INTERNATIONAL LABOUR OFFICE

Governing Body
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Institutional Section

INS

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THIRTEENTH ITEM ON THE AGENDA

Reports of the Officers of the Governing Body

Second report: Complaint concerning non-observance by Chile of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Maternity Protection Convention (Revised), 1952 (No. 103), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151), made under article 26 of the ILO Constitution by a delegate to the 108th Session (2019) of the International Labour Conference

1. At the 108th Session of the International Labour Conference, Mr Jean-Jacques Elmiger, President of the Conference, received a communication dated 20 June 2019, signed by a Workers' delegate, Mr Wills Asunción Rangel (Bolivarian Republic of Venezuela). The communication contained a complaint against the Government of Chile under article 26 of the ILO Constitution for non-observance of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Maternity Protection Convention (Revised), 1952 (No. 103), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151). The text of the complaint is attached in the appendix.

2. In a plenary sitting of that session of the Conference, the Workers' substitute delegate of the Bolivarian Republic of Venezuela provided information on the complaint. The President of the Conference took note of the complaint and stated that it would be referred to the Officers of the Governing Body.

3. Article 26 of the ILO Constitution reads as follows:

> 1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.
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> 2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.
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> 3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.
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> 4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.
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> 5. When any matter arising out of articles 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.

4. Conventions Nos 87 and 98 were ratified by Chile on 1 February 1999; Convention No. 103 was ratified on 14 October 1994; Convention No. 135 was ratified on 13 September 1999; and Convention No. 151 was ratified on 17 July 2000. Therefore, Conventions Nos 87 and 98 have been in force in the country since 1 February 2000; Convention No. 103 since 14 October 1995; Convention No. 135 since13 September 2000; and Convention No. 151 since 17 July 2001.

5. On the date on which the complaint was filed, the signatory was a delegate at the 108th Session of the Conference. Therefore, under article 26(4) of the ILO Constitution, the delegate was entitled to file a complaint if he was not satisfied that the Republic of Chile had adopted measures to secure the effective observance of these five Conventions.

6. Another complaint alleging non-observance of the same Conventions (Nos 87, 98, 103, 135 and 151) by Chile was submitted by a Workers' delegate at the 105th Session (2016) of the International Labour Conference. [1] In that regard, the Governing Body, at its 329th Session (March 2017), invited the Committee of Experts on the Application of Conventions and Recommendations to continue its examination of any pending issues concerning the application of the Conventions concerned and decided that the complaint would not be referred to a commission of inquiry and that, as a result, the procedure under article 26 of the ILO Constitution be closed. [2]

7. At this stage of the procedure, the Governing Body is unable to discuss the merits of the complaint. If a commission of inquiry were to be appointed – a decision which the Governing Body may take in accordance with article 26(4) of the Constitution – the Governing Body would be requested to take measures only after the commission of inquiry has reported on the merits of the complaint.

[1] GB.328/INS/18/1.

[2] GB.329/INS/12(Rev.) and GB.329/PV, para. 231.

8. In light of the above, the Officers consider the complaint to be receivable in accordance with article 26 of the ILO Constitution and, without entering into the substance of the complaint, have agreed to refer the matter to the Governing Body.

9. In accordance with established practice, when the Governing Body appoints a commission of inquiry, the relevant matters before the various ILO supervisory bodies are referred to that commission. Until a commission of inquiry is appointed, the supervisory bodies remain competent to consider the matters raised.

Draft decision

10. ***The Governing Body considered that the complaint was receivable and decided to request the Director-General to forward the complaint to the Government of Chile, inviting it to communicate its observations on the complaint by 30 January 2020, and to include this item on the agenda of the 338th Session of the Governing Body (March 2020).***

Appendix

Geneva, 20 June 2019

Mr
Jean-Jacques Elmiger
President of the 108th Session
of the International Labour Conference

Director, International Labour Standards Department

Members of the Governing Body
International Labour Organization

Dear Sir/Madam,

I, the undersigned, Wills Asunción Rangel, Workers' delegate of the Bolivarian Republic of Venezuela to the 108th Session of the International Labour Conference, supported by the World Federation of Trade Unions (WFTU), represented by its Vice-President and member of the Workers' delegation of Peru to the 108th Session of the International Labour Conference, Valentín Pacho, and by José Ortiz Arcos, Coordinator in Chile of the World Federation of Trade Unions and President of the General Confederation of Public and Private Sector Workers (CGTP), hereby submit a representation under article 26(4) of the ILO Constitution against the Government of Chile and request, as a matter of urgency, the appointment of a Commission of Inquiry for Chile to investigate the serious and repeated violations committed by the Government of Chile in relation to: **the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Labour Relations (Public Service) Convention, 1978 (No. 151); the Workers' Representatives Convention, 1971 (No. 135); and the Maternity Protection Convention (Revised), 1952 (No. 103)**, all of which have been ratified by the Government of Chile after being submitted to the National Congress of Chile for approval.

As the Governing Body, the Standards Committee and the Committee on Freedom of Association are already aware, despite various appeals made by the ILO supervisory bodies, the Government of Chile continues to violate the fundamental Conventions referred to above. It persists in failing in its obligations to incorporate their content in the Constitution and in the legislation and to apply the Conventions in practice.

In view of this situation, which is extremely detrimental to freedom of association and workers in Chile, particularly those who are organized and/or bargain collectively in both the public and private sectors, and in an attempt to put an end to the innumerable violations committed by using domestic legislation to restrict the rights to organize, bargain collectively and legitimately strike, as well as by the non-application in practice of ratified Conventions by the country's administrative and judicial bodies, **we request the appointment of a Commission of Inquiry for Chile**.

The situation for organized workers is growing graver by the day. As the ILO supervisory bodies are aware, new provisions on minimum services and emergency teams were introduced in the most recent labour reform. However, the current Government is using those provisions to impede collective bargaining, while enterprises are requesting the improperly named "minimum services" and the Labour Directorate is taking longer than the time stipulated to make decisions on the requests. Moreover, many of the applications handled do not comply with the legislation in force. A procedure that had a deadline of 180 days for completion, and which could be requested in only two ways, is currently taking 14 or 15 months, while unlawful applications are being processed. The disorder is creating

countless difficulties for various economic sectors, including the transport, food handling, services and banking sectors.

In addition to these violations, the courts' powers are now being usurped by Government officials, specifically the Labour Director, in order to amend court decisions, and the functions of members of Congress are being usurped to amend laws, all by the issuing of unlawful decisions, which no one prevents. Having previously annulled ongoing collective bargaining negotiations, the Labour Director is now suspending strike ballots at the same time as refusing to designate a certifying officer for strike ballots and trade union elections.

In fact, CGTP members and food handlers had to stage a national strike to demand that the Labour Directorate implement court rulings with which the Labour Director refuses to comply. The Labour Directorate usurped judicial and legislative powers to grant the Labour Director the right to amend laws in order to restrict the rights to strike and to bargain collectively. In addition, it annulled four ongoing negotiations and suspended voting ballots after the vote had taken place, in violation of the legislation in force.

The Labour Director has refused to respect the judgment of the Second Labour Court, which ordered the continuation of the negotiations between the enterprise Merken SpA and five trade unions. The judge stated that **"the inter-enterprise trade union complainants meet the conditions required by article 364(2) of the Labour Code to bargain collectively with the employer, Consorcio Merken SpA, and the collective bargaining process must be allowed to continue without further delay".**

The Labour Directorate refuses to implement the ruling and has issued two decisions to amend it, which is unlawful and constitutes an offence. In addition, it is not allowing the five trade unions that won the case to continue to bargain collectively or to carry out a strike ballot. In other words, the Labour Directorate does not intend to comply with the judgment of the Second Labour Court in Case No. 1-522-2018. The authorities of the Ministry of Labour insist that there is nothing they can do, which means that a Labour Directorate official is committing two offences – usurping court powers and contempt of court – while his superiors do nothing to reinstate the rule of law. The situation is now so irregular that the person drafting the decisions is a lawyer who works for the consultancy that advises the Merken SpA enterprise.

As previously mentioned, the Government has also refused to designate certifying officers for strike ballots and elections for trade union leaders and delegates, increased the restrictions on the organization of workers, and issued a decision amending the standing orders of trade unions with respect to the election of trade union leaders, in violation of Convention No. 87. All this has been achieved through unlawful administrative decisions that violate the Conventions ratified by Chile.

Moreover, the Ministry of Transport and Telecommunications, alongside and with no opposition from the Labour Directorate, has built a strike-breaking system to hinder the collective bargaining of public transportation unions in Santiago de Chile and replace workers from that sector who go on strike.

A new urban public transport system called Transantiago was implemented in Santiago de Chile in February 2007 and was renamed the Metropolitan Mobility Network (RED) this year. It is a system of public road concessions granted to national and transnational companies that operate passenger services in the city. The system, which is subsidized by the State and operates alongside other forms of passenger transport, such as the Metro and suburban trains, has six operators – three nationally owned enterprises that account for 30 per cent of Santiago's public transport market, and three transnationals that make up the other 70 per cent. These seven enterprises comprise approximately 22,000 workers, including drivers, mechanics, and maintenance and administrative workers, and possess a total of 6,800 buses.

These enterprises have trade unions which can exercise their right to bargain collectively and may take strike action, in theory. However, in practice they are obliged only to engage in collective bargaining by enterprise rather than as a branch, and their right to strike is limited, in violation of their fundamental rights and Conventions Nos 87 and 98 on freedom of association and collective bargaining. Furthermore, the Ministry of Labour and the Labour Directorate impose administrative obstacles on them and, since 2000, have not applied Conventions Nos 87 and 98, which are ratified by the Chilean State and passed by the Chilean Parliament, making them law in the Republic of Chile.

Public transport workers in the capital who work in the enterprises of the RED system and manage to negotiate collectively are affected by the requirement to maintain minimum services, whereby the Labour Director abuses and violates national labour legislation and ILO Conventions. Cases have been pending a ruling from the Labour Directorate on minimum services for more than a year, leaving those involved unable to engage in collective bargaining.

ROLE OF THE MINISTRY OF TRANSPORT AND TELECOMMUNICATIONS IN COLLECTIVE BARGAINING AND ITS STRIKE-BREAKING APPROACH

The Government of Chile permanently maintains an anti-union, strike-breaking approach. Whenever workers in an enterprise exercise their right to strike, the Ministry of Transport and Telecommunications implements contingency plans, which are based on buses and drivers from other companies being sent to cover the services and fill the workplaces of those on strike. In addition, it deploys police officers at bus terminals to intimidate workers, and on many occasions, it has detained strikers on the purported grounds that passengers' freedom of movement was being impeded. Consequently, a right being exercised legitimately is ultimately violated.

Such action by the Ministry of Transport impedes the effectiveness of a strike by placing it in the hands of the employer. By this arbitrary and unlawful measure, the ILO Conventions are violated and, more seriously, workers are prevented from being able to negotiate their working conditions effectively.

This same approach is beginning with the food handlers, since the Government is issuing decisions that violate the law and later stating that anyone who feels aggrieved should go to court, even though it knows that the courts have a huge backlog and will not be able to handle the complaint for at least six months. We are before a Government that is exercising authoritarian and shameless authority.

For years, Chilean organizations, including those that are affiliates and friends of the World Federation of Trade Unions, have been calling on successive governments – as have the ILO supervisory bodies – to fully apply the ratified Conventions, yet this has not occurred to date. We are therefore submitting our representation to the ILO in search of more robust decisions and action from the supervisory bodies, given the Government of Chile's failure to comply with ratified Conventions, the ILO Declaration on Fundamental Principles and Rights at Work, and the previous decisions and recommendations of the supervisory bodies.

As the ILO supervisory bodies are already aware, for several years the Government of Chile has been called on to uphold ratified Conventions and to repeal or modify domestic laws that are not in line with the ratified Conventions. The Government persists in its legislation in discriminating against branch or inter-enterprise unions, those in the construction sector and those representing casual or temporary workers. Even though workers can establish unions, these are exposed to discrimination in practice. In order for enterprise unions and workplace unions, for example, to have representation in the enterprise, they require 25 workers in order to have three leaders, while workers in an inter-enterprise union must have 76 or more workers affiliated in their enterprise in order to be entitled to three workers' representatives (article 229 of the Labour Code). The same applies to the formation of unions: inter-enterprise unions must have a certifying officer appointed exclusively by the labour inspectorates, whereas certifying officers for enterprise unions may

be inspectors, notaries or civil registry officials, whereby the labour inspectorates may abuse their power by making demands that are not contemplated in the legislation, such as to endorse the standing orders of the future union, and, if they do not approve of them, insist that they be amended at their whim. However, under article 221 of the Labour Code, a Notary Public, a civil registry official or a labour inspector may certify the establishment of an enterprise union.

Furthermore, the legislation in force with respect to the negotiations of inter-enterprise unions is also discriminatory and a source of legal uncertainty. It obstructs the right of workers to exercise their right to negotiate collectively their conditions of employment, since it requires them to have a quorum that is not required of enterprise or workplace unions (discrimination by type of union). The same legislation requires workers to belong to enterprises of the same category, and therefore the question of whether enterprises that straddle three, four or more categories fulfil this requirement is left to the discretion of the administrative officer of the inspectorate. He himself earns a salary that leaves much to be desired, which makes him prey to bribes and other inducements by employers, as occurred during the collective bargaining between food handlers' unions and the Uruguayan enterprise Merken SpA. One year ago, on 29 June 2018, regulated collective bargaining began, involving more than 2,500 thousand workers, all courageous and strong-willed women food handlers who hailed from three different regions of Chile (the Fourth, Ninth and Metropolitan regions). These workers were members of the five unions involved in the bargaining, which were represented by a bargaining committee that had never been opposed. The committee had to overcome the hurdles that the Labour Directorate placed in its path to try to thwart the regulated collective bargaining, which did in fact comply with the legislation in force. On the same day that the strike ballot was due to start, 8 August 2018, the National Labour Director himself issued a decision CANCELLING THE COLLECTIVE BARGAINING. The workers went to the Ministry of Labour, thinking that it had instructed the National Labour Director, who supposedly oversees the protection of labour rights and collective bargaining laws, and were told that they had no choice but to initiate legal proceedings in court and then submit another collective bargaining proposal, in accordance with the LATEST LABOUR REFORM. Faced with such a violation of the law, including international agreements, they decided to create a precedent, and lodged a legal challenge to the Labour Directorate's decision. The case should have been heard by the judge within 15 days, in accordance with an abbreviated procedure. However, the courts sat on the case for more than four months without hearing the case. In the meantime, the workers submitted a new draft collective agreement.

At the start of the proceedings, the judge, at the request of the Labour Director's counsel, asked for the complaint to be withdrawn so as not to obstruct the bargaining under way. The workers acquiesced when told that the bargaining process thereafter would not be obstructed, but they were deceived, and the bargaining process was obstructed once again. Moreover, the Labour Directorate declared that there was no quorum. As 1,790 women trade unionists had bargained and only 250 workers are required for a quorum, they appealed this decision and won, as the enterprise had not complained that the quorum was not satisfied. However, a new decision was then issued that once again put an end to the bargaining process, as, under the terms of that text, the workers had not proved that they belonged to the same category (Decision No. 813), namely that they were all food handlers. When they protested, a number of strange things happened. The courts handled the case incorrectly and subsequently rejected their claim. The workers managed to lodge an appeal and, several months later than was required, a ruling was issued. The workers won their case against the Labour Directorate, but it did not comply with the ruling and appealed, insisting that collective agreements had been signed. As the union bargaining committee had never signed any collective agreement, and the law dictates that the participants in collective bargaining remain part of the negotiations until a collective agreement is signed, the Court of Appeal rejected the appeal of the Labour Directorate and upheld the previous ruling in favour of the workers, stating that "the collective bargaining process must be allowed to continue without

further delay". Currently, the Labour Directorate is refusing to implement the ruling and is insisting that the bargaining must be continued by just two unions rather than by the five specified in the court ruling.

In the ensuing 12 months, the enterprise took the opportunity to pressurize the members of the National Women Food Handlers' Federation (FENAMA) into withdrawing from the negotiations by offering money to union members and leaders, in conjunction with unions controlled by employers. However, the majority have stayed members of FENAMA. As the law holds that anti-union practices must be resolved by the courts at the request of the labour inspectorate, and as the inspectorate refused to raise the violations with the courts, the National Food Handlers' Federation filed a lawsuit with the courts against the enterprise for its anti-union and disloyal practices. The courts set January 2020 as the date for the trial, which represents another failing, not to say a denial of justice. The courts also supported the enterprise's intimidation of the complainants, and refused, despite repeated requests, to order the enterprise to cease its anti-union actions, which continue on a daily basis.

In order to intimidate the President of FENAMA, the enterprise instituted criminal proceedings against her before the courts, calling for three years' imprisonment and a fine as a result of her having taken the enterprise to court and having reported countless anti-union practices, including an attempt by the enterprise's general manager to bribe the President of the CGTP and a leader of one of the unions that was taking part in the bargaining.

The criminal proceedings against the President of FENAMA are now scheduled for July. The proceedings were initiated by the enterprise in January, and will now take place before the proceedings concerning anti-union practices. The enterprise is currently proposing to withdraw its complaint on condition that the defendant declares that the attempted bribery has not been proven, which is a clear act of harassment and an attempt to delegitimize the complaint concerning anti-union practices. In addition, the President of the CGTP received a note stating that he would be the next to be sent to jail. All this clearly stems from the fact that the labour courts have not acted quickly enough and have been delaying the trial for more than a year, which is absurd and reflects the denial of justice to Chilean workers and trade union leaders. We are living through a period that is very similar to the dictatorship that took place in Chile between 1973 and 1990.

The enterprise is putting pressure on the unions in every way possible: it offered each woman worker in Choapa Province 2,200 dollars to discredit their union leaders; labour inspectors insisted that the enterprise union vote to go on strike even though the negotiations were conducted within the legal time limits and prior to the court proceedings; and the enterprise offered bribes to the union leaders.

We have learned that Mr David Odo, a former employee of the law firm that advises Merken SpA, currently works in the National Labour Directorate and is issuing decisions. There is therefore a conflict of interest, since this official has worked and still works as an adviser to the enterprise. This situation is incredible and at the same time commonplace in Chile.

What is occurring is highly suspicious, especially since the Labour Directorate now refuses to apply the decision issued by the courts in the context of these negotiations. In addition, the latest decision issued by the Labour Directorate indicates that on 3 June, the enterprise asked it to provide guidance on the court decision. Why should the enterprise receive guidance when it was not a party to the proceedings, since they concerned only the Labour Directorate and the trade unions?

The Labour Directorate is CURRENTLY REFUSING TO COMPLY with the order of execution of the court ruling and has issued a decision stating that only two of the five unions concerned may vote, IN CLEAR VIOLATION OF THE RULING AND IN CONTEMPT OF THE JUDGE'S DECISION. THE LABOUR DIRECTOR HAS ISSUED A REPLACEMENT JUDGMENT, which he is not authorized to do. The workers appealed

these arbitrary decisions before the Ministry of Labour, which swept them aside or rather endorsed the violations.

The Labour Directorate has issued opinions against the legislation in force in the country and has restricted the right of the food handlers to strike: only 13 per cent of the participants in the negotiations can take part in strikes; the remaining 87 per cent must continue to provide ordinary services.

What is more, the Labour Directorate has suspended three collective bargaining actions, alleging that they could not continue because the enterprises had invoked minimum services provisions. It has even suspended strike ballots that had been under way for more than an hour and a half when it realized that the workers were voting to go on strike.

Although the law provides for mechanisms to limit the right to strike that violate Conventions Nos 87 and 98, the Labour Directorate has also agreed to process requests for minimum services that violate the law, as the Labour Director unlawfully amended the provisions approved by Congress.

In addition, the courts are slow and unwilling to respect the time limits set by law for the processing of complaints of violations of fundamental rights, dismissals of union leaders and anti-union practices. The courts ignore ratified Conventions when making their decisions; for instance, the proceedings brought by FENAMA concerning anti-union practices have already been pending for eight months and the hearing will take place in a further seven months' time. Meanwhile, anti-union practices are continuing.

In the interests of procedural economy and to avoid unnecessary paper wastage, we request the Governing Body to ensure that any decisions and any other evidentiary documents are shared with the National Federation of Food Handlers (FENAMA) and the General Confederation of Public and Private Sector Workers (CGTP) once a Commission of Inquiry has been appointed and has arrived in Chile.

While these circumstances concern trade unions with national representation that are very militant in other cases, the law simply does not allow them to bargain, as that right remains at the discretion of the employers and the incumbent Government. In other words, these unions and their members depend on the will of a third party to allow them to bargain collectively. In practice, this does not happen, as the employer simply does not agree to negotiate but rather imposes its will, and the workers have no right or means to obtain equal bargaining strength. Workers can negotiate under article 314, which does not provide for the right to strike in such cases, or under article 364(3), which states the following: "In small and micro-enterprises [accounting for 90 per cent of workers], bargaining with an inter-enterprise union shall be voluntary or optional. If the employer agrees to bargain, it must respond to the draft collective agreement within ten days of the latter's submission. If it declines to do so, it must so state in writing within the same ten-day period."

Since the employer can decline to engage in collective bargaining, the workers are totally deprived of any defence or protection and do not have the right to strike. This opens the way for the persecution of trade union members by the employer, all the more so because dismissal without just cause, which is based solely on the will of the employer, exists in Chile. This undermines the trade unions, since the workers organize precisely to exercise their right to bargain collectively, and must be working in order to do so. These legal provisions are therefore contradictory, since workers see that the union to which they belong may exist, yet is unable to engage in collective bargaining in practice and, furthermore, that membership can cause them to lose their jobs.

These regulations in the Labour Code which violate Conventions Nos 87, 98 and 135 are endorsed by the administrative body, the Labour Directorate, which has stipulated that, for the protection and rights established by the Labour Code in relation to collective bargaining to apply, the employer must first agree to collective bargaining; if the employer does not agree, the protection and rights do not exist. This violates the aforementioned Conventions and, although the Labour Directorate recognizes that Chile has ratified these

Conventions, which have constitutional status and therefore take primacy over the Labour Code, it insists that they are mere statements of principle without legal validity.

Federations and confederations are in the same situation: in order to bargain collectively they must first obtain the employers' consent, in accordance with articles 408 to 411 of the Labour Code. This violates Article 3 of Convention No. 87 and Article 4 of Convention No. 98, given that it hinders rather than facilitates the negotiation of conditions of work.

Casual, seasonal and temporary workers and construction workers can only negotiate if their employment lasts for more than a year but, as they have no right to any protection, they may be dismissed without just cause whenever the employer so desires. As they also have no right to strike, how can they negotiate if they have nothing with which to exert pressure on the other party, and that party has coercive power since it can dismiss them without just cause? If their employment lasts for less than a year, they can engage in bargaining in accordance with article 314 of the Labour Code, meaning that the employer must agree, the bargaining is not subject to any regulation, and the workers have no right to protection or to strike or any other rights.

In other words, temporary and construction workers cannot bargain collectively. It is possible only if the employer agrees; if the employer declines, the branch-level or inter-enterprise union representing small enterprises, the construction industry and others, cannot bargain or enjoy the protection afforded by the Labour Code with respect to collective bargaining (trade union immunity; right to strike); this occurs in the first, second or third round of bargaining.

(This is established by the Labour Directorate Directive No. 1489 of 26 March 2010.) The end of the aforementioned directive states that the fact of the employer having agreed on one occasion to bargaining with the inter-enterprise union leading to a collective agreement is not enough; to renegotiate the collective agreement in future, the employer must again give consent on the second or third occasion. For each round of bargaining, if the employer indicates that it does not wish to engage in collective bargaining with the trade union, the collective agreement is terminated.

Consequently, there is the massive contradiction that a branch or inter-enterprise union may have negotiated as an inter-enterprise union with an enterprise and signed a collective agreement and, when the latter expires and it is time for renegotiation, the employer may refuse to engage in bargaining and the workers immediately lose all the rights covered by that process.

They are only able to bargain as a group as if they were not members of the branch union (as a supposed (virtual) enterprise union) without the union leaders who do not work in the enterprise that is engaged in bargaining), as well as doing it with the maximum quorum, without any connection with the union.

This situation occurs whenever the union upholds the collective agreement or the labour regulations in force, as in the case of the National Inter-Enterprise Union of Workers in the Metallurgy, Communications, Energy and Allied Industries (registration No. RSU 13.01.2411), whose collective agreements with the enterprises concerned expired because DirecTV, an American multinational TV corporation, refused to negotiate with the trade union in December 2015, with the result that all workers left the union en masse, some sending their resignations to the union and others to the enterprise, which suspended the payment of trade union dues. A similar situation occurred with the Escapes Mendoza enterprise, which had a collective agreement with the same union for three periods but then refused to renegotiate it. Nothing more could be done, and the enterprise engaged in countless anti-union practices aimed at undermining the union structure from within the enterprise. Meanwhile, the labour inspectorate preferred to turn a blind eye and accuse the union of a lack of transparency.

Furthermore, we understand that the courts are using various ploys to avoid recognizing the validity of the Conventions on freedom of association in their rulings. The

aforementioned case of anti-union practices at Escapes Mendoza is highly significant. The union reported the above anti-union practices to the Labour Directorate, which verified each of the union's complaints and referred them to the courts, but the courts refused to impose any penalties on the enterprise for these violations of the principles of freedom of association, Case No. ….

The above situation persists even though the Government of Chile has ratified ILO Conventions Nos 87 and 98 and despite the fact that the ILO Standards Committee has urged the Government of Chile to bring its domestic legislation into line with the Conventions and the principles of freedom of association. It should be recalled that, since 2001, the ILO supervisory bodies have drawn the attention of successive Chilean governments to the fact that the national legislation is not in line with the ratified Conventions on freedom of association. Nevertheless, the same violations and failures to act on the observations persist even 19 years later.

The National Inter-Enterprise Union of Workers in the Metallurgy, Communications, Energy and Allied Industries (registration No. RSU 13.01.2411), a legally active branch trade union, was refused the right to represent its members in collective bargaining.

The same situation occurred at various enterprises – ECM INGENIERÍA SA; MAESTRANZA AMÉRICO VESPUCIO SA; INDUSTRIAS CERESITA SA; ESCAPES MENDOZA SA; CONSTRUCCIONES Y SERVICIOS SIGLO VERDE SA; and DirecTV – on the grounds that the employer could choose whether or not to bargain with a branch (inter-enterprise) union, in accordance with article 334, as well as with article 374(4), which provides that "In small and micro-enterprises, bargaining with an inter-enterprise union shall be voluntary or optional", or that it was impossible under the law for such a union to be party to bargaining alongside an enterprise union.

The trade union complained to the administrative authority that the regulations concerned are invalid because they are not in line with the ILO Conventions on freedom of association. The administrative authority upheld the position of the employers denying the unions' right to engage in collective bargaining on behalf of their members as established in the international Conventions.

Further to the rejection by the administrative authority, the trade union filed a complaint with the courts. The courts in turn rejected the complaint, upholding the employers' arguments. In this way, they did not recognize or disregarded the validity of Conventions Nos 87, 98 and 135.

In other cases brought before the courts concerning the replacement of striking workers and the right to collective bargaining, rulings have been handed down that have violated the ILO Conventions (**Appendix No. 1**).

Not only the right to collective bargaining but also the right to strike is restricted, especially in the case of public sector workers. However, there are also serious limitations in the private sector, as previously indicated in the representation made in 2010, whereby the labour inspectorates, on the instructions of the National Labour Directorate, are unconstitutionally granting to employers the right to agree or refuse to negotiate with specific unions, federations or confederations, thereby violating the principles of freedom of association.

According to the Labour Directorate, the only unions that always have the right and capacity to negotiate and the right to approve strike action are enterprise unions, workplace unions or groups of workers from the enterprise. Even where other unions exist in the enterprises concerned, they depend on the wishes of the employers as regards collective bargaining and exercising their rights, including the right to strike.

Nor is the right to strike effectively respected in the legislation.

Article 381 of the Labour Code contains a series of violations of the principles of freedom of association in authorizing the replacement of striking workers, including through the recruitment of strike-breakers.

The wording of article 381 is misleading and unclear. On the one hand, it states that the replacement of striking workers is forbidden. But then, in the next line, after a comma, it states: *"unless the last offer made, in due form and with the notice indicated in the third paragraph of article 372, proposes at least …"*. Here, the issue is the same. Article 345 recognizes the right to strike; however, further on in the latest edition of the Labour Code, this right is restricted under article 359, on restrictions on the right to strike, which provides:

> Minimum services and emergency teams.
>
> Without affecting the right to strike as such, a union's bargaining committee must provide, for the duration of the strike, workers to provide such minimum services as are strictly required in order to protect the enterprise's assets and facilities, prevent accidents and ensure that public utility services are delivered, that the basic needs of the population – including those related to life, safety and public health – are met, and that the environment and sanitation are not harmed.

This explicitly violates all the jurisprudence of the Standards Committee and the Committee on Freedom of Association.

In the end, the right to strike amounts to nothing more than an empty declaration, as demonstrated by the decisions already issued by the Labour Directorate.

The right to strike is being restricted not just in essential services, in areas that are sensitive in terms of personal safety, but for all workers. This is a disguised general ban on the right to strike. Obviously, if workers are aware that their employer will have emergency teams to do their jobs while they are on strike, they know that the strike will have no practical effect, since the enterprise or service will continue to operate normally; hence this is a disincentive to collective bargaining or union membership. At the same time, it is an incentive for the employer not to seek an agreement, either cutting ties with the union by not negotiating, or provoking a fruitless strike. The labour reform submitted to Parliament in 2014 changed the legislation but the replacement legislation introduced two new limitations: the obligation on trade unions to provide the enterprise with a number of workers to act as an emergency team in all collective bargaining; and the option for the enterprise to make changes in staff at the enterprise in the event of a strike. This is an incentive for the enterprise to hire staff during the bargaining period and then use them as strike-breakers during the strike, an action which is not explicitly considered to be an anti-union practice.

Furthermore, the courts have stated in their latest rulings that no replacements can be made by workers who are not union members at the time of the strike. In other words, all that has to be done is to hire workers prior to the strike in order to replace those who go on strike. The practice of hiring new workers in the period prior to the negotiations or during the negotiations to replace strikers was already fairly common in the past, and this is accentuated by the court rulings. This situation is absolutely contrary to the principles of freedom of association and the jurisprudence of the Committee on Freedom of Association.

The fact that the courts in Chile are upholding the unlawful replacement of striking workers is an extremely serious matter. It legalizes violations of workers' fundamental human rights, and it makes the situation unmanageable in encouraging the recruitment of strike-breakers by the employers before the final bargaining process or the strike. Above all, it obstructs the very bargaining process while it is taking place. This completely undermines the right to organize and to bargain collectively and is therefore completely contrary to Article 4 of Convention No. 98, which has been ratified by Chile.

With the court rulings, combined with the provisions of the Labour Code and the opinions of the Labour Directorate, the employer always has the possibility of using strike-breakers to replace workers who are legitimately exercising the right to strike. Nowadays,

inspecting the existence of strike-breakers is not a priority. Inspections are carried out 96 hours or more after the beginning of a strike, not during the first 48 hours, and only one inspector is assigned to the task, who does not remove the strike-breakers. Two months afterwards, the inspector reports the fact to the courts, which takes a number of days longer to resolve. Often, the judgments merely order employers to take a course in fundamental rights. In other words, the relevant provisions of the Labour Code are not even applied. On other occasions, despite the use of strike-breakers having been proven, the court merely uses legal chicanery to avoid imposing sanctions on employers.

The strike by the workers of the Pavicret Ltda Enterprise is a prime example of the violation of the right to strike in Chile. The facts are as follows.

On 20 July 2017, the collective bargaining process began, with the National Union of Workers, SME, representing its members in the Pavicret Ltda enterprise. No agreement was reached with the employers, therefore the workers of the enterprise began strike action on 20 September. At the start of the strike, the enterprise hired strike-breakers and placed staff members who worked in other areas of the enterprise in the positions of the striking workers to do their work. Against this backdrop, still on 20 September 2017, the trade union submitted its grievances to the Municipal Labour Inspectorate of Santiago South, in which it provided information on the jobs that were being done by strike-breakers, the place of work or job of the union members and the names of the striking workers.

The trade union assumed that the investigation and inspection would begin on-site immediately, on 20 September. That did not happen, even after the union leaders had insisted that the inspection must take place, nor did it take place the following day. After several days had gone by without any inspection, it finally took place on 25 September, five days after the start of the strike. Only a small number of places were inspected, at times where there were no longer any strike-breakers. The majority of places were not inspected, as when a strike-breaker was identified they stopped inspecting.

The Municipal Labour Inspectorate submitted a complaint concerning the anti-union practices to the courts on 17 October 2017, which was registered with the serial number S-10-2017 of the San Miguel Labour Court. However, the complaint contained a series of factual errors. There were in fact 19 workers who were replaced, but the labour inspectorate focused on only one worker, in the interests of economy of proceedings.

The court fundamentally dismissed the complaint, as the judge considered that the strike-breaker had been hired on 30 August 2017 and one of the operators was on medical leave at the time of the strike – in this case the operator to whom the inspectorate referred in the complaint.

The judge clearly violated ILO Convention No. 87 by supporting the violation in practice of the Pavicret Ltda enterprise.

We enclose the complaint of the facts reported by the labour inspectorate and the court ruling.

VIOLATION BY THE LABOUR DIRECTORATE OF THE CONVENTIONS ON FREEDOM OF ASSOCIATION

Further to the ratification by Chile of **Conventions Nos 87, 98, 135 and 151**, the Labour Directorate, in its work of interpretation in recent years, has issued various opinions and directives that seriously violate the principles of freedom of association. Rather than creating the conditions for problem-free collective bargaining, it is creating more and more obstacles to such a possibility, not only through the opinions that it issues under the powers conferred by the Labour Code, but also in cases where it defines the scope of interpretation of the Labour Code without taking account of the fact that the Conventions on freedom of association are already in force in the country. Attached to the present communication are directives of the Labour Directorate and a decision of the labour inspectorate which clearly

demonstrate how collective bargaining is being obstructed and how the Conventions ratified by Chile are being violated.

1. Directive No. 1489 of 26 March 2010;
2. Directive No. 1091 of 24 November 2009 of the Santiago Norte Chacabuco Inspectorate;
3. Decision No. 11 of 18 April 2011 of the Santiago Norte Chacabuco Inspectorate;
4. Directive No. 1607/99 of 28 May 2002, concerning bargaining with inter-enterprise unions (this directive violates the principles of freedom of association);
5. Directive No. 1197/61 of 11 April 2002 establishing criteria for the replacement of workers during a strike;
6. Directive No. 0545/33 of 2 February 2004 fixing penalties for failure to respond to observations of the employer;
7. Directive No. 4665/186 of 5 November 2003 issuing an opinion on inter-enterprise bargaining;
8. Directive No. 3861/140 of 16 September 2003 concerning refusal of protection and strike rights to members of an inter-enterprise union;
9. Directive No. 5241/241 of 3 December 2003 obliging members of an inter-enterprise union to sign bargaining lists;
10. Directive No. 1131 of 10 March 2010 rejecting the inclusion of a trade union in the collective bargaining process.

The contents of the attached directives and decisions clearly demonstrate how the international Conventions on freedom of association are being violated by the Government, in this case the Labour Directorate, in Chile (**Appendix No. 2**).

VIOLATIONS OF THE CONVENTIONS IN CHILEAN DOMESTIC LEGISLATION

The Labour Code and other national laws contain various provisions that are in total contradiction with the standards of the ILO and the principles of freedom of association. The WFTU Coordinating Committee in Chile has forwarded proposals to amend or repeal provisions of the Labour Code and other internal regulations which are attached to the present communication (**Appendix No. 3**).

The ILO supervisory bodies have sent the Government of Chile a series of observations concerning the Conventions on freedom of association but little or nothing has been achieved. While the supervisory bodies continue to insist with their observations, repeatedly asking for the repeal or amendment of provisions of the Labour Code, the Penal Code, the Internal State Security Act, the Civil Servant Associations Act and provisions of the Chilean Constitution itself which contravene the Conventions, successive governments have offered various excuses faced with the requests of the supervisory bodies. But this is ultimately a failure to act in response to the recommendations of the ILO supervisory bodies and of the Governing Body. In other words, little or nothing is being done by successive Chilean governments to change the situation, and **the violations continue**.

It is high time to put an end to years of systematic violations and to establish appropriate mechanisms to stop the violations of freedom of association and of indigenous peoples' rights.

LABOUR REFORM OF 2014

In December 2014, the Government presented a proposed labour reform, with the stated objective of ensuring harmony with the ILO Conventions which Chile had ratified, especially Convention No. 87. This sounded promising, but in reality the violations continued under the new text. After a process lasting nearly a year and a half, Parliament approved the reform in April 2016. Regrettably the stated objective was not achieved; on the contrary, the reform ultimately made the situation of thousands of workers worse by introducing a series of provisions that undermine inalienable rights, such as the eight-hour working day, maximum periods for the payment of wages, and "standby" working days. With regard to trade unions, the quorum for organizing trade unions in enterprises of fewer than 50 workers was increased from eight workers to 50 per cent of the workforce.

With regard to collective bargaining, there is the new requirement that the quorum for the formation of trade unions must always be achieved for entitlement to collective bargaining. Negotiations cannot go ahead if this requirement is not met at the time of bargaining; in other words, this obstructs bargaining even further, contrary to the terms of Article 4 of Convention No. 98.

Still with regard to collective bargaining, a provision on "necessary adjustments" was introduced, which in practice legalizes the replacement of workers on strike. The situation could have been rectified through the latest rulings on the subject issued by the Supreme Court. This provision runs counter to the rulings that recognize workers' effective right to strike, in accordance with the international treaties ratified by Chile.

This provision legalizes replacement in a disguised form, since it does not define as anti-union action the fact that the enterprise makes changes regarding shifts and workers during a strike at the enterprise or that new workers are hired during the bargaining process. This retrograde step marks a return to the era of dictatorship, when it was possible to hire new workers during or before the collective bargaining period, who then did the jobs of strikers during the strike. Article 345 of the Labour Code provides:

> Right to strike.
>
> Strike action is a right which must be exercised by workers collectively.
>
> Replacement of striking workers shall be prohibited.
>
> The strike shall not affect the work of those workers who are not involved in the strike, **or the exercise of the duties agreed on in their employment contracts**.

This provision in in clear conflict with the ILO Conventions which Chile has ratified, as it **does not prohibit the filling of posts of striking workers, nor does it prohibit the hiring of strike-breakers during the collective bargaining before a strike**, which is a very common practice among our country's employers. The effect of this provision is to encourage the hiring of workers during bargaining in order to use them in the event of a strike. This undermines the pressure that workers can exert during collective bargaining, as the provision enables them to carry out the work stated in their contracts. This is a lawful manoeuvre to whitewash strike-breakers and demonstrates the bad faith of the Government and Parliament which adopted the legislative amendments, and shows the absolute lack of trust in organized workers and their trade union organizations.

Another standard which is totally inconsistent with the international treaties ratified by Chile is the one that obliges all trade unions to provide the enterprise with staff during the strike (so-called "emergency teams"), including in enterprises which are not involved in essential sectors or services, in the strict sense of the term.

Problems relating to the right to strike persist in Chile as a result of the new legislation. Even though previous restrictions have been eliminated, and the possibility was removed for the employer to hire strike-breakers on payment of UF4 per worker, these two new scenarios

have now been introduced which in practice make strike action impossible, impractical or a right in theory only.

A third limitation on the right to strike which persists and is made more damaging by the reform is the possibility for striking workers to abandon strike action after six days in small enterprises or 15 days in medium-sized or large enterprises. This facilitates anti-union practices in enterprises, which can pressurize striking workers with the threat of dismissal at the end of the protection period, fixed at 30 days after the end of the strike, if they do not abandon the strike.

This current situation represents a serious restriction of freedom of association in Chile, since many workers are indeed dismissed at the end of the protection period as the possibility of dismissal without just cause exists. Both the administrative and judicial authorities consider such action by the employers to be legitimate.

Another legislative provision which causes complications for freedom of association is the one which empowers the courts to terminate a strike.

A reform which was supposed to eliminate the violations that had persisted in the legislation for years in relation to the international treaties ratified by Chile has ended up with new standards that in turn violate those ratified treaties and now also the Vienna Convention on the Law of Treaties.

Even worse, some standards that brought the legislation into line with the ILO Conventions have ultimately been debased. For example, the right to engage in bargaining was granted to branch or inter-enterprise unions but in the end only union leaders working at the enterprise are permitted to negotiate on behalf of the union. The paradox thus arises in many negotiations – in addition to other constraints – that the union president cannot participate in the collective bargaining over which he presides with the enterprise where the union has members.

On the other hand, inter-enterprise unions cannot negotiate on behalf of their members in small enterprises, where it is the employer who decides whether or not to negotiate with the union. This has been described by the Standards Committee as a violation of the ratified Conventions.

Worse still, two provisions that implied real improvements to the legislation on the right to organize and collective bargaining – namely, a trade union's entitlement to engage in collective bargaining and to extend the benefits thereof to its new members who did not participate in the bargaining process – were declared to be unconstitutional by the Constitutional Court. **(Appendix No. 4)**

Here there is clearly a conflict between, on the one hand, the Constitutional Court and the Government of Chile and, on the other, the international community and the obligations of ILO member States and those deriving from the Vienna Convention to observe the terms of ratified instruments.

The Constitutional Court of Chile refuses to accept the ILO Committee of Experts' interpretation of a trade union's entitlement to bargain and when groups of workers can engage in collective bargaining. Indeed the Constitutional Court affirms that the ILO Collective Agreements Recommendation, 1951 (No. 91), and the interpretation of the Standards Committee are not applicable, and in fact one of the issues raised by the ILO with regard to Chile is precisely the egalitarian treatment given by the legislation to trade unions and groups of workers. For years the interpretation of the Standards Committee has therefore been that collective bargaining rights are the prerogative of trade unions, whereas the Constitutional Court declares that entitlement to be unconstitutional precisely because it considers that there can be no discrimination towards groups of workers, because in the Chilean Constitution the right to engage in collective bargaining belongs to the workers, not to the unions, and the ratified Conventions are not being complied with.

The issue under discussion now concerns the whole international community, including the International Court of Justice, since the action of the Constitutional Court of Chile calls into question the validity and force of treaties in the countries that have ratified them. The Chilean Parliament approved a reform, including the aforementioned provisions aimed at harmonizing the national legislation, especially concerning unions' collective bargaining rights, with the international treaties ratified by Chile, but the Constitutional Court overruled Parliament's approval and declared those provisions to be unconstitutional.

We cannot overlook the fact that in 2014 the ILO itself drew the attention of the Government of Chile to this precise matter, and asked the Government to repeal the provisions that gave groups of workers the same collective bargaining rights as trade unions, in violation of Convention No. 98.

I, the undersigned, , WILLS ASUNCIÓN RANGEL, WORKERS' DELEGATE of the Bolivarian Republic of Venezuela to the 108th Session of the International Labour Conference, supported by the World Federation of Trade Unions, represented by its Deputy General Secretary, Valentín Pacho, member of the Workers' delegation of Peru to the 108th Session of the International Labour Conference, José Ortiz Arcos, General Secretary of the General Confederation of Public and Private Sector Workers of Chile, whose signatures appear at the end of this paragraph and at the end of the appendices, responding to the express request of the trade unions and allied organizations of Chile, which have been victims of serious and repeated violations of the rights established in ILO Conventions Nos 87, 98, 135, 151 and 103 ratified by the Government of Chile, submit this representation under article 26 of the ILO Constitution against the Government of Chile, request the appointment of a Commission of Inquiry for Chile, and request that procedures are set in motion by the ILO to appoint the said Commission of Inquiry.

[Signatures of the Workers' Delegate of the Bolivarian Republic of Venezuela, the Deputy General Secretary of the World Federation of Trade Unions, and the General Secretary of the CGTP Chile.]