

INTERNATIONAL COURT OF JUSTICE

RIGHT TO STRIKE UNDER ILO CONVENTION No. 87

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN COMMENTS OF THE KINGDOM OF THE NETHERLANDS

16 SEPTEMBER 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 *Right to Strike under ILO Convention No. 87* ('Request').
- 1.2 The Kingdom of the Netherlands,¹ as a Member State of the UN and by virtue of Article 92 of the UN Charter also as a Party to the Statute of the Court as well as a Party to the Freedom of Association and Protection of the Right to Organize Convention of 1948 ('ILO Convention No. 87', the 'Convention'), availed itself of the opportunity afforded by the Order of the Court of 16 November 2023 to submit a written statement further to the Request. The Written Statement of the Kingdom of the Netherlands ('Written Statement')² was submitted to the Court on 16 May 2024.
- 1.3 In its Order of 16 November 2023, the Court designated 16 September 2024 as the time limit within which States and organizations having presented written statements may submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute of the Court. The Kingdom of the Netherlands wishes to avail itself of the opportunity afforded by that Order to present written comments to the Court.
- 1.4 The Kingdom of the Netherlands wishes, in view of other written statements submitted to the Court, to comment on the response by the Kingdom of the Netherlands to the questionnaire from the International Labour Office of August 1947 and to inform the Court of recent developments with respect to the right to strike within the European part of the Kingdom of the Netherlands.

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 the 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 Written Statement of the Kingdom of the Netherlands, submitted on 16 May 2024, with respect to the *Right to strike under ILO Convention No. 87*, currently pending before the ICJ (hereinafter 'Written Statement of the Kingdom of the Netherlands').

2. Comments pertaining to the questionnaire of the International Labour Office of August 1947

2.1 The Kingdom of the Netherlands observes that some written statements presented in these advisory proceedings suggest that, at the time of the preparatory work of ILO Convention No. 87, the Kingdom of the Netherlands held the position that the right to strike was not relevant to the proposed Convention. Reference is made to the response of the Kingdom of the Netherlands to a questionnaire from the International Labour Office on the scope and nature of the new instrument.³

2.2 In this respect, the Kingdom of the Netherlands notes that the response was provided in connection with a question on the recognition of the right of association of public officials and that it does not preclude the position – a position that the Kingdom of the Netherlands has consistently held – that the right to strike is included in the freedom of association and is protected by ILO Convention No. 87. At the time of the preparatory work of ILO Convention No. 87, the Kingdom of the Netherlands explained that questions relating to the right to strike had not been considered during the preparatory work.⁴

2.3 In its Written Statement, in respect of the preparatory work of ILO Convention No. 87, the Kingdom of the Netherlands points out that it would have taken considerable time to reach agreement on clarifying the scope of the right to strike,⁵ because the scope was largely regulated by domestic law.⁶ Furthermore, the negotiating parties were under time constraints to conclude the Convention, thus limiting the possibilities for further elaboration of the text. The UN Economic and Social Council had requested the urgent conclusion of the Convention in order to solve a “concrete problem which required a solution on the international level”⁷ and the Convention had to be adopted “under the procedure of a single discussion”.⁸

2.4 Therefore, the fact that no specific reference to the right to strike was included in the final text of ILO Convention No. 87 cannot lead to the conclusion that the negotiating parties, including the Kingdom of the Netherlands, considered the right to strike as being excluded from the freedom of association and the scope of ILO Convention No. 87.

³ ICJ file, Volume 4, Document No. 158, International Labour Conference, 31st Session, 1948, Report VII, Freedom of Association and Protection of the Right to Organise, p. 14.

⁴ *Idem.*, pp. 19-20.

⁵ Written Statement of the Kingdom of the Netherlands, *supra* note 2, para. 2.32.

⁶ *Ibid.*

⁷ ICJ file, Volume 4, Document No. 152, International Labour Conference, 30th Session, 1947, Record of Proceedings, Appendix X, Freedom of Association and Industrial Relations, p. 566.

⁸ *Idem.*, p. 577.

2.5 The Kingdom of the Netherlands has referred in its Written Statement to the freedom of association of public servants, including their right to strike and possible restrictions of that right, by setting out views of the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations,⁹ the Committee on Economic, Social and Cultural Rights,¹⁰ the European Committee for Social Rights ('ECSR')¹¹ and case law of the European Court of Human Rights¹² relevant thereto. In the case of public servants exercising authority in the name of the State and performing essential services, restrictions of the right to strike may be permissible, including – depending on the circumstances – a prohibition on strike action. In the domestic case law of the countries of the Kingdom of the Netherlands,¹³ for all workers, the permissibility of restrictions to the right to strike – including the possibility of a prohibition of a strike – is assessed by reference to Article G of the European Social Charter ('ESC').

3. Recent developments regarding the right to strike in the European part of the Kingdom of the Netherlands

3.1 In its decision of 24 January 2024, published on 23 July 2024, in the case of *European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) v. the Netherlands*, the ECSR concluded that there is no violation of Article 6, paragraph 4, of the ESC as regards the framework used by the Supreme Court of the Netherlands to assess the lawfulness of strike action. Furthermore, the ECSR concluded that there is no violation of Article 6, paragraph 4, of the ESC as regards the application of this framework by the lower courts in the Netherlands.

3.2 In addition, the ECSR confirmed in its decision that:

The right to strike is intrinsically linked to the right to collective bargaining, as it represents the most effective means to achieve a favorable result from a bargaining process. The abolition of the right to strike affects one of the essential elements of the right to collective bargaining, as

⁹ Written Statement of the Kingdom of the Netherlands, *supra* note 2, para. 4.5 – 4.10.

¹⁰ *Idem.*, para. 4.18.

¹¹ *Idem.*, paras. 4.29 – 4.32.

¹² *Idem.*, paras. 4.35 and 4.37.

¹³ See explanation in *supra* note 1 about the composition of the Kingdom of the Netherlands.

provided for in Article 6 of the Charter, and without which the content of this right becomes void of its very substance and is therefore deprived of its effectiveness.¹⁴

3.3 It also noted therein that any restrictions on the right to strike must comply with the terms of Article G of the ESC and that Article G does not require restrictions to necessarily be imposed through provisions of statutory law. In this regard, case law of domestic courts may also comply with the requirements of Article G of the ESC “provided that it is sufficiently stable and foreseeable to provide sufficient legal certainty for the parties concerned”.¹⁵

3.4 The ECSR also maintained its assessment, previously made in its Conclusions regarding the Netherlands of 2018,¹⁶ that the framework established by the Supreme Court of the Netherlands in the *Enerco* and *Amsta* judgments¹⁷ recognizes the intrinsic link between collective bargaining and collective action, expressly provides that the scope for collective action should not be interpreted narrowly, and moderates the role that the “ground rules” (*spelregels*) – previously established by the Supreme Court of the Netherlands¹⁸ – play in judicial decisions concerning the lawfulness of collective action. Consequently, the assessment framework regarding the lawfulness of strike action used by the Supreme Court of the Netherlands – as established in its case law – does not infringe the right of workers’ and employers’ organizations to take collective action.¹⁹

3.5 Lastly, the ECSR considers that the judgments of lower courts in the Netherlands restricting or prohibiting collective action – some of which were later overturned by the Court of Appeal, applying a more appropriate and principled understanding of Article 6, paragraph 4, and Article

¹⁴ *European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) v. the Netherlands* (Complaint No. 201/2021), 24 January 2024 (hereinafter ‘*European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) v. the Netherlands*’), para. 76.

¹⁵ *Idem.*, para. 78, referring to *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), 13 September 2011, para. 43.

¹⁶ ECSR, Conclusions 2018 on Article 6(4), available at www.hudoc.esc.coe.int/eng?i=2018/def/NLD/6/4/EN.

¹⁷ *Vereniging van FNV Bondgenoten/Vakvereniging het Zwarte Corps v. Enerco B.V.*, Dutch Supreme Court, 31 October 2015, ECLI:NL:HR:2014:3077 (hereinafter ‘*Enerco case*’); *Vereniging van AbvaKabo FNV v. Stichting AMSTA*, Dutch Supreme Court, 19 June 2015, ECLI:NL:HR:2015:1687 (hereinafter ‘*Amsta case*’) (See Written Statement of the Kingdom of the Netherlands, *supra* note 2, translated excerpts in Annex 4 and 5 of the Written Statement); See also Written Statement of the Kingdom of the Netherlands, paras. 5.10 – 5.18.

¹⁸ *Netherlands Railways (NS) case*, Dutch Supreme Court, 30 May 1986, ECLI:NL:HR:1986, NJ 1986, 688 (See Written Statement of the Kingdom of the Netherlands, *supra* note 2, translated excerpts in Annex 2); See also the Written Statement of the Kingdom of the Netherlands, *supra* note 2, paras. 5-7 – 5.9; *Enerco case*, *supra* note 17, and *Amsta case*, *supra* note 17, (See Written Statement of the Kingdom of the Netherlands, *supra* note 2, translated excerpts in Annex 4 and 5 of the Written Statement).

¹⁹ *European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) v. the Netherlands*, *supra* note 14, para. 93.

G of the ESC – do not point to the existence of a systemic problem regarding the adequate assessment of the lawfulness of strike action through case law in the Netherlands.²⁰

Respectfully,



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²⁰ *European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) v. the Netherlands*, supra note 14, para. 133.