INTERNATIONAL COURT OF JUSTICE

RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN STATEMENT OF THE KINGDOM OF THE NETHERLANDS

16 MAY 2024

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1. Introduction

1.1 In a resolution adopted at its 349th bis (Special) Session held on 10 November 2023, the Governing Body of the International Labour Organization ('ILO') decided, in accordance with Article 96, paragraph 2, of the Charter of the United Nations ('UN Charter'), article IX, paragraph 2, of the Agreement between the United Nations ('UN') and the ILO, Article 37, paragraph 1, of the Constitution of the ILO, and the Resolution concerning the Procedure for Requests to the International Court of Justice (the 'ICJ', the 'Court') for Advisory Opinions adopted by the International Labour Conference on 27 June 1949, to request the ICJ to render urgently an advisory opinion pursuant to Article 65 of the Statute of the Court, on the following question ('Request'):

"Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)?"

1.2 In its Order of 16 November 2023, the Court designated 16 May 2024 and 16 September 2024 as the time limit within which, respectively, written statements and written comments on written statements on the question may be presented to it by the UN and States Parties entitled to appear before the Court, in accordance with Article 66, paragraph 2, of the Statute of the Court.

1.3 As the Kingdom of the Netherlands[1] is a Member State of the UN and by virtue of Article 92 of the UN Charter also a Party to the Statute of the Court, and a Party to the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) ('ILO Convention No. 87), it wishes to avail itself of the opportunity afforded by the Court's Order of 16 November 2023 to submit a written statement further to the Request.

1.4 For the purposes of the present advisory proceedings, the Kingdom of the Netherlands leaves it to the discretion of the Court to satisfy itself that it has advisory jurisdiction and that it may exercise this jurisdiction with respect to the present Request, in accordance with Article 65, paragraph 1, of the Statute of the Court and Article 102 of the Rules of Court.

[1] The Kingdom of the Netherlands wishes to emphasize that the 'Kingdom of the Netherlands' comprises of the European part of the Kingdom, as well as a group of islands in the Caribbean part of the Kingdom (consisting of Aruba, Curaçao, the Dutch part of Sint Maarten, Bonaire, Sint Eustatius and Saba).

2. The interpretation of the right to strike under ILO Convention No. 87

A. Means of interpretation

2.1 In order to provide an answer to the question whether the right to strike of workers and their organizations is protected under ILO Convention No. 87, the means of treaty interpretation as codified in the 1969 Vienna Convention on the Law of Treaties ('VCLT') may provide guidance.

2.2 Articles 31 and 32 of the VCLT set forth, respectively, the general rule of interpretation of treaties and the supplementary means of interpretation. These rules also apply as customary international law, as confirmed on numerous occasions by the ICJ.[2] The text of these Articles of the VCLT reads as follows:

> **Article 31. General rule of interpretation**
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

[2] See, for example, *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045, para. 18; *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, p. 14, para. 65.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

2.3 Article 31 of the VCLT contains the general rule of interpretation. As clarified by the International Law Commission ('ILC') in its commentaries on the *Draft Articles on the Law of Treaties* "the process of interpretation is a unity and [...] the provisions of [Article 31] form a single, closely integrated rule." There exists no hierarchical order for the application of the various elements of interpretation in the Article. According to the ILC "the application of the means of interpretation in the article [31] would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation."[3]

2.4 This process was confirmed by the ILC in its *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties and its Commentaries thereto* adopted in 2018. In its commentary to draft conclusion 2, paragraph 5, the ILC described "the interpretation of a treaty as a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32", while "[maintaining] the distinction between the mandatory character of the taking into account of the means of interpretation, which are referred to in article 31, and the discretionary nature of the use of the supplementary means of interpretation under article 32."[4]

B. Ordinary meaning of the terms in their context and object and purpose

2.5 Article 31, paragraph 1, of the VCLT, stipulates that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

[3] ILC Draft Articles on the Law of Treaties, with commentaries, *Yearbook of the International Law Commission*, 1966, vol. II, draft Article 27 (General rule of interpretation, now Article 31 of the VCLT).
[4] Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, Commentary to draft Conclusion 2.

2.6 The text of ILO Convention No. 87 does not explicitly mention the right to strike. It does however, establish, in its Article 3, the right of workers' and employers' organizations to "organise their administration and activities and to formulate their programmes", and, in its Article 10, the aims of such organizations as "furthering and defending the interests of workers or of employers".

2.7 Article 3 of ILO Convention No. 87 does not specify what particular activities workers' and employers' organizations may organize, but such activities necessarily include, among others, the activities of collective bargaining and industrial action, which aim to defend the interests of workers. The protection of the freedom of association does not only comprise the right to associate with specific objectives, but also the legitimate pursuit of these objectives, *inter alia*, through the right to strike. That this right is part of the activities referred to in Article 3 of ILO Convention No. 87 has been confirmed by the Committee on Freedom of Association ('CFA') noting that it is "an intrinsic corollary to the right to organize protected by Convention No. 87"[5], and "[T]he right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests".[6] For the Kingdom of the Netherlands and other Members of the Council of Europe, the case law of the European Court of Human Rights ('ECtHR') also confirms that the right to strike is protected as part of the right to freedom of assembly and association under Article 11 of the European Convention on Human Rights ('ECHR'). In this regard, the ECtHR has also held that the "right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87" and that "[s]trike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests".[7] This will be explained in more detail in Section 3 of this written statement.

[5] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para 754, (2006 Digest, para. 523); ILO Committee on the Freedom of Association (hereafter 'CFA'), Report No. 344 (2007), Case No. 2471 (Djibouti), para. 891; CFA, Report No. 346 (2007), Case No. 2506 (Greece), para. 1076, Case No. 2473 (United Kingdom/Jersey), para. 1532; CFA, Report No. 349 (2008), Case No. 2552 (Bahrain), para. 419; CFA, Report No. 354 (2009), Case No. 2581 (Chad), para. 1114; CFA, Report No. 362 (2011), Case No. 2838 (Greece), para. 1077.

[6] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 753, (2006 Digest, para. 522); See also CFA, Report No. 342 (2006), Case No. 2323 (Islamic Republic of Iran), para. 695; CFA, Report No. 342 (2006), Case No. 2365 (Zimbabwe), para. 1048; CFA, Report No. 344 (2007), Case No. 2496 (Burkina Faso), para. 407; CFA, Report No. 344 (2007), Case No. 2471 (Djibouti), para. 891; CFA, Report No. 340 (2006), Case No. 1865 (Republic of Korea), para. 780; CFA, Report No. 346 (2007), Case No. 2473 (United Kingdom of Great Britain and Northern Ireland), para. 1532; CFA, Report No. 349 (2008), Case No. 2548 (Burundi), para. 538; CFA, Report No. 350 (2008), Case No. 2602 (Republic of Korea), para. 681; CFA, Report No. 351 (2008), Case No. 2581 (Chad), para. 1329; CFA, Report No. 354 (2009), Case No. 2581 (Chad), para. 1103; CFA, Report No. 356 (2010), Case No. 2696 (Bulgaria), para. 306; CFA, Report No. 357 (2010), Case No. 2713 (Democratic Republic of Congo), para. 1101; CFA, Report No. 360 (2011), Case No. 2803 (Canada), para. 340; CFA, Report No. 362 (2011), Case No. 2723 (Fiji), para. 842; CFA, Report No. 365 (2012), Case No. 2723 (Fiji), para. 778; CFA, Report No. 372 (2014), Case No. 3022 (Thailand), para. 614; CFA, Report No. 377 (2016), Case No. 3107 (Canada), para. 240.

[7] ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application No. 68959/01, 21 April 2009, para. 24.

2.8 This ordinary meaning to be given to the terms of Article 3 of ILO Convention No. 87 must be interpreted in its context and in light of the object and purpose of ILO Convention No. 87. On the basis of its Preamble, that refers to the Preamble to the Constitution of the ILO as well as the Declaration of Philadelphia,[8] the object and purpose of ILO Convention No. 87 can be seen as improving the conditions of labour and sustaining progress through the endorsement of certain fundamental principles of the right to organize. While the ILO Constitution makes no explicit reference to the right to strike, it recognizes the principle of freedom of association in its Preamble:

> And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by (…), recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;

2.9 In addition, Part III of the Declaration of Philadelphia sets out the following as one of the obligations of the ILO:

> (e) The effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.

2.10 Also, the principles unanimously adopted by the International Labour Conference at its Thirtieth Session, which form the basis for international regulation concerning freedom of association and protection of the right to organize, stress that any system of industrial relations should be founded on the guarantee of the principle of freedom of association.[9] Therefore, the context of Article 3 of ILO Convention No. 87 supports the protection of the right to strike under this Convention. This is also in line with its object and purpose.

[8] *Declaration concerning the aims and purposes of the International Labour Organisation* ('Declaration of Philadelphia', ILO), 10 May 1944.
[9] International Labour Conference, 13th Session, Resolution concerning Freedom of Association and Protection of the Right to Organise and to Bargain Collectively, submitted by the Committee on Freedom of Association, adopted on 11 July 1947.

C. Subsequent practice

2.11 When concluding on the commitments of the States Parties under ILO Convention No. 87, it is not only the ordinary meaning of the terms in their context and in the light of its object and purpose that should be taken into account. Account must also be taken of the manner in which States Parties have applied the Convention since its adoption, since all means of interpretation in Article 31 of the VCLT, including any subsequent practice and relevant rules of international law, are part of a single integrated rule as set out above.

2.12 Further to the assessment on the basis of the elements of Article 31, paragraph 1, of the VCLT, the rights and activities protected under ILO Convention No. 87 must thus be assessed in light of the rule contained in Article 31, paragraph 3, of the VCLT providing that, *inter alia*, there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

2.13 In its *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* the ILC defines subsequent practice in Draft conclusion 4, paragraph 2, as follows:

> A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.[10]

2.14 In its commentary to that paragraph, the ILC explained that the word "conduct" is used in the sense of Article 2 of the Commission's articles on Responsibility of States for Internationally Wrongful Acts, meaning that "[i]t may thus include not only acts, but also omissions, including relevant silence, which contribute to establishing agreement".[11] Conduct may take a variety of forms.[12] Depending on the treaty concerned, conduct may be externally oriented, such as official acts, statements and voting at the international level, but it may also be in the form of, amongst others, internal legislative, executive and judicial acts.[13] For conduct to qualify as subsequent practice within the meaning of subparagraph (b) of Article 31 VCLT, paragraph 3,

[10] Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, draft Conclusion 4, para. 2.
[11] *Idem*., Commentary to draft Conclusion 4, p. 31.
[12] *Idem*., draft Conclusion 6, para. 2.
[13] *Idem*., Commentary to draft Conclusion 6, para. 2, pp. 49-50.

it must be determined whether the parties to a treaty by a practice have taken a position regarding the interpretation of the treaty.[14]

2.15 The use of subsequent practice to interpret treaties has been confirmed in international case law, as demonstrated in the case law of the Court[15] and other international courts and tribunals, including the ECtHR.[16] Subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[17]

2.16 In the application of ILO Convention No. 87, there is a subsequent practice over a period of more than 60 years which establishes the agreement of the States Parties regarding the interpretation of the Convention to include the right to strike. This practice can be established as follows.

2.17 The bodies set up to supervise the application of ILO standards and exercising this function in relation to, among others, this Convention, are the CFA[18] and the Committee of Experts on the Application of Conventions and Recommendations ('CEACR').[19]

2.18 At its second meeting in 1952, the CFA held that the right to strike was an "essential [element] of trade union rights". The CFA expressed the view that:

> The right to strike and that of organising union meetings are essential elements of trade union rights, and measures taken by the authorities to ensure the observance of the law should not, therefore, result in preventing unions from organising meetings during labour disputes.[20]

[14] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, draft Conclusion 6, para. 1.
[15] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 55; *Rights of nationals of the United States of America in Morocco (France v. United States of America),* I.C.J. Reports 1952, p. 211.
[16] ECtHR, *Loizidou v. Turkey* (preliminary objections), Application No. 15318/89, 23 March 1995, paras. 79-80.
[17] World Trade Organization, 'Japan - Taxes on Alcoholic Beverages', Report of the Appellate Body (4 October 1996), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/ AB/R, section E.
[18] The Committee on Freedom of Association was set up by the ILO for the purpose of examining complaints of violations of freedom of association under ILO Conventions Nos. 87 and 98.
[19] The Committee of Experts on the Application of Conventions and Recommendations was established as an independent body by the International Labour Conference to analyze how Conventions are applied by Member States, determining their legal scope and meaning.
[20] CFA, Report No. 2 (1952), Case No. 28 (UK-Jamaica), para. 68.

2.19 In 1959, the CEACR found that prohibitions on the right to strike run counter to Articles 8 and 10 of ILO Convention No. 87.[21] In 1983, in the General Survey, the CEACR reiterated the conclusion previously established by the CFA that "the right to strike is one of the essential means available to workers and their organizations for the promotion of their social and economic interests".[22] Also in 2008, in the *General Survey on the Fundamental Conventions concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization*, it was confirmed that:

> (i) the right to strike is a right which must be enjoyed by workers' organizations (trade unions, federations and confederations); (ii) as an essential means of defending the interests of workers through their organizations, only limited categories of workers may be denied this right and only limited restrictions may be imposed by law on its exercise; (iii) the objectives of strikes must be to further and defend the economic and social interests of workers and; (iv) the legitimate exercise of the right to strike may not result in sanctions of any sort, which would be tantamount to acts of anti-union discrimination. Accordingly, subject to the restrictions authorized, a general prohibition of strikes is incompatible with the Convention, although the supervisory bodies accept the prohibition of wildcat strikes. Furthermore, strikes are often called by federations and confederations which, in the view of the Committee, should be recognized as having the right to strike. Consequently, legislation which denies them this right is incompatible with the Convention.

2.20 The large majority of States that have ratified ILO Convention No. 87 have done so since the CFA and the CEACR recognized the right to strike contained within that Convention. Of the 152 ILO Member States that have ratified ILO Convention No. 87, 138 did so after 1952 when the CFA first pronounced itself on the right to strike.[23] Furthermore, 116 out of those 152 ratified the Convention after the publication by the CEACR of the first General Survey on Freedom of Association in 1959. When expressing their consent to be bound by ILO Convention No. 87, those States have not made any declarations rejecting the right to strike as inherent in the Convention, while the circumstances were such as to call for some reaction and they may thus be presumed to have accepted that right as part of that Convention. Moreover, none of the States that became party to ILO Convention No. 87 before the CFA and the CEACR presented their views on the right to strike, have subsequently made any declarations, reservations or objections indicating that they consider that the right to strike is not protected under the Convention. This approach would be in line with draft Conclusion 10 of the *ILC's*

[21] International Labour Conference, Report of the Committee of Experts on the Application of Conventions and Recommendations, 43rd Session, 1959, Report III (Part IA), p. 115.
[22] International Labour Conference, General Survey on the Freedom of Association and Collective Bargaining, 69th Session, 1983, Report III (Part 4B), p. 62.
[23] CFA, Report No. 2 (1952), Case No. 28 (UK-Jamaica), para. 68.

Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties which underlines, in paragraph 1, that "an agreement under Article 31, paragraph 3 … (b)[VCLT] requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept"; and it confirms, in paragraph 2, that "silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction".[24] This is clearly the case for the understanding that the right to strike is protected under ILO Convention No. 87.

2.21 This interpretation of ILO Convention No. 87 protecting the right to strike has been consistently confirmed by a large number of States Parties to the Convention in their national practice and case law, and remains undisputed by many others. Although the views of States Parties may differ on the scope of the right to strike, there seems agreement on the principle that the right to strike is protected under ILO Convention No. 87. This principle has also been acknowledged over the years by both the workers' and employers' organizations, thus doing justice to the tripartite nature of the ILO.

2.22 In its *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, the ILC included draft Conclusion 13, paragraph 2, that states that a pronouncement of an expert treaty body may refer to a subsequent practice under Article 31, paragraph 3, of the VCLT.[25] This draft Conclusion could also be applied, *mutatis mutandis*, to committees of international organizations, including committees of the ILO.[26] The CFA and the CEACR have frequently confirmed the practice of States Parties to ILO Convention No. 87 by demonstrating that the right to strike is a fundamental right of workers and of their organizations, and by defining the limits within which it may be exercised (see Section 4 below), laying down a body of principles in connection with the right to strike which renders more explicit the extent of Articles 3 and 10 of ILO Convention No. 87, viewed in light of its object and purpose. In addition, commissions of inquiry – that decide on complaints brought pursuant to Article 26 of the ILO Constitution – have also interpreted the right to strike to be an intrinsic corollary of the right to organize protected by ILO Convention No. 87.[27] It has been indicated that "the right to strike constitutes one of the essential means that should be available

[24] Draft conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, draft Conclusion 10.
[25] *Idem*., draft Conclusion 13.
[26] *Idem*., para. 4, including footnote 162.
[27] See, for example, ILO, 'Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of Zimbabwe of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)' (2009), para. 575.

to trade union organisations for, in accordance with Article 10 of the Convention, furthering and defending the interests of their members".[28]

2.23 In the interpretation of a treaty, the views expressed by these bodies may thus be taken into account in considering the question whether the right to strike of workers and their organizations is protected under ILO Convention No. 87. The Court itself has attached importance to the interpretation adopted by independent bodies established specifically to supervise the application of a treaty.[29]

2.24 Even if the right to strike was not explicitly set out in ILO Convention No. 87 when it was first adopted in 1948, it is the view of the Kingdom of the Netherlands that the subsequent practice of the States Parties, within the meaning of Article 31, paragraph 3, under b, of the VCLT, confirms that the right to strike of workers and their organizations is protected under ILO Convention No. 87. This practice is reaffirmed by the fact that both Articles 3 and 10 of ILO Convention No. 87, interpreted in their context and in the light of the Convention's object and purpose, include the right to strike.

D. Relevant rules of international law

2.25 In addition to the general rule of treaty interpretation and the subsequent practice of States Parties, Article 31, paragraph 3, under c, of the VCLT provides that "any relevant rules of international law applicable in the relations between the States Parties" are to be taken into account together with the context. This rule of interpretation is not limited to the time of adoption of ILO Convention No. 87.

2.26 Since other agreements, concluded after the adoption of ILO Convention No. 87, do explicitly include the right to strike and many of the States that are party to these instruments are also party to ILO Convention No. 87, there is a broad framework of recognition of this right at the international level. These other rules of international law on the right to strike, either explicitly included in other treaties or interpreted as including the right to strike, are to be taken into account while interpreting and applying Articles 3 and 10 of ILO Convention No. 87 and the right to strike that they protect.

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[28] ILO, Report of the Commission of Inquiry instituted under Article 26 of the Constitution of the ILO to examine the complaint on the observance by Poland of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No 98) Official Bulletin, Special Supplement Series B, Vol LXVII (1984), para. 517.

[29] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, para. 66.

2.27 ILO Convention No. 87 was adopted in 1948. The ECHR, which also does not explicitly include the right to strike, was adopted in 1950. In 1952, the first CFA decision, interpreting ILO Convention No. 87 to include the right to strike, was adopted. All relevant international instruments subsequently adopted by States, have explicitly included the right to strike. Almost a decade after the CFA decision in 1952, the European Social Charter ('ESC') was adopted - in 1961 - which explicitly included the right to strike. In 1966, the International Covenant on Economic, Social and Cultural Rights ('ICESCR') was adopted which also explicitly includes the right to strike. The Charter of Fundamental Rights of the European Union ('EU Charter'), adopted in 2000, also explicitly includes such a right. Furthermore, in 2009, the ECtHR interpreted Article 11 of the ECHR on freedom of assembly and association as protecting the right to strike.[30]A detailed description of these instruments is included in Section 3 below.

2.28 According to the Kingdom of the Netherlands and on the basis of the analysis above, it would therefore be consistent with the rule of treaty interpretation as provided for in Article 31, paragraph 3, under c, of the VCLT, to interpret ILO Convention No. 87 as protecting the right to strike.

E. Supplementary means of interpretation

2.29 In certain circumstances, recourse may be had to supplementary means of interpretation in accordance with Article 32 of the VCLT, including the preparatory work of the treaty and circumstances of its conclusion. Such recourse may be had to confirm the meaning resulting from the application of Article 31 of the VCLT, or when reliance on the primary means of interpretation produces an interpretation which (a) leaves the meaning "ambiguous or obscure" or (b) leads to a result which is "manifestly absurd or unreasonable". In such case the purpose is not to confirm, but to determine the meaning.

2.30 The interpretation of ILO Convention No. 87 must accordingly first be conducted pursuant to Article 31 of the VCLT. As set out above, the resulting interpretation is clear: the right to strike of workers and their organizations is protected under ILO Convention No. 87. This interpretation does not lead to ambiguity, obscurity, absurdity or unreasonableness.

2.31 Recourse to supplementary means of interpretation, such as the preparatory work of ILO Convention No. 87, is not an alternative, autonomous means of interpretation, but only a means

[30] ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application. No. 68959/01, 21 April 2009.

to confirm or determine the meaning as described above. Thus, the intention of States Parties as contained in Article 32 of the VCLT is placed in a subsidiary position compared to the interpretation on the basis of the elements as set out in Article 31 of the VCLT. Therefore, there is no need to resort to the preparatory work in this particular case.

2.32 Notwithstanding this role of supplementary means of interpretation, looking at the preparatory work of ILO Convention No. 87, it confirms the position that the right to strike is protected under this Convention. During the negotiations in 1947 and 1948, the suggestion was made to include an explicit reference to the right to strike in the text of the Convention.[31] However, since the scope of the right to strike was largely regulated by domestic law, it would take considerable time to reach agreement on clarifying the scope and no such time was available. Although, therefore, no specific reference was included in the final text of ILO Convention No. 87, the negotiating parties considered the right to strike as being incorporated within the protection of freedom of association.[32]

3. The recognition of the right to strike in international instruments, other than ILO Convention No. 87

3.1 As mentioned, other international instruments - adopted since the CFA first recognized the right to strike as being protected by ILO Convention No. 87 - recognize the right to strike explicitly. This is the case with the ESC, the ICESCR, and the EU Charter. Furthermore, although the International Covenant on Civil and Political Rights ('ICCPR') and the ECHR do not include such a right specifically, the relevant treaty body and the ECtHR have both recognized the right to strike as falling within the scope of the right to freedom of association under Article 22 of the ICCPR and Article 11 of the ECHR, respectively.

A. The right to strike under the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights

3.2 In a joint statement on the right to freedom of association, the Committee on Economic, Social and Cultural Rights ('CESCR') and the Committee on Civil and Political Rights ('CCPR') recalled that: "the right to strike is corollary to the effective exercise of the freedom to form and

[31] Janice R. Bellace, 'The ILO and the Right to Strike', International Labour Review, Vol. 153 (2014), No. 1, p. 42.
[32] *Idem*., p. 43.

join trade unions. Both committees have sought to protect the right to strike in their review of the implementation of the ICESCR and the ICCPR by the States parties".[33]

i. The views on the right to strike by the CESCR under the ICESCR

3.3 Article 8 of the ICESCR establishes, *inter alia*, the right to form and join trade unions. The right to strike is included in Article 8, paragraph 1, under d, which establishes that:

> 1. The States Parties to the present Covenant undertake to ensure: […] (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
> 2. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
> 3. Nothing in this Article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

3.4 The CESCR has noted that "trade union rights, freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work".[34]

3.5 In its views on the right to strike included in Article 8 of the ICESCR, the CESCR frequently refers to ILO Convention No. 87.[35] For example, it has noted that:

> [p]ublic officials who do not provide essential services are entitled to their right to strike in accordance with Article 8 of the Covenant and ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise (1948).[36]

ii. The views on the right to strike by the CCPR under the ICCPR

3.6 The ICCPR does not explicitly include the right to strike, but its Article 22 establishes that:

[33] Joint statement by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, E/C.12/2019/3-CCPR/C/2019/1, 23 October 2019.
[34] General comment No. 23 (2016) on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), 27 April 2016, UN Doc. E/C.12/GC/23.
[35] Concluding observations on the initial report of Montenegro, 15 December 2014, E/C.12/MNE/CO/1, para. 15; Concluding observations on the fourth periodic report of Australia, 12 June 2009, E/C.12/AUS/CO/4, para. 19.
[36] Concluding observation the fifth report of Germany, 12 July 2011, E/C.12/DEU/CO/5, para. 20.

> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
>
> 3. Nothing in this Article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

3.7 The CCPR has addressed the right to strike in a more limited manner than the CESCR, but has viewed Article 22 of the ICCPR – establishing the right to freedom of association - as protecting the right to strike. For example, it has noted its concern in the context of a review of periodic report that "public servants who do not provide essential services do not fully enjoy their right to strike" with reference to Article 22 of the ICCPR.[37]

B. The right to strike in the framework of the Council of Europe

3.8 The right to strike is protected in the framework of the Council of Europe by the ESC, explicitly in its text and in the views of its monitoring body, the ECSR, as well as in the case law of the ECtHR.

i. The views on the right to strike by the ECSR under the ESC

3.9 The ESC was adopted in 1961 and revised in 1996. It guarantees fundamental social and economic rights and lays specific emphasis on the protection of vulnerable persons, such as the elderly, children, people with disabilities and migrants.

3.10 The ESC contains safeguards for a number of social rights for workers, including the right to bargain collectively and the right to strike. The latter is established in Article 6, paragraph 4 of the ESC:

[37] Concluding observations on the fourth periodic report of Estonia, 18 April 2019, CCPR/C/EST/CO/4, para. 32; Concluding observations on the third report of Estonia, 4 August 2010, CCPR/C/EST/CO/3, para. 15.

> With a view to ensuring the effective exercise of the right to collective bargaining, the Parties […] recognise: […] 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

3.11 The ECSR, in its views on Article 6, paragraph 4, of the ESC, has stated that: "the right to collective action is essential in ensuring the autonomy of trade unions and protecting the employment conditions of workers".[38]

ii. The interpretation of the right to strike by the ECtHR under the ECHR

3.12 The ECHR does not explicitly refer to the right to strike. However, the ECtHR has recognized that Article 11 of the ECHR on 'Freedom of assembly and association' protects the right to strike.

3.13 Article 11 of the ECHR states that:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

3.14 In *Wilson, National Union of Journalists and Others v. The United Kingdom*, the ECtHR held that:

> [t]he essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests.[39]

[38] ECSR, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012 (Adopted by the Committee of Ministers on 5 February 2014).
[39] ECtHR, *Wilson, National Union of Journalists and Others v. The United Kingdom*, Application Nos. 30671/96 and 30678/96, 2 July 2002, para. 46.

3.15 In its Grand Chamber judgment in *Demir and Baykara v. Turkey*[40], the ECtHR for the first time recognized explicitly the right to collective bargaining as included in the right to freedom of assembly and association established in Article 11 of the ECHR. In *Enerji Yapi-Yol Sen v. Turkey*, the ECtHR recognized the right to strike as protected under Article 11 of the ECHR, with reference to the ILO Committees' recognition of this right:

> Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests […] The Court also observed that the right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights.[41]

3.16 The ECtHR has, on several occasions, taken into accounts the views of the CFA in its interpretation of the ECHR. In *Ognevenko v. Russia*, the ECtHR referred to the ILO, specifically to the Digest of decisions and principles (fifth (revised) edition, 2006) of the CFA and cited from the Section entitled "Right to strike".[42] In *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NFT) v. Norway* ,[43] the ECtHR referred to Articles 3 and 11 of ILO Convention No. 87 and to the same Digest of the CFA, specifically to the sections entitled "'Right of organizations freely to organize their activities and to formulate their programmes'; 'Other activities of trade union organizations (protest activities, sit-ins, public demonstrations, etc.) and 'Collective bargaining"'.[44]

3.17 Specifically with regard to strike action, in *National Union of Rail, Maritime and Transport Workers v. the United Kingdom,* the ECtHR held that secondary industrial action "is recognised and protected as part of trade union freedom under ILO Convention No. 87 and the European Social Charter"[45] and that "strike action is clearly protected by Article 11 [ECHR]",[46] It also held that it:

> [w]ould be inconsistent with [its previously established method of interpretation of the ECHR] for the Court to adopt in relation to Article 11 [ECHR] an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law. In addition, such an understanding of trade-union freedom finds further support in the

[40] ECtHR, *Demir and Baykara v. Turkey* [GC], Application No. 34503/97, 12 November 2008, paras. 155, 169-170.
[41] ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application No. 68959/01, 21 April 2009, para. 24.
[42] ECtHR, *Ognevenko v. Russia*, Application No. 44873/09, 20 November 2018, para. 20.
[43] ECtHR, *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NFT) v. Norway*, Application No. 45487/17, 10 June 2021.
[44] *Idem*., paras. 71-72.
[45] ECtHR*, National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, Application No. 31045/10, 8 April 2014, para. 76.
[46] *Idem*., para. 84.

> practice of many European States that have long accepted secondary strikes as a lawful form of trade-union action.[47]

3.18 In the same judgment, the ECtHR also noted that - at the 101st International Labour Conference in 2012 - "[t]he governments who took the floor during that discussion were reported as saying that the right to strike was 'well established and widely accepted as a fundamental right'".[48]

3.19 In the recent case of *Humpert and Others v. Germany*, the ECtHR reiterated that the right to strike "constitutes an important instrument for the trade union to protect the occupational interests of its members and in turn for the members of a trade union to defend their interests" [49] and that strike action is "clearly protected by Article 11 in so far as it is called by trade unions".[50]

C. The right to strike in the framework of the European Union

3.20 In European Union law, the right to strike is included in the EU Charter. According to its Article 28, which establishes the right of collective bargaining and action:

> Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

3.21 This right is based on the right to strike in Article 6 of the ESC and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14).[51]

3.22 The CJEU has recognized, in the *Viking* case, the right to strike as an exercise of the right to collective action, and as a fundamental right, in the context of the freedoms guaranteed in the EU Treaties:

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[47] ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, Application No. 31045/10, 8 April 2014, para. 76.
[48] *Idem*., para. 97.
[49] ECtHR, *Humpert and Others v. Germany*, Application Nos. 59433/18, 59477/18, 59481/18 and 59494/18, 14 December 2023, para. 104.
[50] *Ibid.*
[51] Official Journal of the European Union, 'Explanations regarding the Charter of Fundamental Rights' (2007/C 303/02).

> [i]t must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter […] and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers […] and the Charter of Fundamental Rights of the European Union […].
>
> […] the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures.[52]

3.23 The CJEU has reiterated this position, that the right to strike constitutes a fundamental right, subsequently in its judgments with respect to the *Laval* and *Airhelp Ltd* cases.[53]

4. Permissible and impermissible restrictions of the right to strike

A. The views on restrictions of the right to strike of ILO Committees

4.1 As mentioned, the CFA has recognized the right to strike as "an intrinsic corollary to the right to organize protected by Convention No. 87"[54] and as "a fundamental right of workers and of their organizations".[55] The CFA and, to a lesser extent, the CEACR have also addressed the permissibility of restrictions of the right to strike.

[52] Case C–438/05, *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v. Viking Line,* Judgment of 11 December 2007 [2007] ECR I-10779, para. 43.
[53] Case C–341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, Judgment of the Court (Grand Chamber) of 18 December 2007, ECLI:EU:C:2007:809, para. 91; See also, *Airhelp Ltd v. Scandinavian Airlines System Denmark – Norway – Sweden*, Judgment of the Court (Grand Chamber) of 23 March 2021, ECLI:EU:C:2021:226, para. 27; See also Case C-613/20, *CS v. Eurowings GmbH*, Judgment of the Court of 6 October 2021, ECLI:EU:C:2021:820, para. 20.
[54] ICJ file, Volume 5, Document No. 282. ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 754, (2006 Digest, para. 523); CFA, Report No. 344, Case No. 2471 (Djibouti), para. 891; CFA, Report No. 346, Case No. 2506 (Greece), para. 1076; CFA, Report No. 346, Case No. 2473 (United Kingdom/Jersey), para. 1532; CFA, Report No. 349, Case No. 2552 (Bahrain), para. 419; CFA, Report No. 354, Case No. 2581 (Chad), para. 1114; CFA, Report No. 362, Case No. 2838 (Greece), para. 1077.
[55] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 751 (2006 Digest, para. 520).

i. Permissible restrictions of the right to strike

4.2 In general, the right to strike is recognized if it is used as a means to defend the "economic and social interests" of workers.[56] This means that "[s]trikes of a purely political nature and strikes decided systematically long before negotiations take place" are not regarded as legitimate.[57]

4.3 Any conditions that need to be fulfilled to render a strike lawful "should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations".[58] For example, the CFA has noted that "making the right to call a strike the sole preserve of trade union organizations" does not appear to be incompatible with ILO Convention No. 87.[59]

4.4 The CFA has noted that a general prohibition of strikes can only be justified in the event of an acute national emergency and for a limited period of time.[60] It has noted that the prohibition of strike pickets and restrictions on certain types of strikes, including 'wild cat strikes', are justified only if the strike ceases to be peaceful[61] or disturb public order and threaten workers who continue to work.[62]

4.5 The main permissible restriction or prohibition of strikes, including the imposition of compulsory arbitration,[63] can furthermore only be acceptable:

[56] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 751 (2006 Digest, para. 520).
[57] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 760, (2006 Digest, para. 528); CFA, Report No. 340, Case No. 2413, para. 901; CFA, Report No. 344, Case No. 2509 (Romania), para. 1245; CFA, Report No. 353, Case No. 2619 (Comoros), para. 573.
[58] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 789, (2006 Digest, para. 547); CFA, Report No. 343, Case No. 2432 (Nigeria), para. 1026; CFA, Report No. 346, Case No. 2488 (Philippines), para. 1331; CFA, Report No. 357, Case No. 2698 (Australia), para. 225; CFA, Report No. 359, Case No. 2203 (Guatemala), para. 524; CFA, Report No. 371, Case No. 2988 (Qatar), para. 850; CFA, Report No. 375, Case No. 2871 (El Salvador), para. 231.
[59] ICJ file, Volume 5, Document No. 282 ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 756. (2006 Digest, para. 524).
[60] ICJ file, Volume 5, Document No. 282 ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 824, (2006 Digest, para. 570); CFA Report No. 343 (2006), Case No. 2426 (Burundi), para. 284; CFA, Report No. 371, Case No. 3001 (Plurinational State of Bolivia), para. 211.
[61] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 937 (2006 Digest, para. 649); CFA, Report No. 350, Case No. 2252 (Philippines), para. 171; CFA, Report No. 356, Case No. 2488 (Philippines), para. 148; CFA, Case No. 2652 (Philippines), para. 1216; CFA, Report No. 376, Case No. 3096 (Peru), para. 894.
[62] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 938, (2006 Digest, para. 650); CFA, Report No. 346, Case No. 2473 (United Kingdom/Jersey), para. 1544; CFA, Report No. 350 (2008), Case No. 2602 (Republic of Korea), para. 694; CFA, Report No. 376 (2015), Case No. 3096 (Peru), para. 894; CFA, Report No. 348, Case No. 2519 (Sri Lanka), para. 1143; CFA, Report No. 362 (2011), Case No. 2815 (Philippines), para. 1370.
[63] ICJ file, Volume 5, Document No. 282 ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para 818. (2006 Digest, para. 565); CFA, Report No. 371, Case No. 2988 (Qatar), para. 853.

in the case of civil servants acting on behalf of the public authorities or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population.[64]

4.6 However, the CFA has recognized that "[t]oo broad a definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers, so that it only regards public servants exercising authority in the name of the state".[65]

4.7 The following are considered to be essential services: public health services,[66] electricity services,[67] water provision,[68] telephone services,[69] police and armed forces,[70] fire services,[71]

[64] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 779, (2006 Digest, paras. 541 and 576); CFA, Report No. 340 (2006), Case No. 1865 (Republic of Korea), para. 751; CFA, Report No. 344 (2007), Case No. 2467 (Canada), para. 578; CFA, Report No. 346 (2007), Case No. 2500 (Botswana), para. 324; CFA, Report No. 348 (2007), Case No. 2433 (Bahrain), para. 48, Case No. 2519 (Sri Lanka), para. 1141; CFA, Report No. 349 (2008), Case No. 2552 (Bahrain), para. 421; CFA, Report No. 351 (2008), Case No. 2355 (Colombia), para. 361, Case No. 2581 (Chad), para. 1336; CFA, Report No. 353 (2009), Case No. 2631 (Uruguay), para. 1357; CFA, Report No. 354 (2009), Case No. 2649 (Chile), para. 395; CFA, Report No. 356 (2010), Case No. 2654 (Canada), para. 370; CFA, Report No. 357 (2010), Case No. 2698 (Australia), para. 224; CFA, Report No. 362 (2011), Case No. 2741 (United States), para. 767; CFA, Report No. 365 (2012), Case No. 2723 (Fiji), paras. 778 and 842; CFA, Report No. 367 (2013), Case No. 2894 (Canada), para. 335, Case No. 2885 (Chile), para. 384, Case No. 2929 (Costa Rica), para. 637, Case No. 2860 (Sri Lanka), para. 1182; CFA, Report No. 370 (2013), Case No. 2956 (Plurinational State of Bolivia), para. 142; CFA, Report, No. 371 (2014), Case No. 3001 (Plurinational State of Bolivia), para. 211, Case No. 2988 (Qatar), para. 851; CFA, Report No. 372 (2014), Case No. 3022 (Plurinational State of Bolivia), para. 614; CFA, Report No. 374 (2015), Case No. 3057 (Canada), para. 213; CFA, Report No. 377 (2016), Case No. 3107 (Canada), para. 240; CFA, Report No. 378 (2016), Case No. 3111 (Poland), para. 715; ICJ file, Volume 5, Document No. 272, Case No. 1304 (Costa Rica), Representation made by the Confederation of Costa Rican Workers (CTC), the Authentic Confederation of Democratic Workers (CATD), the Unity Confederation of Workers (CUT), the Costa Rican Confederation of Democratic Workers (CCTD) and the National Confederation of Workers (CNT) alleging the failure by Costa Rica to implement several international labour conventions including Conventions Nos 11, 87, 98 and 135, Official Bulletin, vol. LXVIII, 1985, para. 99; ICJ file, Volume 5, Document No. 275, Case No. 1971 (Denmark), Representation against the Government of Denmark presented by the Association of Salaried Employees in the Air Transport Sector (ASEATS) and the Association of Cabin Crew at Maersk Air (ACCMA) alleging non-observance by Denmark of Conventions Nos 87 and 98, Official Bulletin, vol. LXXXII, 1999, para. 55.

[65] ICJ file, Volume 5, Document No. 282 ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 816, (2006 Digest, para. 575); CFA, Report No. 344 (2007), Case No. 2365 (Zimbabwe), para. 1446; CFA, Report No. 378 (2016), Case No. 3111 (Poland), para. 715.

[66] ICJ file, Volume 5, Document No. 282 ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 925, (2006 Digest, para. 585); CFA, Report No. 349 (2008), Case No. 2552 (Bahrain), para. 422; CFA, Report No. 351 (2008), Case No. 2581 (Chad), para. 1336; CFA, Report No. 355 (2009), Case No. 2659 (Argentina), para. 240.

[67] ICJ file, Volume 5, Document No. 282 ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 840, (2006 Digest, para. 585); CFA, Report No. 349 (2008), Case No. 2552 (Bahrain), para. 422; CFA, Report No. 351 (2008), Case No. 2581 (Chad), para. 1336; CFA, Report No. 362 (2011), Case No. 2723 (Fiji), para. 842; CFA, Report No. 365 (2012), Case No. 2723 (Fiji), para. 778.

[68] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 840, (2006 Digest, para. 585); CFA, Report No. 349 (2008), Case No. 2552 (Bahrain), para. 422; CFA, Report No. 351 (2008), Case No. 2581 (Chad), para. 1336; CFA, Report No. 354 (2009), Case No. 2649 (Greece), para. 395; CFA, Report No. 362 (2011), Case No. 2723 (Fiji), para. 842; CFA, Report No. 365 (2012), Case No. 2723 (Fiji), para. 778.

[69] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 840, (2006 Digest, para. 585); CFA, Report No. 349, Case No. 2552, para. 422; CFA, Report No. 351, Case No. 2581, para. 1336; CFA, Report No. 362, Case No. 2723, para. 842; and 365th Report, Case No. 2723, para. 778.

[70] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 840, (2006 Digest, para. 585); CFA, Report No. 349 (2008), Case No. 2552 (Bahrain), para. 422.

[71] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 840, (2006 Digest, para. 585); CFA, Report No. 351 (2008), Case No. 2581 (Chad), para. 1336.

public and private detention facilities,[72] food and cleaning services in schools,[73] and air traffic control.[74]

4.8 However, what are regarded as essential services may also depend on the particular circumstances prevailing in a country and the CFA has recognized that "a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope".[75]

4.9 The CFA has furthermore noted that employees who are "deprived of the right to strike because they perform essential services must have appropriate guarantees to safeguard their interests" and that they should be compensated "for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services".[76]

4.10 The CEACR has noted that for public servants not exercising authority in the name of the State and for services not considered essential in the strict sense of the term, a negotiated "minimum service, as a possible alternative to the full prohibition of strike action, could be appropriate in circumstances where strikes of a certain magnitude and duration could cause an acute crisis threatening the normal conditions of existence of the population, or in public services of fundamental importance in which it is important to deliver the basic needs of users".[77]

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[72] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para 840, (2006 Digest, para. 585); CFA, Report No. 349 (2008), Case No. 2552 (Bahrain), para. 422.
[73] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para 840, (2006 Digest, para. 585); CFA, Report No. 360 (2011), Case No. 2784 (Argentina), para. 243.
[74] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para 840. (2006 Digest, para. 585); CFA, Report No. 349 (2008), Case No. 2552 (Bahrain), para. 422; CFA, Report No. 351 (2008), Case No. 2581 (Chad), para. 1336; CFA, Report No. 353 (2009), Case No. 2631 (Uruguay), para. 1357; CFA, Report No. 362 (2011), Case No. 2785 (Spain), para. 736, Case No. 2841 (France), para. 1041; CFA, Report No. 376 (2015), Case No. 3079 (Dominican Republic), para. 421.
[75] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para 837, (2006 Digest, para. 582); CFA, Report No. 343 (2006), Case No. 2432 (Nigeria), para. 1024; CFA, Report No. 348 (2007), Case No. 2519 (Sri Lanka), para. 1142; CFA, Report No. 349 (2008), Case No. 2552 (Bahrain), para. 422; CFA, Report No. 351 (2008), Case No. 2355 (Colombia), para. 361, Case No. 2581 (Chad), para. 1336; CFA, Report No. 354 (2009), Case No. 2581 (Chad), para. 1114; CFA, Report No. 372 (2014), Case No. 3038 (Norway), para. 469.
[76] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 853, (2006 Digest, para. 595); CFA, Report No. 344 (2007), Case No. 2467 (Canada), para. 578; CFA, Report No. 349 (2008), Case No. 2552 (Bahrain), para. 421; CFA, Report No. 350 (2008), Case No. 2543 (Estonia), para. 726; CFA, Report No. 356 (2010), Case No. 2654 (Canada), para. 376; CFA, Report No. 367 (2013), Case No. 2860 (Sri Lanka), para. 1182; CFA, Report No. 370 (2013), Case No. 2956 (Plurinational State of Bolivia), para. 142; CFA, Report No. 355 (2009), Case No. 2659 (Argentina), para. 241; CFA, Report No. 371 (2014), Case No. 2988 (Qatar), para. 854; CFA, Report No. 374 (2015), Cases Nos. 2941 and 3026 (Peru), para. 662.
[77] ICJ file, Volume 4, Document No. 196, Report III (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations (Albania), International Labour Conference, 110th Session, 2022, pp. 97-98; ICJ file, Volume 4, Document No. 195, Report III/Addendum (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations (Fiji), ILC, 109th Session, 2021, pp.181-185; ICJ file, Volume 4, Document No. 228, Report III (Part A), Report of the Committee of Experts on the Application of Conventions and Recommendations, (Burkina Faso), International Labour Conference, 109th Session, 2020, p. 85.

ii. Impermissible restrictions of the right to strike

4.11 Although some restrictions of the right to strike are deemed permissible, there are some restrictions that are deemed to be incompatible with ILO Convention No. 87. The CFA has noted that an:

> [a]bsolute prohibition of strikes would constitute a serious limitation of the right of organisations to further and defend the interest of their members (Article 10 of the Convention) and could be contrary to Article 8, paragraph 2, of the Convention, under which 'the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention', including the right of unions to organise their activities in full freedom (Article 3 of the Convention).[78]

4.12 The CFA has also concluded that "excessive restrictions on the right to strike imposed on workers constitute a serious violation of the principles of freedom of association".[79]

4.13 The restrictions that the CFA considers as impermissible can therefore be grouped into three categories: (i) restrictions regarding certain types of strikes, (ii) restrictions regarding procedure, and (iii) criminalization of strike action.

4.14 Regarding restrictions concerning certain types of strikes:

a) A general prohibition of sympathy strikes could lead to "abuse" and workers should be able to take such action "provided the initial strike they are supporting is itself lawful";[80]

b) Excluding "secondary boycotts and industrial action in support of multiple-enterprise agreements from the scope of protected industrial action" could unduly restrict the right to strike;[81]

[78] ILO, Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaints concerning the Observance by Greece of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), (Vol/LIV, 1971, No. 2, Special Supplement).
[79] ICJ file, Volume 5, Document No. 274, pp. 345-346, Cases Nos. 1810 and 1830 (Turkey), Representation made by the Confederation of Turkish Trade Unions (TURK-IS) alleging non-observance by Turkey of Convention No. 87; Complaint against the Government of Turkey presented by the Confederation of Progressive Trade Unions of Turkey (DISK), Official Bulletin, vol. LXXIX, 1996, paras. 61-63.
[80] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 926 (2006 Digest, para. 534); CFA, Report No. 346 (2007), Case No. 2473 (United Kingdom), para. 1543; CFA, Report No. 357 (2010), Case No. 2698 (Australia), para. 220.
[81] See, for example, CFA, Report No. 357 (2010), Case No. 2698 (Australia), para. 220.

c) "A ban on strikes related to recognition disputes (for collective bargaining) is not in conformity with the principles of freedom of association".[82]

4.15 Regarding restrictions concerning procedure:

a) "The legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike";[83]

b) A "prohibition of strikes in rural occupations when produce may be damaged", is not permissible;[84]

c) The "conciliation and mediation machinery should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness";[85]

d) Prior notice to the employer before calling a strike may be considered acceptable, but only insofar as the notice period is reasonable[86] (whereby prior notice of 48 hours has been deemed reasonable[87] and a 20-day period of notice in cases of services of social or public interest);[88]

e) An imposition of a limit on the duration of a strike is a concern, due to its nature as a last resort for the defence of workers' interests.[89]

4.16 Regarding restrictions that involve criminalization of strike action, the CFA has noted that:

a) It should only be possible to "impose sanctions for strike action solely in cases in which the action is not in conformity with the principles of freedom of association, and such sanctions should not be disproportionate with the severity of the offence involved; and this is not the

[82] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 773, (2006 Digest, para. 536).
[83] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 790, (2006 Digest, para. 548); CFA, Report No. 359 (2011), Case No. 2203 (Guatemala), para. 524.
[84] ICJ file, Volume 5, Document No. 278, p. 371, 'Report of the Commission of Inquiry appointed under article 26 of the Constitution to examine the observance by Nicaragua of Conventions Nos 87, 98 and 144', Official Bulletin, vol. LXXIV, 1991, para. 506.
[85] CFA, Report No. 375 (2015), Case No. 2794 (Kiribati), para. 387.
[86] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 799, (2006 Digest, para. 552); CFA, Report No. 340 (2006), Case No. 2415 (Serbia and Montenegro), para. 1257; CFA, Report No. 344 (2007), Case No. 2509 (Sri Lanka), para. 1246; CFA, Report No. 346 (2007), Case No. 2473 (United Kingdom/Jersey), para. 1542; CFA, Report No. 376 (2015), Case No. 2994 (Tunisia), para. 1002.
[87] CFA, Report No. 344 (2007), Case No. 2509 (Romania), para. 1246.
[88] ICJ file, Volume 5, Document No. 282 ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 801 (2006 Digest, para. 553).
[89] CFA, Report No. 376 (2015), Case No. 2994 (Tunisia), para. 1002.

case when the strikers expose themselves to penalties of up to two years or even three years in prison";[90]

b) "[I]n no case should penal sanctions be imposed or people deprived of their freedom simply for having organized or participated in a peaceful strike"[91] or be "penalized for carrying out or attempting to carry out a legitimate strike";[92]

c) Use of "the military and requisitioning orders to break a strike over occupational claims, unless these actions aim at maintaining essential services in circumstances of the utmost gravity, constitutes a serious violation of freedom of association";[93]

d) "[A]ny intervention by the security forces in situations of strikes by workers should be strictly limited to ensuring public order. The use of the security forces for other purposes, and in particular to disperse a peaceful workplace strike, constitutes interference in trade union affairs". [94]

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[90] ICJ Volume 5, Document No. 274, p. 345-346, Cases Nos. 1810 and 1830 (Turkey), Representation made by the Confederation of Turkish Trade Unions (TURK-IS) alleging non-observance by Turkey of Convention No. 87; Complaint against the Government of Turkey presented by the Confederation of Progressive Trade Unions of Turkey (DISK), Official Bulletin, vol. LXXIX, 1996, paras. 61-63.

[91] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 586, (2006 Digest, para. 672); CFA, Report No. 344 (2007), Case No. 2471 (Djibouti), para. 894; CFA, Report No. 348 (2007), Case No. 2494 (Indonesia), para. 962; CFA, Report No. 353 (2009), Case No. 1865 (Republic of Korea), para. 715; CFA, Report No. 358 (2010), Case No. 2742 (Plurinational State of Bolivia), para. 279; CFA, Report No. 362 (2011), Case No. 2788 (Argentina), para. 254, Case No. 2812 (Cameroon), para. 395, Case No. 2741 (United States), para. 772; CFA, Report No. 363 (2012), Case No. 2854 (Peru), para. 1042; CFA, Report No. 364 (2012), Case No. 2727 (Bolivarian Republic of Venezuela), para. 1083; CFA, Report No. 374 (2015), Case No. 3029 (Plurinational State of Bolivia), para. 111; See also CFA, Report No. 230 (1983), Case No. 1184 (Chile), para. 282; ICJ file, Volume 5, Document No. 281, 'Towards Freedom and Dignity in Myanmar, Report of the Commission of Inquiry established in accordance with article 26 of the ILO Constitution concerning the non-observance by Myanmar of Conventions Nos. 87 and 29, 4 August 2023', para. 586.

[92] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 953 (2006 Digest, para. 660); CFA, Report No. 343 (2006), Case No. 2472 (Indonesia), para. 966; CFA, Report No. 346 (2007), Case No. 2473 (United Kingdom/Jersey), para. 1532; CFA, Report No. 348 (2007), Case No. 2494 (Indonesia), para. 961; CFA, Report No. 351 (2008), Case No. 2569 (Republic of Korea), para. 640; CFA, Report No. 355 (2009), Case No. 2664 (Peru), para. 1089; CFA, Report No. 358 (2010), Case No. 2735 (Indonesia), para. 608; CFA Report No. 359 (2011), Case No. 2754 (Indonesia), para. 680; CFA, Report No. 360 (2011), Case No. 2747 (Islamic Republic of Iran), para. 840; CFA Report No. 362 (2011), Case No. 2794 (Kiribati), para. 1138; CFA, Report No. 367 (2013), Case No. 2938 (Benin), para. 227; CFA Report No. 368 (2013), Case No. 2972 (Poland), para. 824; CFA Report No. 370 (2013), Case No. 2994, para. 735; CFA, Report No. 372, Case No. 3004, para. 573; CFA, Report No. 374, Case No. 3030, para. 536; CFA, Report No. 376, Case No. 2994 (Tunisia), para. 1002.

[93] ICJ file, Volume 5, Document No. 282. ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 921, (2006 Digest, para. 635).

[94] ICJ file, Volume 5, Document No. 282, ILO, Compilation of decisions of the Committee on Freedom of Association, Sixth edition, 2018, para. 586, (2006 Digest, para. 672); CFA, Report No. 344 (2007), Case No. 2471 (Djibouti), para. 894; CFA, Report No. 348 (2007|), Case No. 2494 (Indonesia), para. 962; CFA, Report No. 353 (2009), Case No. 1865 (Republic of Korea), para. 715; CFA, Report No. 358 (2010), Case No. 2742 (Plurinational State of Bolivia), para. 279; CFA, Report No. 362 (2011), Case No. 2788 (Argentina), para. 254, Case No. 2812 (Cameroon), para. 395, Case No. 2741 (United States), para. 772; CFA, Report No. 363 (2012), Case No. 2854 (Peru), para. 1042; CFA Report No. 364 (2012), Case No. 2727 (Bolivarian Republic of Venezuela), para. 1083; CFA, Report No. 374 (2015), Case No. 3029 (Plurinational State of Bolivia), para. 111; CFA, Report No. 230, Case No. 1184 (Chile), para. 282; ICJ file, Volume 5, Document No. 281, 'Towards Freedom and Dignity in Myanmar, Report of the Commission of Inquiry established in accordance with article 26 of the ILO Constitution concerning the non-observance by Myanmar of Conventions Nos 87 and 29', 4 August 2023, para. 586.

B. The views on restrictions of the right to strike of the CESCR and CCPR

4.17 In its concluding observations on the practices of States with regard to the right to strike, the CESCR has addressed restrictions of that right, which may – similarly to the decisions of ILO Committees – be grouped into three main categories of restrictions: (i) types of strikes, mainly focusing on strikes in sectors that provide "essential services", (ii) procedural restrictions, and (iii) criminalization of strike action.

4.18 Regarding restrictions on types of strikes and "essential services", it has noted that:

a) "[T]he categories of workers prohibited from exercising their right to strike should be limited to only those fields where a strike would result in life-threatening situations,[95] to essential services, in accordance with ILO Convention No. 87, and, in the context of the civil service, to civil servants who exercise functions of State authority";[96]

b) "[T]he general prohibition of strikes for all public employees and civil servants, even those not working in essential governmental services […] contravenes Article 8, paragraph 2, of the Covenant and ILO Convention No. 87".[97]

4.19 Regarding procedural restrictions, the CESCR has noted that:

a) "The right to strike should not be restricted by imposing compulsory arbitration,[98] which - with enforceable penalties involving compulsory labour for services whose interruption is not likely to endanger the life, personal safety or health of the whole or part of the population - "has the effect of making most strikes illegal";[99]

[95] CESCR, Azerbaijan, E/1998/22 (1997) 61, para. 349.
[96] CESCR, Australia, E/2001/22 (2000) 66, para. 394; CESCR, Azerbaijan, E/2005/22 (2004) 59, para. 486.
[97] CESCR, Japan, E/2002/22 (2001) 90, para. 600; See also Concluding observations on the third periodic report of Panama, 31 March 2023, E/C.12/PAN/CO/3, paras. 28-29; Concluding observations on the sixth periodic report of El Salvador, 9 November 2022, E/C.12/SLV/CO/6, para. 37(d); Concluding observations on the initial report of Bahrain, 4 August 2022, para. 25(c); Concluding observations on the third periodic report of Czechia, 28 March 2022, E/C.12/CZE/CO/3, para. 27(a); Concluding observations on the third periodic report of Benin, 27 March 2020, E/C.12/BEN/CO/3, para. 30(a); Concluding observations on the third periodic report of Estonia, 27 March 2019, E/C.12/EST/CO/3, para. 27; Concluding observations on the initial report of Cabo Verde, 27 November 2018, E/C.12/CPV/CO/1, para. 37; Concluding observations on the sixth periodic report of the Russian Federation, 16 October 2017, E/C.12/RUS/CO/6, para. 34.
[98] CESCR, Senegal, E/1994/23 (1993) 51, para. 266; Malta, ICESCR, E/2005/22 (2004) 45, para. 346.
[99] CESCR, Mauritius, E/1995/22 (1994) 37, para. 175.

b) "[T]he excessively long procedure for declaring a legal strike […] constitute[s] a restriction on the right provided for in Article 8(1)(d) of the Covenant";[100]

c) "[R]equiring a quorum of two thirds of the total number of workers and the agreement of at least half of the workers present at the meeting to call a strike", may impose undue restrictions on the right to strike;[101]

d) "[L]eav[ing] to the authorities an almost absolute discretion in the determination of the legality of incidents of industrial action, is 'excessively restrictive'".[102]

4.20 Regarding criminalization, the CESCR has urged States to "desist from using criminal proceedings against trade unions for striking [and] […] to refrain from using any force beyond what is absolutely necessary for the maintenance of public order".[103] It has also urged States to "ensure that the right to establish free and independent trade unions is respected, and that the right to strike can be exercised without any form of intimidation".[104] In addition, the CESCR has noted that workers should be able to "freely exercise trade union rights, including rights to collective bargaining, strike and union representation, and be effectively protected against reprisals",[105] and that States should "refrain from actions that lead to violations of the right to strike and conduct independent investigations on allegations of reprisals against workers participating in industrial action".[106]

4.21 The CESCR has referred to additional instances of criminalization in its concluding observations, noting that these are not compatible with Article 8 of the ICESCR:

a) The right to strike was not observed when a Government had "intimidated, and even arrested, strikers on several occasions"[107] or where "doctors and nurses who have organized strikes have been subjected to arrest and dismissal";[108]

[100] CESCR, Bolivia, E/2002/22 (2001) 52, para. 273.
[101] CESCR, Russian Federation, E/C.12/1/Add.94 (2003) 3, para. 21.
[102] CESCR, Republic of Korea, E/1996/22 (1995) 24, para. 71; See also Republic of Korea, ICESCR, E/2002/22 (2001) 45, para. 230.
[103] CESCR, Republic of Korea, E/2002/22 (2001) 45, para. 249; See also CESCR, Colombia, E/1996/22 (1995) 41, para. 188.
[104] CESCR, Syrian Arab Republic, E/2002/22 (2001) 67, para. 428; See also Concluding observations on the third periodic report of China, including Hong Kong, China, and Macao, China, 22 March 2023, E/C.12/CHN/CO/3, para. 139.
[105] Concluding observations on the fourth periodic report of Azerbaijan, 2 November 2021, E/C.12/AZE/CO/4, para. 31; Concluding observations on the sixth periodic report of Colombia, 19 October 2017, E/C.12/COL/CO/6, para. 39.
[106] Concluding observations on the fourth periodic report of the Republic of Korea, 19 October 2017, E/C.12/KOR/CO/4, para. 39.
[107] CESCR, Guinea, ICESCR, E/1997/22 (1996) 39, para. 201.
[108] CESCR, Zimbabwe, ICESCR, E/1998/22 (1997) 24, para. 74; Concluding observations on the combined second to fourth periodic reports of the former Yugoslav Republic of Macedonia, 16 July 2016, E/C.12/MKD/CO/2-4, para. 35; Concluding observations on the third periodic report of Argentina, 14 December 2011, CESCR, E/C.12/ARG/CO/3, para. 19.

b) The "approach taken to criminalize strike activities is entirely unacceptable […] the Committee is deeply disturbed by the excessive police force used in recent labour demonstrations that had been set off by massive lay-offs. The Committee considers the combined effect of these circumstances to be a clear negation of the rights provided for in Article 8 of the Covenant";[109]

c) "[T]he imposition of sanctions, including imprisonment, which constitutes non-compliance with the obligation regarding Article 8 of the Covenant";[110]

d) That a State should: "(c) prevent and punish all acts of reprisals against workers who exercise their right to strike; and (d) release those workers who have been unjustly arrested for exercising their labour rights".[111]

4.22 The CCPR has addressed restrictions of the right to strike to a lesser extent than the CESCR, but has noted - for example regarding regarding procedural requirements - that legislation was "too restrictive in providing, *inter alia*, for the prohibition of strikes in services that cannot be considered as essential and requiring a two-thirds majority to call a strike, which may amount to a violation of Article 22 [ICCPR]".[112]

4.23 Similarly to the CESCR, the CCPR has also expressed concern over "the high levels of violence against trade union members, the intimidation by agents of offshore operations and the high number of cases of strikes that are deemed illegal", [113] as well as arrests of trade unionists during strikes.[114]

C. The views and interpretation on the right to strike in the framework of the Council of Europe

i. The views on restrictions of the right to strike of the ECSR

4.24 The ESC refers, in its Article G, paragraph 1, to the permissibility of restrictions of the rights established in it (including the right to strike, established in Article 6 of the ESC):

[109] CESCR, Republic of Korea, E/2002/22 (2001) 45, para. 230.
[110] CESCR, Syrian Arab Republic, E/2002/22 (2001) 67, para. 411; CESCR, Iraq, E/1998/22 (1997) 50, para. 260; Concluding observations on the initial, second and third periodic reports of Ethiopia, 31 May 2012, E/C.12/ETH/CO/1-3, para. 12; Concluding observations on the second to fourth periodic reports of Sri Lanka, 9 December 2010, CESCR, E/C.12/LKA/CO/2-4, para. 22.
[111] Concluding observations on the initial report of Namibia, 23 March 2016, E/C.12/NAM/CO/1, para. 40.
[112] CCPR, Lituania, A/59/40 vol. I (2004) 52, para. 71(18).
[113] CCPR, Guatemala, A/51/40 vol. I (1996) 33, para. 239; CCPR, Bolivia, A/52/40 vol. I (1997) 35, para. 214.
[114] Concluding observations on the third periodic report of Guinea, 7 December 2018, CCPR/C/GIN/CO/3, paras. 45-46.

> The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

4.25 However, the ECSR has stated that:

> [n]ational legislation which prevents a priori the exercise of the right to collective action, or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards would infringe the fundamental right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers.[115]

4.26 The ECSR has recognized that political strikes are not covered by Article 6 of the ESC, which is designed to protect "the right to bargain collectively"; such strikes are deemed to fall outside the purview of collective bargaining.[116]

4.27 Regarding *permissible* restrictions of the right to strike, the ECSR has clarified that each State may regulate the exercise of the right to strike, provided that any further restriction that this might place on such right can be justified under the terms of Article G, paragraph 1, of the ESC.[117] This means that the right of trade unions to collective action is not an absolute one, but may be subject to restrictions that meet the criteria set out in that Article and are proportionate to the legitimate aim pursued.[118]

4.28 By requiring that restrictions "shall be prescribed by law", Article G, paragraph 1, of the ESC does not require that such restrictions must necessarily be imposed solely by statutory provisions.[119] The case law of domestic courts may also comply with this requirement provided that it is stable and foreseeable enough to provide sufficient legal certainty for the parties concerned.[120] In addition, the Committee considered that the expression "prescribed by law" includes the requirement that fair procedures exist.[121]

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[115] ECSR, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012 (Adopted by the Committee of Ministers on 5 February 2014), para. 120.
[116] Statement of Interpretation on Article 6, paragraph 4, of the ESC, Conclusion II (1971).
[117] ESCR, *ETUC/CITUB/Podkrepa v. Bulgaria*, Complaint No. 32/2005, Decision 16 October 2006, para. 24.
[118] ESCR, *LO and TCO v. Sweden*, Complaint No. 85/2012, Decision 3 July 2013, para. 118.
[119] ESCR, *European Trade Union Confederation (ETUC)/Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/Confédération des Syndicats Chrétiens de Belgique (CSC)/Fédération Générale du Travail de Belgique (FGTB) v. Belgium,* Complaint No. 59/2009, Decision on the merits of 13 September 2011, para. 43.
[120] *Ibid.*
[121] ESCR, *European Trade Union Confederation (ETUC)/Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/Confédération des Syndicats Chrétiens de Belgique (CSC)/ Fédération Générale du Travail de Belgique (FGTB) v. Belgium,* Complaint No. 59/2009, Decision 3 September 2011, para. 44.

4.29 The ESCR has also expressed that a strike ban in the internal affairs, national defence and State security sectors may serve a legitimate purpose, since work stoppages in these sectors could pose threats to public order and national security.[122] However, simply prohibiting these workers from striking, without distinguishing between their particular functions, cannot be considered proportionate to the particular circumstances of each of the sectors concerned, and thus necessary in a democratic society. The introduction of a minimum service requirement in these sectors may be considered to be in conformity with Article 6, paragraph 4, of the ESC.[123]

4.30 The prohibition of certain types of collective action, or even the introduction of a general limitation of the right to collective action in order to prevent initiatives with illegitimate or abusive goals (for example, goals which do not relate to the enjoyment of labor rights) is not necessarily contrary to Article 6, paragraph 4, of the ESC.[124] Excessive or abusive forms of collective action, such as extended blockades, which would put at risk the maintenance of public order or unduly limit the rights and freedoms of others may be limited or prohibited by law.[125]

4.31 Regarding *impermissible* restrictions, the ECSR has stated that the full exclusion of unions to strike poses a risk that their legitimate interests are not taken into consideration.[126] This means that such restrictions to the right to strike cannot be considered as being "prescribed by law".[127]

4.32 Furthermore, a general ban on the right to strike, even in essential sectors, is not permissible since it cannot be regarded as being necessary in a democratic society. The ECSR takes the view that a denial of the right to strike of public servants in general cannot be regarded as compatible with the ESC. However, States Parties to the ESC do have a greater margin of discretion in these situations to restrict the right to strike.

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[122] ESCR, *European Organisation of Military Associations (EUROMIL) v. Ireland*, Complaint No. 112/2014, Decision 12 September 2017, para. 113, citing Conclusions I (1969) of the Statement of Interpretation on Article 6, paragraph 4, of the ESC*;* ESCR*, Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" and European Trade Union Confederation (CES) v. Bulgaria*, Complaint No. 32/2005, Decision 16 October 2006, para. 45.
[123] ESCR, *Matica Hrvatskih Sindikata v. Croatia*, Complaint No. 116/2015, Decision on the merits of 21 March 2018, para. 114; See also ESCR, Conclusions XVII-1 (2006), Czech Republic.
[124] ESCR, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden,* Complaint No. 85/2012, Decision 3 July 2013, para. 119.
[125] *Ibid.*
[126] ESCR, Conclusions (2018), Serbia.
[127] ESCR, *European Trade Union Confederation (ETUC)/ Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/Confédération des Syndicats Chrétiens de Belgique (CSC)/ Fédération Générale du Travail de Belgique (FGTB) v. Belgium,* Complaint No. 59/2009, Decision 13 September 2011, para. 44.

4.33 The ESCR has stated that compulsory arbitration or mediation prior to a strike will generally be in breach of the ESC. It considers that such an obligation, which is considerably more onerous than a cooling-off period, constitutes an impermissible restriction of the right to strike.[128]

4.34 Regarding measures taken with regard to those engaging in strike action, the ESCR has noted that Article 6(4) of the ESC requires that "deductions to the salaries of strikers be in proportion to the duration of the strike".[129]

ii. The interpretation of restrictions of the right to strike under the ECHR by the ECtHR

4.35 In *Enerji Yapi-Yol Sen v. Turkey*, the ECtHR acknowledged that the right to strike was not absolute and could be subject to certain restrictions. However, the ECtHR established - for example - that, while certain categories of civil servants could be prohibited from taking strike action, such prohibition did not extend to all public servants or employees of State-owned commercial entities.[130] In *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain,* the ECtHR found a ban on members of a police force taking strike action to be permissible. The ECtHR held that the difference with doctors and firefighters, who retained the right to strike, was objectively justified in light of the substantive difference between the nature of the duties of police officers and workers in other sectors.[131]

4.36 In *Ognevenko v. Russia*, the ECtHR found a violation of Article 11 of the ECtHR since the applicant's dismissal had been a disproportionate restriction of his right established therein. It held that some types of railway worker were prohibited from striking, but that the restriction had not been sufficiently justified and was in conflict with internationally recognized labour rules. The ECtHR held that sanctions such as dismissal have a "chilling effect" on others who might consider striking to protect their interests.[132] In the same case, the ECtHR held that: "the ILO advises the States to require minimum services to be provided during a strike by its participants instead of banning strikes".[133]

[128] ESCR, Conclusions XVII-1 (2004), Czech Republic.
[129] ESCR, *Confédération Française de l'Encadrement (CFE-CGC) v. France*, Complaint No. 9/2000, para. 49.
[130] ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application No. 68959/01, 21 April 2009, para. 32.
[131] ECtHR, *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*, Application No. 45892/09, 21 April 2015, para. 42.
[132] ECtHR, *Ognevenko v. Russia*, Application No. 44873/09, 20 November 2018, para. 83.
[133] *Idem*., para. 77.

4.37 In *Humpert and Others v. Germany*, the Court held that the prohibition of a strike constitutes a restriction of the right to freedom of association of a trade union and trade union members. Nonetheless, the right to strike may be subject to restrictions, such as a prohibition on strikes imposed on civil servants exercising public authority in the name of the State or restrictions on the right to strike of workers providing essential services, although "a complete ban on the right to strike in respect of certain categories of such workers requires solid evidence from the State to justify the necessity of those restrictions".[134]

4.38 The ECtHR held that States, "are in principle free to decide what measures they wish to take in order to ensure compliance with Article 11 of the ECHR as long as they thereby ensure that trade-union freedom does not become devoid of substance as a result of any restrictions imposed".[135] In order to assess "whether a prohibition on strikes affects an essential element of trade-union freedom because it renders the latter devoid of substance in a given context" all the circumstances of the case need to be taken into account.[136] The ECtHR also established that "restrictions on the right to strike may serve to protect the rights of others, which are not limited to those on the employer's side in an industrial dispute, and may serve to fulfil a Contracting State's positive obligations under its constitutional law, the Convention and other human rights treaties".[137]

4.39 In *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NFT) v. Norway*, the ECtHR further summarised its position on the margin of appreciation of States regarding restrictions imposed on the right protected under Article 11 of the ECHR:

> The evolution of case-law on the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned to secure trade union freedom, subject to its margin of appreciation; and secondly, the Court does not accept restrictions that affect the essential elements of trade union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, while in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law.[138]

[134] ECtHR, Humpert and Others v. Germany, Applications Nos. 59433/18, 59477/18, 59481/18 and 59494/18, 14 December 2023, para. 107; ECtHR, *Ognevenko v. Russia*, Application No. 44873/09, 20 November 2018, para. 73.
[135] ECtHR, *Humpert and Others v. Germany*, Applications Nos. 59433/18, 59477/18, 59481/18 and 59494/18, 14 December 2023, para. 144.
[136] ECtHR, *Humpert and Others v. Germany*, Applications Nos. 59433/18, 59477/18, 59481/18 and 59494/18, 14 December 2023, para. 110.
[137] *Idem*., para. 136.
[138] *Idem*., para. 94.

4.40 The ECtHR has also pronounced itself on measures taken, including criminalization, against those who exercise their right to strike. In *Saime Özcan v. Turkey,*[139] for example, conviction and sentencing to imprisonment (later commuted) with a temporary prohibition to practice the profession of teachers striking for improved working conditions was considered by the ECtHR as an impermissible restriction. This constituted a breach of the right to freedom of association and assembly under Article 11 of the ECHR.[140] Similarly, in *Karaçay v. Turkey* and *Kaya and Seyhan v Turkey*, disciplinary action against public servants who participated in strike action was also held by the ECtHR to constitute an unlawful restriction of the right to strike, constituting a violation of Article 11 of the ECHR.[141]

D. The interpretation of restrictions of the right to strike in the framework of the European Union

4.41 In the *Viking* case, the CJEU recognized that some restrictions of the right to strike may be permitted:

> Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices.[142]

4.42 The CJEU also held that the collective action at issue in that case constituted a restriction of the freedom of establishment, established in Article 49 of the Treaty on the Functioning of the European Union ('TFEU'), even though such restriction could, in principle, be justified by an overriding reason of public interest, such as the protection of workers.[143] The CJEU confirmed this judgment in the subsequent *Laval* case, including that such restriction would be justified

[139] ECtHR, *Saime Özcan v. Turkey*, Application No. 22943/04, 15 September 2009, paras. 22-24.
[140] ECtHR, *Saime Özcan v. Turkey*, Application No. 22943/04, 15 September 2009, paras. 22-24; *Urcan and others v. Turkey*, Application Nos. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 July 2008, paras. 34-36.
[141] ECtHR, *Karaçay v. Turkey* , Application No. 6615/03, 27 March 2007, paras. 37-39; *Kaya and Seyhan v. Turkey*, Application No. 30946/04 , 15 September 2009, paras. 30-32.
[142] Case C–438/05, *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v. Viking Line*, Judgment of 11 Dec. 2007 [2007] ECR I-10779, para. 44; See also Case C-28/20*, Airhelp Ltd v. Scandinavian Airlines System Denmark – Norway – Sweden*, Judgment of the Court (Grand Chamber) of 23 March 2021, ECLI:EU:C:2021:226, para. 27; Case C-613/20, *CS v. Eurowings GmbH*, Judgment of the Court of 6 October 2021, ECLI:EU:C:2021:820, para. 20.
[143] Case C–438/05, *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v. Viking Line*, Judgment of 11 Dec. 2007 [2007] ECR I-10779, para 77.

when suitable for ensuring the attainment of the legitimate objective pursued and if it did not go beyond what was necessary to achieve that objective. [144]

4.43 In *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NFT) v. Norway*, the ECtHR referred to the *Viking* and *Laval* cases of the CJEU. [145] The ECtHR noted that, in both of these cases, "the balancing of the fundamental right to collective action with internal market economic freedoms was at issue".[146] In this regard, the ECtHR held that it is for national courts to apply domestic law, if necessary in conformity with EU or European Economic Area ('EEA') law, and that its role is confined to an assessment of the compatibility of such adjudication with the ECHR.[147] In exercising its jurisdiction in this manner, the ECtHR held that:

> From the perspective of Article 11 of the Convention, EEA freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality under Article 11, paragraph 2.[148]

5. Domestic law

5.1 With regard to the domestic law of the Kingdom of the Netherlands, it should be noted that the Kingdom of the Netherlands consists of four countries which decide their social affairs autonomously, including the right to strike: these countries are the Netherlands, Aruba, Curaçao and Sint Maarten. The latter three countries form part of the Caribbean part of the Kingdom, together with the islands of Bonaire, St. Eustatius and Saba, which are part of the country of the Netherlands. Each country is responsible for implementing the provisions of ILO Convention No. 87 within its own jurisdiction.

A. The interpretation of the right to strike in the Netherlands

5.2 The Netherlands ratified the ESC in 1980, which has direct effect in the Netherlands. The right to strike is not regulated in the Netherlands in legislation but through case law.

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[144] Case C–341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, Judgment of 18 Dec. 2007 [2007] ECR I-11767, para. 91.
[145] ECtHR, *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NFT) v. Norway,* Application No. 45487/17, 10 June 2021, para. 67.
[146] *Ibid.*
[147] ECtHR, *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NFT) v. Norway,* Application No. 45487/17, 10 June 2021, para. 118.
[148] *Ibid.*

5.3 Interim injunction proceedings in relation to collective action may be brought before civil courts of first instance. Where time is of the essence, such proceedings are used to obtain a ruling from the courts at short notice or at very short notice. Both parties have the opportunity to express their views. Interim injunction proceedings in the Netherlands comply with the requirements of due process within the meaning of Article 6 of the ECHR. Parties may appeal a court of first instance's judgment to the court of appeal. Subsequently, a judgment of a court of appeal can be appealed before the Supreme Court of the Netherlands, whose decision is final domestically.

5.4 Courts of first instance and appeal may request the Supreme Court to give a preliminary ruling when a legal issue arises during proceedings on the merits or in interim injunction proceedings, which the Supreme Court has not previously ruled on and which is expected to have an important bearing on similar pending or subsequent cases. Courts may request such a ruling *proprio motu*, but a party to the proceedings may also request the relevant court to do so. National courts may, and in certain cases must, pursuant to Article 267 on the TFEU, also request for a preliminary ruling to the Court of Justice of the European Union on the interpretation of European Union Law and on the validity of acts of the institutions and other bodies of the Union. Within the framework of the Council of Europe, Protocol No. 16 to the ECHR allows the highest courts and tribunals of a State Party to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of rights established in the Convention or the protocols thereto.

5.5 In the *Netherlands Railways (NS)* case[149] in 1986, the Supreme Court held that Article 6, paragraph 4, of the ESC had direct effect because it is binding on all persons pursuant to Article 93 of the Constitution and takes precedence over Dutch legislation pursuant to Article 94 of the Constitution. As it has direct effect, private parties can invoke this international provision directly in civil proceedings before Dutch courts. Whether or not the actions of the trade unions are lawful is directly assessed by Dutch courts with reference to Article 6, paragraph, 4 of the ESC and the restrictions or limitations referred to in its Article G. paragraph 1.

5.6 As regards the restrictions to the right to strike, the Supreme Court held in the *FNV v. Streekvervoer* case[150] that a strike that falls under Article 6, paragraph 4, of the ESC must, in principle, be recognized as a legitimate exercise of the right to bargain collectively established in this provision of the ESC, notwithstanding the possible consequences that a strike may have

[149] *Netherlands Railways (NS)* case ('*NS Spoorwegstaking'*), Dutch Supreme Court, 30 May 1986, ECLI:NL:HR:1986, NJ 1986, 688, paras. 3.2-3.7 (See Annex 2 to this written statement for the translated excerpts).
[150] *FNV Streekvervoer* case, Dutch Supreme Court, 21 March 1997, ECLI:NL:HR:1997:ZC2309, NJ 1997, 437, para. 4.3 (See Annex 3 to this written statement for the translated excerpts).

for the employer and third parties. The Supreme Court held that, in view of the duty of care that must be observed with regard to the person and property of others pursuant to Article 6:162 of the Dutch Civil Code, the only circumstance in which the courts may impose restrictions on a strike is if such a strike would infringe the rights of third parties or the public interest to such an extent that restrictions are urgently needed to protect the interests of society. The Supreme Court has established that this is a matter of proportionality, which can be decided only by assessing the various interests involved in the exercise of the right established in Article 6 paragraph 4, of the ESC and the interests which are being affected by such exercise. This assessment must take into account all the different factors that characterize the dispute between the parties, in relation to one another and in their overall context.

5.7 Moreover, the Supreme Court held in its judgment in the above-mentioned *Netherlands Railways (NS)* case that collective action that fell within the scope of Article 6, paragraph 4, of the ESC was unlawful if it did not comply with what it called "ground rules" ('*spelregels'*), including if notice had not been given in a timely manner. Moreover, a strike should be a measure of last resort (called only where all other possibilities have been exhausted).

5.8 The Supreme Court held that the assessment whether these ground rules have been fulfilled amounts to a procedural test that precedes the necessity test established in Article G, paragraph 1, of the ESC and that such assessment is to determine whether the trade unions are entitled to resort to strike action. This test of compliance with the ground rules is therefore applied in addition to the restrictions permitted by Article G, paragraph 1, of the ESC.

5.9 The framework for assessing the lawfulness of a strike was subsequently amended by the Supreme Court in its judgments in the *Enerco* case in 2014 and the *Amsta* case in 2015. These judgments, which are discussed below (and relevant excerpts of which are included in the Annexes to this submission), broadened the scope of the concept of 'collective action' contained in Article 6, paragraph 4, of the ESC and moved away from the test of compliance with the ground rules.

i. The Supreme Court judgment in the Enerco case (2014)

5.10 The *Enerco* case concerned instances of collective action in the port of Amsterdam. These had been organized by the trade unions against the stevedoring company Rietlanden, because it had refused to conclude a collective agreement. Enerco, a company that washes coal, had hired Rietlanden to unload the *Evgenia*, a seagoing vessel loaded with 120,000 tonnes of coal. The dispute between Rietlanden and the trade unions resulted in an unannounced strike in mid-

October 2012. As a result of this strike, the *Evgenia's* cargo was not fully unloaded. Enerco then started searching for another firm to complete the unloading, but the unions called on trade union officials at similar firms to declare their solidarity with the strike action and not to unload the ship. The work was declared by the unions to be "tainted" (indicating that it is subject to a strike action and therefore not to be performed). This resulted in sympathy strikes and the vessel was not unloaded either by Rietlanden or by its competitors. Enerco applied for an interim injunction barring the unions from instigating the sympathy strikes. Enerco's application therefore did not relate to the strike at the employer targeted by the strike, but instead concerned the sympathy strikes at its competitors in support of that strike.

5.11 The Supreme Court overturned the court of appeal's judgment, which had held that the unions' declaration of the work as tainted did not fall within the scope of Article 6, paragraph 4, of the ESC, because such action was carried out at a different company than the company targeted by it. The Supreme Court held that - in the light of Article 6, paragraph 4, of the ESC - there was no reason to adopt a limited interpretation of the term 'collective action', which it interpreted broadly. It decided that, in principle, unions are free to choose what form of action they take to achieve their goal. To determine whether a form of action is permissible under the ESC, it held that it is necessary to consider whether such action can reasonably contribute to the effective exercise of the right to bargain collectively. If that question is answered in the affirmative, the collective action falls within the scope of Article 6, paragraph 4, of the ESC. The exercise of the right to collective action can be limited only in accordance with Article G of the ESC.

5.12 Having established that the collective action of declaring the work as tainted fell within the scope of Article 6, paragraph 4, of the ESC, the Supreme Court considered that the action was, in principle, lawful and that it was therefore up to Enerco to demonstrate its lack of necessity.

ii. The Supreme Court judgment in the Amsta case (2015)

5.13 The *Amsta* case concerned collective action by the AbvaKabo FNV trade union ('FNV') at the premises of Amsta, a care provider. At the FNV's request, consultations had taken place about the terms and conditions of employment of Amsta's employees. The consultations failed to produce the result desired by the FNV. The FNV subsequently organized collective action on three occasions. This took the form of work stoppages of two hours each at two of Amsta's institutions. On 2 February 2013, Amsta employees again took collective action. This involved denying access to the building to senior executives and to managers not involved in the action.

5.14 Amsta had applied for, and obtained, an interim injunction barring the FNV from organizing occupations of its premises. Amsta argued that the FNV was involved in the 'unannounced occupation' of the premises on 2 February 2013 and that it feared that the further action that had been announced for 8 February 2013 would again lead to an occupation of the premises. The Supreme Court's judgment concerned the issue of whether the unannounced occupation of the premises of 2 February 2013 fell within the scope of Article 6, paragraph 4, of the ESC.

5.15 The Supreme Court considered that it followed from its judgment in the *Enerco* case of 2014 that the ground rules were no longer an independent and additional criterion for assessing whether collective action is lawful. According to the Supreme Court, however, the ground rules were still important as one of the factors in assessing whether the right to collective action should be limited or prohibited in a specific case on the basis of Article G, paragraph 1, of the ESC.

5.16 The Supreme Court also noted that if the collective action affects the specially vulnerable – for example young people, people with a disability and the elderly – it is more likely to be treated as unlawful if their care is jeopardized as a result (which was not the case here).

5.17 This judgment of the Supreme Court means that courts can no longer hold that collective action is unlawful solely on the basis that it does not comply with the ground rules. Courts can still treat the last-resort principle and the requirement of timely notice as relevant factors when assessing whether collective action is lawful under Article G of the ESC, even if these are no longer a precondition for the legality of a strike and an independent assessment criterion to be applied prior to the necessity test established in Article G, paragraph 1, of the ESC. Other factors that may be taken into account are the nature and duration of the collective action, the relationship between the action and its aim, the damage caused by the action to the interests of the employer or third parties, and the nature of those interests and damage, as well as the interests of the specially vulnerable, such as young people, people with a disability and the elderly.

5.18 The decisions of the Supreme Court in the *Enerco* and *Amsta* cases have thus created a larger scope for the unions to take collective action when disputes occur. Nonetheless, the courts can still limit the right to collective action - or prohibit such action – if it is urgently necessary to do so in order to protect the rights and freedoms of others.

B. The interpretation of the right to strike in the Caribbean countries of the Kingdom of the Netherlands

5.19 Regarding the right to strike in Curaçao - as in the Netherlands - such right is not established in legislation and Article 6, paragraph 4, of the ESC applies. The right to strike may be exercised when employers and trade unions cannot agree on the substance of collective labor agreements. Trade unions in public and private sectors are, in exercising such right, bound to criteria established in case law that are used by courts to assess the lawfulness of collective action.

5.20 Even if the right to strike is a fundamental right, it is not absolute. A trade union is in principle free to determine the choice of means to achieve its goal. However, the courts can prohibit certain actions, which do not reasonably contribute to the effective exercise of the right to collective bargaining. A court may, via injunction proceedings, prohibit certain actions when it has been demonstrated that a strike cannot be regarded as "urgently necessary". This assessment as to the lawfulness of a strike is made by courts, taking into account the following criteria developed in case law: (i) nature and duration of the actions, (ii) balance between the action and the goal that such action aims to achieve, (iii) damage caused to the interests of third parties/ employers, (iv) whether certain rules have been taken into account, such as the prior notice given (see the *Amstra* case),[151] and (v) if the action meets the requirement of being a "last resort".[152]

5.21 With regard to the right to strike in Aruba, as in the Netherlands, such right is not established in legislation and Article 6, paragraph 4, of the ESC applies. In addition, the right to strike in Aruba is regulated by Article 1, paragraph 13, of the Constitution of Aruba ('*Staatsregeling van Aruba')* which aligns with Article 9 of the Constitution of the Netherlands. That Article recognizes the right to association and assembly, subject to every person's responsibility in accordance with the national ordinance ('*Landsverordening')*. Article I, paragraph 13, under 2, of the Constitution of Aruba provides that this right may be restricted by national ordinance in order to protect public health, in the interest of traffic and to combat or prevent disorder.

5.22 Regarding the right to strike in Sint Maarten, according to case law of the Supreme Court of the Netherlands,[153] Article 6, paragraph 4, of the ESC – which includes the right to strike – has

[151] *Vereniging van AbvaKabo FNV v. Stichting AMSTA ('Amsta* case'), Dutch Supreme Court, 19 June 2015, ECLI:NL:HR:2015:1687, para. 3.9 (See Annex 5 to this written statement for the translated excerpts).
[152] *Antiliaanse Aannemersvereniging (AAV) van de Algemene Werknemersvereniging Curaçao (SGTK)* and *Curaçao Airport Partners (CAP) v. Algemene Bond van Overheids- en Overige Personeel (ABVO)*, Court of First Instance of Curaçao, ECLI:NL:OGEAC:2016:88 , paras. 4.5-4.13 (See Annex 1 to this written statement for the translated excerpts).
[153] *Netherlands Railways (NS)* case, Dutch Supreme Court, 30 May 1986, ECLI:NL:HR:1986, NJ 1986, paras. 3.2-3.7 (See Annex to this written statement for the translated excerpts).

direct effect in the Kingdom of the Netherlands. Based on the constituent status of Sint Maarten within the Kingdom of the Netherlands, obtained on 10 October 2010, the ESC also directly applies in Sint Maarten. Generally workers, including public sector workers, therefore have a right to strike. The Criminal Code of Sint Maarten was amended in 2015 revoking several articles that were not in accordance with that right. Specific to public sector workers, a civil court may prohibit a strike that threatens public welfare or safety. Amendments to this effect have also been made to the National Ordinance Substantive Civil Service Law.

Respectfully,

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Representative for the Government of the Kingdom of the Netherlands

6. Annexes: Translated excerpts of national judgments referred to in this written statement

List of annexes

Annex 1:

***Antiliaanse Aannemersvereniging (AAV) van de Algemene Werknemersvereniging Curaçao (SGTK)* and *Curaçao Airport Partners (CAP) v. Algemene Bond van Overheids- en Overige Personeel (ABVO)*, Court of First Instance of Curaçao, ECLI:NL:OGEAC:2016:88**

4.5 Article 6, opening words and paragraph 4 of the European Social Charter (the Charter) is intended to ensure that the right to bargain collectively can be exercised effectively. As this is in the nature of a fundamental social right, it follows that a workers' organisation is, in principle, free to decide by what means it wishes to achieve its object. Strike action can be one such means.

4.6 Whether there is a collective action within the meaning of this provision of the Charter is mainly determined by assessing whether the action could reasonably contribute to the effective exercise of the right to bargain collectively. It is up to the organisers of a collective action to show that this is the case. If they succeed, the collective action falls within the scope of Article 6, opening words and paragraph 4 of the Charter. The only way in which the exercise of the right to collective action can then be restricted is under Article G of the Charter, in accordance with what has been accepted on that point in the case law of the Dutch Supreme Court.

4.7 Whether a collective action by workers has been notified to the employer in good time beforehand and whether it should be treated as a last resort are no longer independent criteria for assessing whether the action is lawful. Compliance with those 'ground rules' ('*spelregels'*) is therefore not an independent condition of such lawfulness.

4.8 Where an employer (or a third party) claims in interim injunction proceedings that the exercise of the right to collective action should be limited or excluded in a specific case, it should allege and provide evidence of such facts and circumstances as justify a limitation or exclusion according to the criteria of Article G of the Charter. This is only the case if restrictions on the right to collective action are urgently needed to protect the interests of society. When assessing whether there is an urgent necessity, the court must take into account all the circumstances. Factors that may be important in this connection include the nature and duration of the collective action, the relationship between the action and its aim, the damage caused by the action to the interests of the employer or third parties, and the nature of those interests and damage. In this context, importance (and in certain circumstances even decisive importance) may also be attributed to whether the 'ground rules' referred to above have been complied with.

[...]

4.12 In the Court's opinion, the strike is not unlawful as matters stand at present (this is a snapshot appraisal and the circumstances and assessment can change from day to day). The strike is being called for the very purpose that the right to strike is intended to serve, namely in order to exert pressure during collective bargaining with a view to reaching a collective agreement, and for the time being it is not possible to hold that continuation of the strike cannot contribute to the effective exercise by SGTK of its right to bargain collectively.

4.13 It seems likely that AAV is suffering damage as a result of the strike, although AAV has not produced figures to support this and SGTK has disputed it. However, this in itself is not a ground for restricting the right to strike. Damage is, as it were, an inherent element of strike action. It is not

possible to assume that the strike will cause damage that is disproportionate, partly on account of the lack of financial data. Insufficient evidence has been adduced of other circumstances showing that a restriction of SGTK's right to strike is urgently needed to protect the interests of society. In essence, the bargaining in this case is between private sector parties which must reach agreement among themselves. Naturally, the freedom to strike does not cover setting up blockades and taking part in disturbances, but, as SGTK has emphasised, such activities ceased some time ago and a ministerial order prohibiting unlawful assembly is also now in force. The general strike called for today cannot simply be attributed to SGTK, nor have the parties argued that its consequences are a relevant factor in the present case. It is not necessary – and therefore not possible – in these interim injunction proceedings to rule on the lawfulness of the general strike that has been called for today by a large number of trade unions.

Annex 2:

***Netherlands Railways (NS)* case (‘*NS Spoorwegstaking’*), Dutch Supreme Court, 30 May 1986, ECLI:NL:HR:1986**

3.2 Article 6, paragraph 4 has been drafted in such a way – unlike most other provisions of the European Social Charter (the Charter) and in particular the other provisions of this article – that the States Parties are under no obligation to enact legislation, but, on the contrary, workers and employers can always invoke the right recognised by the States Parties concerned within certain limits in the national legal order. It is also evident from the explanatory note to Article 6, paragraph 4, as included in the Appendix to the Charter, that the States are not obliged to enact legislation regulating ‘the exercise of the right to strike’ – which is apparently taken to mean what Article 6, paragraph 4 calls ‘the right of workers (...) to collective action in cases of conflicts of interest, including the right to strike’; it follows that States Parties that leave the application of Article 6, paragraph 4 and Article 31 and the imposition of any restriction to judicial precedent are not in breach of the Charter, provided that the courts observe the restrictions specified by the latter article. This is also the assumption made by the Committee of Independent Experts referred to in Article 25 of the Charter in its authoritative ‘Conclusions’ (Conclusions I, p. 38, at (e) and VIII, p. 97). This justifies treating Article 6, paragraph 4 of the Charter as a provision which, by virtue of its content, is binding on all persons within the meaning of Article 93 of the Dutch Constitution.

3.3 In order to be able to adopt a systematic approach to the questions raised in the first part of the statement of grounds of appeal, it seems appropriate to treat the general strike against the employer as this ‘normal type’ of collective action by workers. It can be assumed that when Article 6, paragraph 4 of the Charter and the provisions relating to it, including the restrictions to be imposed on the exercise of the right recognised in it, were drafted, it was on the basis of this normal type of collective action, in keeping with the explanatory note to Article 31 of the Charter. The present collective actions differ from the normal type in at least two respects:
- 1. although the present collective actions were brought against the employer, they targeted someone other than the employer, namely in this case the government authorities; these actions harmed the employer in the sense that, in consequence, the agreed work was not performed properly, thereby disrupting the employer’s business and causing it considerable damage; the actions targeted the authorities in the sense that their aim was to put pressure on government and parliament to prevent any intervention as referred to above in the terms and conditions of employment of, for example, NS staff; it is in this sense that the phrases ‘impacting the employer’ and ‘targeting the authorities’ are used below;
- 2. it was not the case that, as a result of the present collective actions, NS’s entire workforce (with the exception of any staff willing to work) no longer performed any of the agreed work during the period referred to above; on the contrary, the actions consisted of working to rule, go slows and short-term work stoppages in different parts of the business.

3.4 In the first part of the statement of grounds of appeal, it is submitted, in brief, that each of these special aspects of the present collective actions has a decisive influence on whether the actions against NS were unlawful. Below, the Supreme Court will examine whether this submission can be accepted as correct in respect of each of these special aspects successively. It should be noted, however, that the question in each case is whether the special aspect in question is decisive in itself, in the sense that it justifies the application of substantially different and stricter standards with regard to the lawfulness of the actions than would apply in its absence. Even if this question is answered in the negative, this

does not mean that the special aspects concerned are of no importance in assessing unlawfulness. If it has to be concluded that the special aspects are not decisive in that sense, it follows that the present collective actions should be assessed against the same criteria as apply to the normal type of action: in principle, they are then lawful since they are 'covered' by Article 6, paragraph 4 of the Charter; a finding that they were nevertheless unlawful will then be possible only if important procedural rules ('ground rules') have not been followed or – subject to the restrictions set in Article 31 of the Charter – if it must be concluded, based on consideration of all the circumstances of the given case both in relation to one another and in their overall context, that the trade unions could not be said to have acted reasonably in calling these actions. When this last assessment is made, the special aspects, as viewed both in relation to one another and in their overall context, therefore play a role in any event. It should be noted at the outset that it is clear from the connection between paragraph 4 and the opening words of Article 6 that, by ensuring the unfettered exercise of the 'right to bargain collectively', Article 6, paragraph 4 is intended to protect that right as referred in part I of the Charter at 6 (which right, as far as the Netherlands is concerned, is also recognised and protected to a degree in Convention No. 87 of the International Labour Organization). [...]

3.5 […] In the case of this normal type of collective action as already referred to in 3.3, the strike is targeted at the employer. Where such a strike occurs, the fact that the employer suffers harmful consequences cannot, of course, automatically justify a conclusion that the strike is unlawful: after all, as such damage is an inevitable result of resorting to strike action, it is covered by the right recognised in Article 6, paragraph 4 and cannot in itself lead to a restriction of that right, except in cases where that right is abused. In other words, the rights of the employer in such a case do not fall under the 'rights of others' as referred to in Article 31 of the Charter, which may in certain circumstances justify a restriction on the exercise of the right to strike. This is consistent with the fact that, in the cases referred to here, the employer is in a position to avoid suffering any damage or further damage by complying with the demands of the workers.

3.7 […] neither of these two aspects justifies assessing the present actions against substantially different criteria than those applicable to the normal type of collective action. This means that – leaving aside for the time being any infringement of important procedural rules – when determining the purpose of these interim injunction proceedings, taking into account the restrictions laid down by Article 31 of the Charter, it was necessary to assess, based on a consideration of all the circumstances of the present case both in relation to one another and in their overall context, whether the trade unions could be said to have acted reasonably in taking this industrial action.

Annex 3:

***FNV Streekvervoer*, Dutch Supreme Court, 21 March 1997, ECLI:NL:HR:1997:ZC2309, NJ 1997, 437**

4.3 If a strike is covered by the provisions of Article 6, opening words and paragraph 4 of the Charter, it must, in principle, be tolerated – even by the employer – as a legitimate exercise of the fundamental right recognised in this provision of the Charter, notwithstanding the harmful consequences which it is intended and accepted that the strike will have for the employer and third parties. The basic assumption in this lawsuit, both on appeal and in the cassation proceedings, is that the strike in question is of this kind. The only issue was and is therefore what requirements must be met before such a strike need no longer be tolerated and may be made subject to restrictions by the court. In Dutch law, these requirements have been developed by the courts rather than through legislation, as allowed for in Article 31 of the Charter, and basically mean that it must be possible to establish that, in view of the duty of care that must be observed with regard to the person and property of others pursuant to article 6:162 of the Dutch Civil Code, the strike infringes the rights of others as designated in Article 31 of the Charter or the public interest to such an extent that restrictions are urgently needed to protect the interests of society. In such circumstances, unrestricted exercise of this fundamental right is unlawful towards all who suffer damage as a result, including the employer. Whether that is so is a question of proportionality which can be decided only by assessing the various interests involved in the exercise of the fundamental right in the light of the interests which are being infringed, taking into account all the different factors that characterise the dispute between the parties, both in relation to one another and in their overall context.

Annex 4:

***Enerco* case, Dutch Supreme Court, 31 October 2015, ECLI:NL:HR:2014:3077**

3.5.1 Article 6, opening words and paragraph 4 of the Charter has direct effect in the Netherlands (Supreme Court, 30 May 1986, ECLI:NL:HR:1986:AC9402, NJ 1986/688). In so far as relevant to the adjudication of the present dispute and 'with a view to ensuring the effective exercise of the right to bargain collectively', this provision recognises 'the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into'.

3.5.2 In view of the aim of this provision – namely to ensure the effective exercise of the right to bargain collectively – there is no reason to adopt a limited interpretation of the term 'collective action', taking into account that this right is in the nature of a fundamental social right. This means that a workers' organisation is, in principle, free to choose what form of action to take in order to achieve its goal. Whether this is a collective action within the meaning of this provision is therefore determined mainly by assessing whether the action can reasonably contribute to the effective exercise of the right to bargain collectively. If that question is answered in the affirmative, the collective action falls within the scope of Article 6, opening words and paragraph 4 of the Charter. The exercise of the right to collective action can then be limited only under Article G of the Charter, in accordance with what has been accepted on that point in the case law of the Supreme Court (see, for example, the above-mentioned judgment of 30 May 1986, as well as Supreme Court, 7 November 1986, ECLI:NL:HR:1986:AC0030, NJ 1987/226 and Supreme Court, 21 March 1997, ECLI:NL:HR:1997:AG3098).

3.6 The Court of Appeal has held that the 'blacking' of the work in this case cannot be treated as a collective action within the meaning of Article 6, opening words and paragraph 4 of the Charter in so far as it related to work performed in or for firms other than Rietlanden. This judgment is evidently based on the view that the blacking of work in a case such as this falls outside the scope of Article 6, opening words and paragraph 4 of the Charter because the action takes place at a business other than that of the employer targeted by it. Given the consideration at 3.5.2 above, that reasoning is incorrect. The determining factor is whether the blacking could reasonably help to ensure the effective exercise of the right to bargain collectively and hence to achieve the aim of the action (which could be the case, for example, if the blacking encourages Enerco to exert pressure on Rietlanden). The answer to that question need not be in the negative simply because the Court of Appeal ruled in consideration 4.9 (in a different context) that the aim of the strike is not undermined if the unloading work can be carried out by a firm other than Rietlanden.

[...]

3.8.1 As the Court of Appeal rightly notes at the outset in consideration 4.12, collective action that falls within the scope of Article 6, opening words and paragraph 4 of the Charter must, in principle, be tolerated as a lawful exercise of the fundamental right recognised in this treaty provision. Nonetheless, the action may be prohibited or restricted under Article G of the Charter if, in view of the duty of care that must be observed towards a third party (in this case: Enerco) pursuant to Article 6:162 of the Dutch Civil Code, the action infringes the rights of the third party to such an extent that restrictions are urgently needed to protect the interests of society. Whether this is the case must be decided by assessing the interests served by the exercise of the fundamental right in the light of the

interests that are being infringed, taking into account all the circumstances of the case (see also Supreme Court, 21 March 1997, ECLI:NL:HR:1997:AG3098).

3.8.2 In consideration 4.12, the Court of Appeal has held that even if the present collective action were to fall under Article 6, opening words and paragraph 4 of the Charter, and should therefore be assessed against Article G of the Charter, the assessment of the blacking would still be unfavourable for the FNV [a trade union confederation] and the HZC [a trade union] on the basis of what has been held in considerations 4.9-4.11. However, those considerations elaborate on considerations 4.7 and 4.8, which are themselves based on the (incorrect) premise that the blacking of the work is, in principle, unlawful. A reference to considerations 4.9-4.11 cannot therefore serve as a basis for the Court of Appeal's finding in consideration 4.12, which proceeds on the assumption that the blacking is, in principle, lawful because it falls within the scope of Article 6 of the Charter. More specifically, mention should be made of the following in this connection:

> (a) One of the factors determining the Court of Appeal's view in consideration 4.12 is its finding in consideration 4.9 that the FNV and HZC have not submitted evidence of any facts and circumstances that could justify their actions. Even allowing for the fact that the normal rules about making factual submissions in support of claims and about the burden of proof do not apply in interim injunction proceedings, this consideration fails to recognise that the FNV and HZC are not required to justify their acts if their collective action falls within the scope of Article 6, opening words and paragraph 4 of the Charter. After all, that action should in principle be treated as a lawful exercise of their fundamental right. The burden was therefore on Enerco to adduce proof of its allegation that the action was unlawful.
>
> (b) In a collective action such as this, it is inevitable that the action will cause damage to third parties affected by it. If, however, the action called by the FNV and HZC falls within the scope of Article 6, opening words and paragraph 4 of the Charter, the basic principle is that it serves an important interest. It follows that the mere fact that Enerco, as a third party, has adduced sufficient evidence for its assertion 'that it suffered substantial and, over time, increasing damage due to the impossibility of getting the *Evgenia*, and possibly also other vessels, unloaded in the Netherlands' (consideration 4.10 of the Court of Appeal) does not mean that the blacking is unlawful on account of that damage, without further findings regarding the extent of the damage, the interests involved and the other relevant circumstances of the case. [...]

Annex 5:

***Amsta* case, Dutch Supreme Court, 19 June 2015, ECLI:NL:HR:2015:1687**

3.9 In assessing the complaints set out in the ground of appeal, the Supreme Court wishes to begin by observing that in its judgment of 31 October 2014, ECLI:NL:HR:2014:3077 (*FNV c.s./Enerco*), it held as follows:

> Article 6, opening words and paragraph 4 of the Charter has direct effect in the Netherlands (Supreme Court, 30 May 1986, ECLI:NL:HR:1986:AC9402, NJ 1986/688). In so far as relevant to the adjudication of the present dispute and 'with a view to ensuring the effective exercise of the right to bargain collectively', this provision recognises 'the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into'.
>
> In view of the aim of this provision – namely to ensure the effective exercise of the right to bargain collectively – there is no reason to adopt a limited interpretation of the term 'collective action', taking into account that this right is in the nature of a fundamental social right. This means that a workers' organisation is, in principle, free to choose what form of action it takes in order to achieve its goal. Whether this is a collective action within the meaning of this provision is therefore determined mainly by assessing whether the action can reasonably contribute to the effective exercise of the right to bargain collectively. If that question is answered in the affirmative, the collective action falls within the scope of Article 6, opening words and paragraph 4 of the Charter. The exercise of the right to collective action can then be limited only under Article G of the Charter, in accordance with what has been accepted on that point in the case law of the Supreme Court (see, for example, the above-mentioned judgment of 30 May 1986, as well as Supreme Court, 7 November 1986, ECLI:NL:HR:1986:AC0030, NJ 1987/226 and Supreme Court, 21 March 1997, ECLI:NL:HR:1997:AG3098).
>
> It is implicit in the considerations of this judgment concerning the system of Articles 6 and G of the Charter and the relationship between these provisions that the 'ground rules' are no longer an independent criterion for assessing whether collective action is lawful. Compliance with these rules is therefore no longer an independent condition for such lawfulness. Nonetheless, those 'ground rules' (not only those mentioned by the Court of Appeal in this case) are still important in assessing whether the exercise of the right to collective action in a specific case should be restricted or prohibited under Article G of the Charter. Although they are therefore no longer conditions that must be assessed independently when determining whether collective action is admissible, they are still one of the factors to be taken into account in deciding whether the action should be restricted or prohibited. However, the importance of the 'ground rules' is not always the same. For example, they carry great weight in the case of a general strike, but are less important when the strike is of short duration and does not inflict major damage.
>
> In keeping with the above, the general rule that a collective action is admissible only if it is called as a last resort no longer applies as an independent condition, as was held in the judgment of 28 January 2000 cited above at 3.3.1.
>
> It follows that, if the organisers of a collective action make the case that the action can reasonably contribute to the effective exercise of the right to bargain collectively, this action falls within the scope of Article 6, opening words and paragraph 4 of the Charter and should

therefore, in principle, be treated as a lawful exercise of the fundamental social right to collective action. It is then up to the employer or a third party demanding that the exercise of the right to collective action be restricted or excluded in the specific case to demonstrate that this restriction or exclusion is justified according to the criterion of Article G of the Charter. That will be the case only if restrictions on the right to collective action are urgently needed to protect the interests of society (as regards this last point, see consideration 4.3 of the Supreme Court judgment of 21 March 1997, ECLI:NL:HR:1997:ZC2309, NJ 1997/437 (*FNV v. Streekvervoer*)).

When assessing whether a restriction or exclusion of the exercise of the right to collective action is urgently needed in the public interest in a specific case, the court should take into account all the circumstances (see Supreme Court, 30 May 1986, ECLI:NL:HR:1986:AC9402, NJ 1986/688 and Supreme Court, 21 March 1997, ECLI:NL:HR:1997:ZC2309, NJ 1997/437). Factors that may be important in this connection include the nature and duration of the action, the relationship between the action and its aim, the damage caused by the action to the interests of the employer or third parties, and the nature of those interests and damage. As follows from the findings at 3.3.3 above, importance (in some circumstances even decisive importance) can also be attached in this connection to whether the ground rules were observed.

It should be noted that if the action also affects the specially vulnerable, for example young people, the disabled, the elderly and others requiring a special degree of care, it is more likely to be treated as unlawful under Article G of the Charter if their care is jeopardised as a result, thereby exposing them to the risk of harm to their mental or physical health (see also Supreme Court, 22 November 1991, ECLI:NL:HR:1991:ZC0424, NJ 1992/508).

Against this background, the Court of Appeal's interpretation of the law in consideration 3.9 is incorrect. After all, an affirmative answer to the question of whether the ground rules developed in case law have been complied with has no bearing on the issue of whether an affirmative answer is given to the question whether the present action falls under the protection of Article 6, opening words and paragraph 4 of the Charter; nor is this automatically a sufficient ground for a restriction or prohibition of the action under Article G of the Charter.