitution. The Workers' group also requested this matter to be put urgently on the agenda of the Governing Body for decision. This request has in the meantime received support from 36 Governments from different regions. We also express our appreciation for the background report that was prepared by your Office to inform the decision during the Special Meeting of the Governing Body on 10 November 2023.

The right to strike is of utmost importance for workers in the United States, as evidence by historic strikes across the country this year, including writers, actors, autoworkers, healthcare workers, teachers, and many, many more. It is essential that the existence of the right to strike protected by Convention 87 be confirmed.

Indeed, the ILO supervisory system has consistently held for 70 years that Convention 87 does protect a right to strike – a view which has also been supported by the ILO Workers' and Government Groups, other UN bodies, regional human rights courts and national high courts around the world as well as

legal academic opinion.¹ The US Government also explicitly endorsed this view in a 2015 ILO tripartite meeting convened specifically on the right to strike.²

The right to strike is of fundamental importance for workers and trade unions. As has often been observed, collective bargaining without the right to strike is nothing more than collective begging. The possibility to withhold labor is one of the critical tools to help equalize power in the workplace and at the bargaining table. But the right to strike is more than that. As the UN Special Rapporteur for Freedom of Peace Assembly and Association explained, “[P]rotecting the right to strike is not simply about States fulfilling their legal obligations. It is also about them creating democratic and equitable societies that are sustainable in the long run. The concentration of power in one sector – whether in the hands of government or business – inevitably leads to the erosion of democracy, and an increase in inequalities and marginalization with all their attendant consequences. The right to strike is a check on this concentration of power.”

Beyond the right to strike, the Employers’ Group objection is more fundamentally about the role of the ILO supervisory system and ILO constituents in interpreting conventions. As such, the Employers’ Group has also challenged interpretations of other conventions, including Convention 98 on collective bargaining. Over the course of the last eleven years, the ILO, governments, and the social partners have engaged in several efforts to resolve their differences through social dialogue, specifically with regard to the right to strike, as well as the mandate and functioning of the various bodies of the ILO supervisory system. These efforts have not resolved the issue concerning the right to strike. There is no reason to believe that further social dialogue will break this impasse.

Fortunately, the ILO Constitution provides a ready mechanism to resolve this legal dispute. Article 37.1 makes clear that such disputes of interpretation must be referred to the International Court of Justice (ICJ) for an advisory opinion.³ As one of the principal organs of the United Nations, the ICJ is well placed to provide the ILO, and its constituents, the needed legal certainty to robustly fulfil its mandate of social justice. It is critical that the ILO and its constituents have legal certainty over the scope of Convention 87.

This dispute and the lack of certainty it has created over eleven years has served to undermine the proper functioning of the ILO supervisory system and damaged the ILO as a whole. We,

¹ An exhaustive legal review of the issue, finding that the right to strike is unquestionably protected by Convention 87, is found in Vogt, et. al., *The Right to Strike in International Law* (Hart Publ. 2020).

² “[The] Committee on Freedom of Association has confirmed and applied the relationship between the right to strike and the right to freedom of association in almost 3000 cases without any dissent from the social partners. It has been the express view of the committee that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests [and] the right to strike is an intrinsic corollary to the right to organize protected by Convention No 87. We concur that the right to organize activities under Convention 87 protects the right to strike, even though that right is not explicitly mentioned in the Convention.” Statement of the United States, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87), in relation to the right to strike and the modalities and practices of strike action at the national level, Geneva, 23 – 25 February 2015.

³ Article 37.1 of the ILO Constitution provides: “Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.”

Mr. Gilbert Houngbo, Director-General

therefore, wholeheartedly support the request for a referral from our Workers' representatives in the Governing Body and call for an urgent decision by the Governing Body to ensure an immediate referral of the dispute to the ICJ.

In addition, since we firmly believe that the right to strike is an essential part of freedom of association and already elaborated by the ILO supervisory bodies, there will be no added value in a protocol complementing the convention to qualify the right to strike. On the contrary, any such attempt would generate a conflict with C.87 already guaranteeing the right to strike as a fundamental principle and right at work. This would further exacerbate the dispute rather than solve it. We are convinced that legal certainty through an advisory opinion of the ICJ that is binding on the ILO is urgently required.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Cathy Feingold". The signature is fluid and cursive, with the first name "Cathy" and last name "Feingold" clearly distinguishable.

Catherine Feingold
Director - International Department
AFL-CIO