EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

6 October 2009

Case document No 1

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

COMPLAINT

registered at the Secretariat on 22 June 2009

Collective Complaint

BY:

the European Trade Union Confederation (ETUC)

represented by:

Mr John Monks, Secretary General, Maison Syndicale Européenne, Boulevard du Roi Albert II, 5, 1210 Brussels (02.224.04.11)

the Centrale Générale des Syndicats Libéraux de Belgique (CGSLB),

represented by:

Mr Jan Vercamst, President, Boulevard Poincaré, 72-74, 1070 Brussels (09.222.57.51)

the Confédération des Syndicats chrétiens de Belgique (CSC)

represented by:

Mr Luc Cortebeeck, President, Chaussée de Haecht, 579, 1030 Schaerbeek (02.246.31.11)

the Fédération Générale du Travail de Belgique (FGTB)

represented by:

Mr Rudy De Leeuw, President, Rue Haute, 42, 1000 Brussels (02.506.82.11)

- the complainant trade unions

against

The Kingdom of Belgium

Based on the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, the complainant trade unions allege that Belgium is in breach of Article 6§4 of the revised European Social Charter (hereafter the revised Charter).

Specifically, they maintain that court intervention in collective disputes since 1987 under the urgent procedure, particularly in the form of restrictions on the activities of strike pickets, is in breach of the right to strike and to collective action, and is therefore incompatible with Article 6§4, one of the core provisions of the revised Charter.

I Admissibility

1 The ETUC is authorised to submit complaints under Article 1 of the 1995 Additional Protocol providing for a system of collective complaints (hereafter the 1995 Protocol). It is an international trade union organisation, as provided for in Article 27§2 of the European Social Charter (see Article C of the revised Charter).

2 The three complainant unions are members of the ETUC. With reference, *inter alia*, to paragraph 22 of the explanatory report to the 1995 Protocol, the EUC considers that this legal authorisation must also apply to its affiliated members.

3 The three trade unions are also representative both nationally and in terms of the industries they cover. They are the employee representative organisations represented on the national labour council.

4 The CGSLB represents 260 000 members (2007 figures).

5 The CSC is a confederation to which 9 occupational unions and 21 federations are affiliated, representing 1 600 000 members (2007 figures).
The FGTB is a confederation to which 7 industrial , 3 inter-regional and 17 regional federations are affiliated, representing 1 400 000 members (2007 figures).
Together, the three employee representative bodies have achieved a trade union membership rate of 60%.

6 The Secretary General of the ETUC and the presidents of the three trade unions are authorised to represent their organisations (appendix 1).

7 These three organisations are entitled to submit collective complaints under Article 1c of the 1995 Protocol, which states that "representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint" (i.e. Belgium) have the right to submit complaints alleging unsatisfactory application of the Charter.

8 Belgium ratified the 1995 Protocol on 23 June 2003 and the revised Charter on 2 March 2004 and, in particular, has accepted Article 6 of the latter.

II. The merits

1 The facts

(1) Recognition of the right to strike in Belgium

9 As everywhere in Europe, the criminal law provisions on the right to strike date back to the era of the French Revolution. These made it a criminal offence for workers to form combinations, based on the ban on combinations of journeymen under the *Ancien Régime.*

10 Belgian criminal legislation was amended by the Act of 31 May 1866, which repealed the relevant provisions of the French Criminal Code so that the mere collective withdrawal of labour was no longer unlawful but picketing was prohibited. Thus, it was an offence to form gatherings near to work places or the homes of managers, in such a way as to restrict the freedom of masters and employees. The legislation therefore introduced into criminal law an artificial distinction between striking and picketing. This conceptual distinction was abandoned with the repeal of these provisions in 1921. There was no explicit recognition of collective action and the right to strike but it was no longer a criminal offence and the so-called "freedom to strike" era began.

11 Historically, explicit recognition of the right to strike in Belgium was not granted by a constituent assembly or by parliament. In a decision of 21 December 1981[1] (Appendix 2), the Court of Cassation ruled that employees were entitled, because they were on strike, not to carry out the agreed work and therefore, as an exception to Article 1134 of the Civil Code, not to perform the obligation arising from their employment contract.

12 The Court of Cassation decision made it possible to use the term "collective and intentional cessation of work", as used in the Services of Public Interest in Peacetime Act (Appendix 3) as the definition of a strike. This simplified definition disregards the purpose of strikes and other forms of collective action as means of expression and of pressure to force opponents to accept demands or simply open negotiations.

13 The Court of Cassation has never referred to the European Social Charter to establish a "right to collective action". It therefore needs to be observed that the court has only recognised one very specific means for employees to take collective action. Based on the Public Interest in Peacetime Act, the Court has defined strikes in a very restrictive fashion.

(2) Judicial intervention in collective disputes following recognition of the right to strike (1987-2009)

14 The Court of Cassation's recognition, however grudging, of the right to strike has reduced the risk of liability in contract and disciplinary measures against strikers. However, the Court has held that participation in strikes that can be considered unreasonable on account of their objectives may be punishable by dismissal for serious misconduct[2].

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1 Cass. 21 December 1981, *Pas.* 1982, I, 531.

2 Cass. 28 January 1991, *Chroniques de droit social* 1991, 296 (Appendix 4). In a subsequent decision of 27 January 2003, the Court of Cassation confirmed that section 35 of the Contracts of Employment Act of 3 July 1978 could possibly be applicable to strikes, thus overruling the lower court, which had refused to apply the ground of serious misconduct directly to the protected employee: see Cass. 27 January 2003, *Journal des Tribunaux de Travail* 2003, 121 (Appendix 5).

15 Having been deprived of this general power to sanction strikers by using their disciplinary powers after the event, since 1987[3] Belgian employers have adopted a preventive and proactive strategy for countering collective action by calling on the presidents of civil courts, acting under the urgent procedure, to intervene in collective disputes. Such interventions are requested in the form of unilateral applications, which prevent the trade unions and employees concerned from duly exercising their rights of the defence, because they are not parties to the proceedings, which are not adversarial. Orders handed down in response to such unilateral applications are therefore effectively imposed on the Belgian labour movement from on high. Moreover, the increasing frequency of such orders is a reminder of the era of the punitive treatment of strike pickets, formerly deemed to hinder the free exercise of industry or labour, since the effect of these orders under the urgent procedure is to prohibit picketing, under the threat of civil financial penalties[4].

16 The third party application procedure to set aside such orders, open to anyone adversely affected by them, is quite ineffective as a means of rectifying the violation of the rights of the defence and unlawful restrictions on the right to collective action. Firstly, it is sometimes impossible for unions to confirm the very existence of such orders, which often prohibit action for an indeterminate period. Court registries have even refused to supply unions with the texts of decisions that have been mentioned in the press, even if they were in their favour (Appendix 8). Secondly, some courts have found the third party application procedure inadmissible on the pretext that the collective dispute as such has been "settled". For example, they argue that the urgent requirement is no longer satisfied so the union appeal is not even considered[5]. Such findings are often based simply on the fact that the collective action has ceased, following a unilateral application and the ordering of coercive fines as a deterrent. This reflects a confusion between collective action and collective disputes. The judges concerned fail to distinguish between cause and consequence, namely the collective dispute and the strike. Strikes are simply the expression of underlying collective disputes. The end of a strike does not necessarily imply that the collective dispute has ceased to exist.

17 In rare cases unilateral applications have culminated in orders explicitly prohibiting strikes in the strict sense of the term, but they are more generally concerned with preventing picketing. The formation and action of pickets are thereby artificially detached from the exercise of the right to strike. This result of this separation is to remove certain forms of collective action from the protective umbrella of the right to strike. These forms of collective action then leave the sphere of the law to enter the domain of freedoms. The courts then focus on the conflict between these practices – which are often devoid of protection – and essentially financial or economic interests that, for the purpose of the case, are often characterised as genuine "fundamental" rights, even though there is absolutely no constitutional validity for this.

18 It has to be said that most of these interim orders confine themselves to a purely formal reference to the arguments and facts presented by employers in their applications, with no attempt by the judge to verify them. The orders therefore take the form of policing measures whose

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[3] See Brussels court of first instance 5 August 1987, Revue de Droit Social 1987, 464 (Appendix 6).

[4] See Article 310 of the Belgian Criminal Code (Appendix 7)

[5] See Antwerp Court of Appeal, 6 September 2006, No. 2005/RK /372, *unpublished* (Appendix 9).

purpose is to strike a balance between the interests concerned, with no real concern to apply the relevant law. The approach adopted by urgent applications judges has been matched by the "capitulation", pure and simple, of the Belgian Court of Cassation, which has refused to exercise its full powers to review the legality of these judges' decisions. The Court of Cassation does not require these judges to provide sufficiently serious arguments in support of their decisions. In a decision of 31 January 1997 relating to an interim order, the Court of Cassation offered a very narrow definition of this obligation[6]: stating that:

"So long as interim judges do not apply the law unreasonably or refuse unreasonably to apply it in their reasoning, they have unfettered discretion, in the light of their initial assessment, to determine whether there is an apparent unlawful interference to justify the handing down of such an order[7].

19 Moreover, in its very limited exercise of its power of judicial oversight the Court of Cassation has never considered itself to be bound by the exhaustive list of restrictions that may be imposed on the right to collective action, or the right to strike, in Article 31 of the Charter and Article G of the revised Charter In the aforementioned decision of 31 January 1997, the Court said that the urgent applications judges, who had assessed the lawfulness of the exercise of the right to strike in accordance with "the socially acceptable and, therefore, ordinary exercise of the right in question", had not ruled unreasonably. The Court did not consider unreasonable the notion that the right to strike should be exercised "within the limits of socially accepted criteria". In brief, the Court intends to make the lawfulness of strike action subject to the "rule of reason", a criterion that lacks the substantial and formal safeguards that are the essence of Article G of the revised Charter[8].

20 In a subsequent decision of 4 February 2000[9], the Court stated that*:*

When urgent applications judges find that the matter is urgent and, after assessing the interests, decide that there is an immediate threat of detriment to the applicant if the precautionary measure sought is not ordered, they are not required to offer a more detailed response to the arguments presented by the person against whom the order is requested, if the application is based on substantive law.

21 The role of urgent applications judges is therefore confined to weighing up the interests at stake, with no legal obligation to reply to any arguments the opposing party may adduce from substantive law.

22 The trend is towards the systematic intervention of courts in collective disputes. For example, when the complainant parties organised action in October 2005 with employment, social and economic ramifications against the Belgian government's "solidarity between the generations

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[6] Cass. 31 January 1997, *Pasicrisie* 1997, I, 56; *Chroniques de droit social* 1998, 1, 23-26 (Appendix 10).

[7] Cass. 31 January 1997, *Pasicrisie* 1997, I, 56; *Chroniques de droit social* 1998, 1, 23-26 (Appendix 10).

[8] Based on the French version, taken from JURIDAT, of “Overwegende dat de voorlopige beoordeling van de appelrechter dat de werknemers een *volgens de maatschappelijke normen* gekwalificeerd recht hebben te staken”.

[9] Cass. 4 February 2000, *Pasicrisie* 2000, I, 92; http://www.juridat.be (Appendix 11).

contract", an unimpeachable source identified no fewer than 59 unilateral urgent applications, the majority of which (37) were granted[10].

23 Similarly, between 3 October 2008 and 7 November 2008 alone, 18 interim orders following unilateral applications and concerning "traditional" industrial disputes with ten separate employers were notified to the Belgian complainant unions.

These were (Appendix 13):

- Charleroi court of first instance, 3 October 2008, 08/RR/2521/B (Deli XL).
- Brussels court of first instance, 14 October 2008, 08/5881/B (Cytec).
- Brussels court of first instance, 15 October 2008 (Carrefour).
- Ghent court of first instance, 21 October 2008, 2008/EV/50 (Carrefour).
- Courtrai court of first instance, 22 October 2008, 08/1732/B (BIG Floorcoverings).
- Courtrai court of first instance, 22 October 2008, 08/1743/B (BIG Floorcoverings).
- Tournai court of first instance, 23 October 2008, 08/7876 (Carrefour).
- Antwerp court of appeal, 24 October 2008, 9023 (N-Allo).
- Charleroi court of first instance, 24 October 2008, 08/RR/2660 (Carrefour).
- Mons court of first instance, 24 October 2008, 08/1290/B (Carrefour).
- Ghent court of first instance, 28 October 2008, 08/2257/B (Eandis).
- Termonde court of first instance, 29 October 2008, 08/2326/B (Eandis).
- Brussels court of first instance, 30 October 2008, 08/6247/B (Elia).
- Termonde court of first instance, 30 October 2008, 08/2327/B (Carrefour).
- Brussels court of first instance, 4 November 2008, 08/6329/B (Sibelgas).
- Nivelles court of first instance, 6 November 2008, 08/1254/B (UCB).
- Tongres court of first instance, 6 November 2008, 2008/1599/B (Carrefour).
- Furnes court of first instance, 7 November 2008, 08/539/B (Carrefour).

To date, only three of the third-party applications lodged by the complainant parties have led to the withdrawal of orders. The employers have already appealed against these withdrawals. The unions still await two decisions on third party applications opposing orders.

2 <u>*The situation in Belgium vis-à-vis the Charter and revised Charter*</u>

(1) The right to collective action in the revised Charter

24 The revised Charter embodies the right to collective action "with a view to ensuring the effective exercise of the right to bargain collectively". As with contractual freedom, collective bargaining presupposes the

[10] See the analysis of two lawyers linked to the legal practices that assisted the employers concerned: B. Adriaens and D. Dejonghe, "De rechterlijke tussenkomst bij stakingen. Een analyse van de rechtspraak inzake de oktoberstakingen tegen het Generatiepact", *Journal des Tribunaux de Travail* 2006, 69-80 (Appendix 12).

existence of contracting parties with distinct interests. Collective bargaining is designed to redefine the "balance" between these interests, which will never be established by a formal statement of what constitutes a community of interests. It is therefore perfectly natural for Article 6§4 of the revised Charter to specify that those concerned have a right to collective action in cases of conflicts of interest.

25 The undertakings entered into by the contracting parties are defined in absolutely unequivocal language. They are required to *recognise* the right of workers and employers to collective action, whereas other commitments are expressed in much less binding terms[11]. The revised Charter is otherwise very sparing in its imposition of the "recognition" of rights[12].

26 The right to collective action also includes the right to strike[13]. The revised Charter is the first international treaty to explicitly embody this fundamental right of employees[14]. This is not just a question of chronology. The importance of this recognition is that it restricts the limits that can be legally imposed on the exercise of the right to strike, or even the right to collective action. The International Covenant on Economic, Social and Cultural Rights only recognises the right to strike if it is exercised "in conformity with the laws of the particular country". Similarly, the Nice Charter only recognises "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" if it is "in accordance with Community law and national laws and practices". Neither the Covenant nor the Nice Charter[15] explicitly specify the restrictions on states' margin of appreciation. The same applies to the constitutional provisions of states party in force since 1961. For example, the French (1946) and Italian (1947)[16] constitutions make explicit recognition of the right to strike subject to its exercise in accordance with the relevant legislation.

27 The revised Charter identifies two sets of circumstances that might justify restrictions on the right to collective action. Under Article 6§4, the right is "subject to obligations that might arise out of collective agreements previously entered into". The authors of such collective agreements may therefore impose restrictions on the exercise of this

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[11] For example, the parties merely undertake to *promote* joint consultation between workers and employers, the establishment and use of appropriate machinery for conciliation and voluntary arbitration machinery for voluntary negotiations (Article 6 of the revised Charter).

[12] The only example in the 1961 Charter, other than recognition of the right to collective action, is the requirement that parties recognise the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties (Article 18 of the revised Charter).

[13] Article 6 of the revised Charter reads "*including* the right to strike".

[14] D. Harris and J. Darcy, The European Social Charter, New York, Transnational Publishers, 2001, 104.

[15] Article 52 of the Nice Charter restricts the limitations that can otherwise be placed on the rights and freedoms embodied in it. These limitations must "respect the essence of those rights and freedoms". However, the reference to "in accordance with .... national laws and practices" is likely to deprive these rights of meaningful content. This wording is used only rarely in the Charter: see in particular articles 16 (freedom to conduct a business); 30 (protection in the event of unjustified dismissal); 34 (social security and social assistance) and 36 (access to services of general economic interest). Such a wording therefore makes this right something of an empty shell.

[16] See article 40 of the Italian constitution: “Il diritto di sciopero si esercita nell'ambito delle leggi che lo regolano.”

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right. This prerogative is not formally subject to the limits laid down in Article G. The Charter does not specify its personal scope.

28 Article G of the revised Charter permits states party to restrict the right to collective action, without obliging them to. To do so, and in contrast to the prerogative granted to the social partners, states party must satisfy three conditions, which are both formal and material. Formally, any restrictions must be "prescribed by law". Materially, they must be "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". In other words, the parties have to justify any restrictions in terms of clearly defined purposes and show that they are proportional to the outcome sought. Restrictions of the right to strike are therefore subject to the proportionality principle.

29 Any consideration of whether Belgium's application of the right to strike or collective action is compatible with its Charter obligations therefore calls for an analysis of the Committee's conclusions. The composition of this committee of independent experts of the highest integrity, with acknowledged competence in international social questions, guarantees a distinctively legal approach to the issues raised by national reports and collective complaints. The Committee is asked to rule on "whether or not the Contracting Party concerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint", that is on its compatibility, *in law*, with the law and practice of the party in question. Its conclusions serve a different purpose to its decisions. The former are essentially based on an analysis of reports in which member states describe their domestic law on collective action. When it analyses the reports, the Committee is largely dependent on information supplied by governments. The information is often general in nature and incomplete, which frequently leads the Committee to defer a ruling on compliance, pending receipt of further information. Comments from one or other of the social partners have often helped to clarify the application of the Charter provisions in the country concerned.

30 Two overviews prepared by the former Chair of the Governmental Committee, Mrs Lenia Samuel, offer a better insight into the Committee's case-law on and interpretation of Article 6 of the Charter. This pioneering work has continued with the Digest[17] prepared by the secretariat of the Committee, which matches the Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO.

(2) The effect of Article 6 of the Charter and revised Charter on the Belgian legal system

31 In its conclusions on the 17th supervision cycle, the Committee noted that Article 6§4 has been held to be directly applicable in national law by the *Conseil d'Etat* (decision no. 52424 of 22 March 1995) and, albeit implicitly, by the *Cour d'Arbitrage* (decision no. 42/2000 of 6 April 2000). This recognition of direct applicability only affects proceedings *in rem*, not individual rights. Since the end of the revised Charter ratification process, the Court of Cassation has had few opportunities to rule on the right to strike. However, it should be noted that the Solicitor General, Mr De Riemaecker, did acknowledge the direct effect of this article in his

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[17] See: http://www.coe.int/t/dghl/monitoring/socialcharter/digest/DigestSept2008_en.pdf.

conclusions preceding the decision of 31 January 1997. Most Belgian legal specialists appear to agree[18].

32 However the revised Charter has only very rarely been cited by the Belgian courts in cases concerning individual rights. For example, in a decision of the Antwerp labour court of 18 May 2001, Article 6 of the revised Charter was described as one of the current foundations of the right to strike[19]. However, this did not prevent judgment against a spontaneous strike on the grounds that it had not been supported by a majority of employees in a referendum organised by a labour conciliator. This decision shows that formal reference to the revised Charter in an *obiter dictum* is not sufficient to guarantee its application in specific cases, since this "numerical" criterion of legality subjects the "collective" nature of strikes to a condition not specified in the revised Charter. The same applies to occasional references[20] in civil court orders following unilateral applications that otherwise flout the Committee's "case-law".

(3) ***The Committee's non-compliance conclusions and judicial decisions preventing peaceful picketing***

33 The complainants refer to the Committee's conclusions on Belgian compliance with Article 6§4, extracts of which appear as an appendix. The conclusions were compiled over a ten-year period (1996-2006) and constitute a coherent body of findings. In the first conclusion (XIII), the Committee asked for further information on court intervention in collective disputes. In the 14th supervision cycle, for the first time the Committee indicated that judicial intervention in collective disputes raised sufficiently serious issues for it to defer a conclusion.

34 Following comments from two of the complainant unions, the FGTB and CSC, in its 16th cycle the Committee stated that:

"In recent years, following appeals by employers, a branch of litigation has emerged in the context of which the urgent applications judge, by *ex parte* application, is asked to issue an order, accompanied by penalties, ordering the strikers – and anyone else – to put an end to strike pickets; these are legally defined as interference with the subjective rights which go along with the right to work and the right to conduct business.

In a judgment of 31 January 1997, the Court of Cassation ruled on these judicial practices. It drew attention to the traditional conditions governing the urgent applications procedure and alluded to the appeal judge's sovereign authority, "provided that he does not apply these rules of law unreasonably or refuse unreasonably to apply them in his interpretation". It made it clear that "the lower court judge's provisional

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18 For an overview of the positions adopted see J. Clesse, "Le statut juridique de la grève dans le secteur privé", in J. Clesse and al, *La grève: recours aux tribunaux ou retour à la conciliation sociale?*, Brussels, Editions du jeune barreau de Bruxelles, 2002, 6-7 and K. Salomez, « Het grondrecht op collectieve actie », in G. Cox and Mr Rigaux *De grondrechtelijke onderbouw van het collectief arbeidsrecht*, Mechelen, Wolters Kluwer, 2005, 81-87.

19 Antwerp labour court, 18 May 2001, unpublished (Appendix 14). For a critical commentary, see F. Dorssemont, "Staking mag niet afhangen van wil meerderheid", *De Juristenkrant*, 26 September 2001, 12.

20 See Mechelen court of first instance, 26 October 2005, *Journal des Tribunaux de Travail* 2006, 90. One swallow does not make a summer: Brussels court of first instance, 26 September 2001, *Chroniques de droit social* 2002, 218.

assessment that workers enjoy a right to strike within the limits of the criteria accepted in social life is not unreasonable". This reference to the lower court judge's sovereign assessment has permitted a continued development of the case-law under the urgent applications procedure.

The Committee asked the Government to supply it with relevant decisions and judgments. The Committee's analysis shows that the vast majority of urgent application judges accept their authority, based mainly on Article 6 of the European Convention on Human Rights, and apply penalties, including in cases where pickets remain peaceful and do not involve any act of physical violence, threat or intimidation. This was also highlighted in the joint observations by the two main organisations representing the trade unions, the *Fédération générale du travail de Belgique* (FGTB, Belgian General Labour Federation) and the *Confédération des syndicats chrétiens* (CSC, Confederation of Christian Trade Unions) in their observations on the Belgian report."

35 Considering that:

"the judicial practices concerned by their nature restrict the right to strike and that they go beyond the restrictions admissible under Article 31 of the Charter",

the Committee refused to defer its conclusion again and found that these judicial practices were incompatible with Article 6§4 of the revised Charter.

36 The Committee therefore concluded that:

"the situation in Belgium is not in conformity with Article 6§4 because the restrictions on the right to strike go beyond those permitted under Article 31 of the Charter".

37 Despite the subsequent justifications and information supplied by the Belgian government, the Committee repeated its criticisms in the 17th and 18th cycles, with explicit reference to the aforementioned arguments, and found that Belgium was still not complying with Article 6§4.

(4) Arguments of the Belgian government

38 The Belgian government minimises the level of judicial intervention in collective disputes and relies, incorrectly, on the separation of powers principle and the gentlemen's agreement between the social partners in 2002.

39 In its ninth report to the Committee, registered on 19 October 2003[21], the government referred to judicial intervention in collective disputes, and even to the Committee's non-compliance conclusion in the 16th cycle concerning certain court decisions and the country's obligations under the revised Charter, in the following terms[22]:

"When the committee states in its conclusions that "it considers that the judicial practices concerned by their nature restrict the right to strike and that they go beyond the restrictions admissible under Article 31 of the

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21 http://www.coe.int/t/dghl/monitoring/socialcharter/Reporting/StateReports/Belgium9_en.pdf.

22 See Appendix 15 for a similar defence presented to the United Nations Committee on Social, Economic and Cultural Rights.

Charter", it is referring directly to the decisions of the Hasselt and Tongres courts of 1 December 1999. These decisions were quite exceptional and out of the norm, as was emphasised in the last report. They concerned the vague wish of a non-representative organisation to bring the railways to a halt to coincide with the marriage of the crown prince."

40 The government refers explicitly to the separation of powers and even to a gentlemen's agreement between the social partners. It states that:

"Like most democratic countries, Belgium has a system of separation of powers and the executive cannot therefore issue instructions to the judiciary."

"This is why the last government planned to issue regulations on the procedures relating to collective disputes coming before the judicial courts. The last report referred to the social partners' reluctance to see parliament become involved through legislation in a field where it had previously only intervened indirectly. They preferred to maintain the *status quo* by means of a gentlemen's agreement in which one side elected not to resort to wildcat strikes and the other not to refer industrial disputes to the courts."

41 In the following passage, the government tends to underestimate such use of the courts:

"Finally, recourse to the courts to settle industrial disputes needs to be seriously qualified. Industrial conciliation is still very much the rule, even when, fairly exceptionally, conflicts come before the courts, almost as a parenthesis since the parties must eventually return to the negotiating table, in what then evidently becomes a more complex psychological context (see above). Moreover, since the gentlemen's agreement was signed a certain calm has prevailed. Industrial conciliation thus remains the rule as a means of settling collective disputes."

42 Firstly, the Belgian government's restrictive reading of the Committee's conclusion in the 16th cycle is incorrect. The government's view is that the Committee's criticisms only concerned the ban on striking immediately prior to the marriage of Prince Philippe and Princess Mathilde, which was certainly a non-recurring event. The trade unions believe that it was criticising the bans on both striking and peaceful picketing. The Committee confirmed this dual criticism in its 17th cycle conclusion, thereby distancing itself from the Belgian government's narrow reading of its conclusions.

43 The complainant organisations fully accept the government's attachment to the separation of powers principle. However, they consider it regrettable that this distinctive feature of the constitution should be used to justify its failure to comply with obligations under an international human rights treaty. Traditionally in international law, the executive power is responsible for breaches of international obligations that may be attributable to other branches of the state.

44 The complainants do not think that the gentlemen’s agreement can be used as a pretext for avoiding this responsibility. The 2002 gentlemen’s agreement between the social partners, officially termed an agreement on the settling of collective disputes (Appendix 16), formed part of a broader agreement covering such matters as the simplification of recruitment plans and greater harmonisation of the employment conditions of manual and non-manual employees. It was confirmed in a statement by the then deputy prime minister and minister for

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employment. The social partners thereby wished to jointly confirm, in response to certain practices then current, that consultation and dialogue took precedence over all other means of settling industrial disputes and to give fresh impetus to the Belgian model of industrial relations based on the legislation of 5 December 1968 on collective labour agreements and works councils. They drew attention to the contribution of the conciliation offices of the sectoral joint committees in preventing and settling industrial disputes. They undertook to give priority to settling disputes at enterprise level or, failing that, through existing sectoral consultative bodies, joint committees and conciliation offices. They confirmed their commitment to mediation and conciliation as the best means of settling disputes between parties and undertook in all circumstances to try to reach a settlement by consensus. The agreement was followed by a series of joint undertakings, the most significant of which concerned formal recommendations from employers' organisations to their members to avoid resorting to the courts in collective disputes and emphasising the principles of justice, equity, consultation and conciliation as elements of good industrial relations. The union side undertook to recommend to their members that they comply with strike notification procedures so that all available consultation machinery could be brought into service to resolve industrial disputes. They also undertook to issue a formal recommendation that their members avoid any use of physical or material violence and ensure that there was no damage to tools or equipment. Finally, the signatories called for a strengthening of the structure and resources of the industrial relations department of the ministry of employment and labour. This department includes a group of officials designated "labour conciliators – chairs of joint committees".

45 The gentlemen’s agreement was therefore inspired by the unions' concern to ensure that the right to organise enshrined in international and European treaties was protected and that court intervention in industrial disputes was brought to a halt. However, the continuation of judicial intervention, which reached a peak in October 2005 and again between October and December 2008, shows that the employers' organisations were unable to secure their members' compliance with this agreement.

Indeed, it should be noted that, in its addendum to the second report (cycle XIII-4), the Belgian government itself acknowledged that there were procedural aberrations and that the situation was no longer acceptable:

"Under a procedure of extreme urgency, the courts, without any adversarial proceedings, issue orders prohibiting the commission of such acts by unspecified persons (“*by anyone*”), on pain of heavy fines. In some cases these orders amount to a denial of the right to strike.

The conciliation machinery established in Belgium for dealing with collective disputes is thus seen being diverted from its original purpose, and legislative action is regarded as necessary."

46 This "tsunami" of court orders, particularly between October and December 2008 (Appendix 13), shows that resort to the courts for preventive purposes has increased. The result is a body of case-law on a whole series of quite unconnected industrial disputes, including Carrefour, Cytec, Deli XL, Eandis, Elia, N-Allo, Sibelgas, UCB, Big Floorcoverings, Ideal Floorcoverings and so on.

3 The situation in Belgium vis-à-vis international instruments

47 Other supervisory bodies in the UN and the ILO have also criticised the Belgian courts' intervention in the right to organise, including the right to strike.

(1) International Covenant on Economic, Social and Cultural Rights

48 in November 2007, the UN Committee on Economic, Social and Cultural Rights issued critical comments on the Belgian government's third report on the application of the International Covenant on Economic, Social and Cultural Rights (Appendix 17). The Committee expressed concern about "significant obstructions to the exercise of the right to strike, arising from the practice of employers to start legal proceedings in order to obtain a ban on certain strike-related activities". This has to be seen in the context of orders issued by urgent applications judges prohibiting the peaceful blocking of access to business premises in the absence of any violence or intimidation.

(2) ILO Convention 87

49 In a recent report to the 97th session of the International labour Conference, the Committee of Experts on the Application of Conventions and Recommendations raised the issue of judicial intervention in industrial disputes in the light of Convention 87 on the right to organise. The Committee reiterated the general principle of non-interference by prosecuting authorities in picketing[23]. The Committee therefore recognised not only the right to form pickets, seen as one aspect of freedom of assembly, but also their freedom of action. The Committee did consider legitimate legislation that prohibited pickets from disturbing public order and threatening workers who continued to work. The complainants consider that such an approach is perfectly consistent with measures to hinder freedom of work that are not accompanied by threats or violence. The trade unions subscribe to this principle and consider that forming strike pickets is also a means of ensuring that such strikes are conducted peacefully.

50 Last but not least, the complainants refer to the critical comments of the International Confederation of Free Trade Unions in its most recent reports (2006 and 2007)[24].

4 The incompatibility of the restrictions on the right to strike with Article 6§4 of the revised Charter

(1) The restrictions cannot be isolated from the exercise of the right to strike or the right to collective action

[23] "The Committee recalls that no one should be subjected to discrimination with regard to employment because of legitimate trade union activities. Moreover, the action of pickets organized in accordance with the law should not be subject to interference by the public authorities. However, the Committee has considered legitimate a legal provision that prohibited pickets from disturbing public order and threatening workers who continued to work." (Appendix 18).

[24] http://www.icftu.org/displaydocument.asp?Index=991223851&Language=EN and http://survey07.ituc-csi.org/getcountry.php?IDCountry=BEL&IDLang=FR (Appendix 19).

51 The steps taken by the Committee in the 14th and 15th cycles to ask certain contracting parties what forms of collective action other than strikes were recognised in their domestic law would suggest that it does not intend to give precedence to any one type of action. Such an open-minded approach to the notion of collective action reinforces the idea of the revised Charter as a living instrument. Throughout history, workers have invented forms of collective action other than collective withdrawal of their labour, in accordance with the vagaries of their era. For example, strikes were preceded by coalitions, circulars (indexing or blacklisting) and prohibitions.

52 More specifically, there was an important passage relating to Belgium in the Committee's conclusions in the 16th supervision cycle, where it noted that urgent applications judges:

"apply penalties, including in cases where pickets remain peaceful and do not involve any act of physical violence, threat or intimidation".

53 The Committee was quite explicit that:

"the judicial practices concerned by their nature restrict the right to strike and ... go beyond the restrictions admissible under Article 31 of the Charter".

54 In making this assessment, the Committee was not just concerned with the courts' interpretation of the theory of the abuse of law or the principle of proportionality. According to the Committee peaceful picketing is an integral aspect of strikes themselves. The Committee also agreed with the comments of the Belgian trade unions and in its conclusions clarified what was meant by "peaceful" picketing. In their comments at the time, the CSC and FGTB unions identified two trends in the case-law of the urgent applications judges during the reference period (1995-1996):

"Some of the case-law is not just concerned with acts of violence against persons or possessions, but also with simple occupations of premises or obstructed access to them, even when the latter are clearly peaceful and are not accompanied by any acts of physical violence or any threats or intimidation" (Appendix 20).

55 In a learned contribution to *Chroniques de droit social,* Mrs Micheline Jamoulle has commented on the conclusions concerning Belgium[25]. This commentary carries authority for a number of reasons. Professor Jamoulle was a member of the Committee at the time of these conclusions, on which there were no dissenting opinions. She appears to confirm that the Committee implicitly rejected the theory of separable acts underlying Belgian urgent applications case-law. Strike pickets must not be considered to infringe the subjective right to freedom of work. They form part of the very exercise of the right to strike. We consider that this intimate relationship between picketing and strikes is the reason why the Committee refers to infringements not of the right to collective action but of the right to strike itself. A stricter definition of the right to strike would have entailed an internal limit on this fundamental right of employees. The interpretation that we are defending was confirmed by the subsequent negative conclusion concerning judicial practice in the 18th supervision cycle.

[25] M. Jamoulle, "Le droit de grève en Belgique. Evolutions et perspectives », *Chroniques de droit social*, 2003, 374 (appendix 21).

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56 Recognition of peaceful picketing is fully consistent with the approach adopted by the European Commission of Human Rights, which decided that a sit-in that blocked access to an American military base could come within the scope of freedom of peaceful assembly[26].

(2) Recent decisions go beyond bans on peaceful blockages

57 Recent interim orders go further than just prohibiting the peaceful blockages referred to above.

58 In most cases they were orders to prevent obstruction of or direct or indirect interference with access to the premises concerned. Such a vague wording could prohibit the placing of pickets, who, even if they were simply calling for solidarity and in the absence of any threat whatever, would clearly not "facilitate" access to the site. Such a wording is calculated to hinder the exercise of peaceful freedom of assembly and expression, even when there is no intention to block access.

59 Further criticism can be made of certain orders that ban strikers from entering premises without the employer's prior authorisation. These prevent striking workers from calling for solidarity from employees inside the workplace. The result is to place a geographical restriction on the right to collectively withdraw labour. Such bans also restrict the ability of union representatives to exercise properly their general responsibilities for industrial relations within those same undertakings[27].

60 Of even more concern are orders that prohibit employees from obstructing, interfering with or making more difficult the normal smooth functioning of the undertaking. Strikes may, by their very nature, disrupt production. This particular ban is therefore liable to be interpreted by court bailiffs, who have sole responsibility for implementing court decisions, quite simply as making a particular strike unlawful, with penalties for non-compliance. This also verges on forced labour[28].

(3) The restrictions concerned cannot be justified by respect for the rights and freedoms of others

61 In their observations on the Belgian 16th cycle report, the trade unions argued strongly that factory occupations and picketing that obstructed or hindered free access to business premises came within the scope of collective action. The Committee found that prohibiting such collective action was incompatible with Article 31 of the Charter (Article G of the revised Charter), despite any financial damage that might ensue. In their unilateral applications, the employers have not confined themselves to references to their financial interests but have also tried to present these interests as if financial profit were a genuine right that brooked no restriction. They

[26] European Commission of Human Rights, no. 13079/87, decision of 6 March 1989, *G v. Federal Republic of Germany* (appendix 22).

[27] Article 11 of collective agreement no. 5, 24 May 1971, Moniteur Belge 1 July 1971 (Appendix 23):

"The trade union representatives shall be responsible, inter alia, *for:*

1. industrial relations"

[28] See also in this context Article 4 of the European Convention on Human Rights.

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have also invoked their property rights and freedom of enterprise (which has never been enshrined in the Belgian constitution), and the freedom of labour or mobility of *their* non-striking employees, often as if they were acting legally on their behalf. Article 31/G authorises states to limit the right to collective action in the interest of the rights and freedoms of others, but the Committee's approach, unlike that of the urgent applications judges, seems to indicate that "the rights and freedoms of others" cannot simply be equated with financial interests.

At all events, the right to collective action does not cease as soon as it conflicts with any of the rights and freedoms of others. Such an approach would confine striking to a mere freedom, whereas it is conceived as a right.

62 This means that under Belgian case-law, the formation of strike pickets and their actions become illegal activities. In the ensuing public debate, various novel "fundamental" rights have been invoked in opposition to strikers, such as consumers' right of access to their shops, the right to a functioning public transport system, incorrectly equated with free movement within the Community, or parents' right to have their children attend school, wrongly confused with the right to education.

63 We would again stress that the right to strike is never likely to facilitate the exercise of property rights or the freedom of industry and labour. Between 1866 and 1921, the criminalisation of various forms of collective action, which were deemed to be in breach of the last-named freedom, paralysed and suppressed the use of such industrial action. Most current Belgian case-law has exactly the same effect. The only minor difference is that the arguments and penalties now rely mainly on the civil rather than the criminal law. Yet recognition of the right to collective action is rendered worthless if it can be immediately neutralised by invoking the right of property and freedom of industry and labour. In this context, tribute should be paid to the wisdom of the European Court of Human Rights, which refused to accept the arguments presented by an employer, *Gustafsson,* who maintained that a collective action – a boycott – was in beach of Article 1 of the First Protocol to the European Convention[29].

Also of great importance is the Dilek and others v Turkey judgment of 17 July 2007 (previously published under Satılmış and others), in which the Court held not only that the freedom under Article 11 of the Convention to form trade unions for the protection of occupational interests implied a right to collective action, but also that those who took such action could also take legitimate steps to ensure that it was effective. It stated that the forms of collective action used must enable unions to defend their members properly and confirmed that the right to collective action was not confined to strikes in the narrow sense of the term. The Court emphasised this point still further in its judgment of 21 April 2009 in Enerji Yapi-Yol Sen v. Turkey.

(4) The restrictions concerned are not "prescribed by law"

64 As we have seen, interim orders have become an important means of restricting the right to strike in Belgium. There are several exceptional aspects to such decisions. As its name implies the

[29] European Court of Human Rights, 25 April 1996, *Gustafsson v. Sweden* (Appendix 24).

procedure in question presupposes a degree of urgency. Applications are often introduced unilaterally and in are breach of the adversarial principle. The judges concerned are also often asked to rule on future actions. The complainants do not think that such cases meet the procedural requirements of Article G of the revised Charter. States are only authorised to impose restrictions if they are prescribed by law. However the English version, taken from the European Convention on Human Rights, cannot be interpreted as meaning that such restrictions can only be formulated by parliament. The Committee has therefore systematically taken account of domestic case-law when assessing the law of states parties and its compatibility with the Charter. This has been clarified in the Digest:

"Prescribed by law means by statutory law or any other text or case-law provided that the text is sufficiently clear i.e. that satisfy the requirements of precision and foreseeability implied by the concept of 'prescribed by law'".

65 Generally speaking, this interpretation matches that adopted by the European Court of Human Rights. The notion of legal prescription presupposes the necessary degree of predictability to ensure that unions and employees involved in collective action enjoy security of the law.

66 We believe that predictability implies that judges who hear urgent applications that would restrict the right of collective action must give proper legal rulings. They must therefore give reasons for their decisions, which means not just balancing the respective interests but showing that in reaching their decisions they have applied the law. Be that as it may, the Court of Cassation's approach to these urgent applications[30] tends to remove them from the scope of legal review. Yet such oversight is an essential safeguard for the right of collective action. Thanks to the case-law of the Court of Cassation, legal review plays a marginal role in such cases, making it possible to restrict human rights on the basis of a simple balancing of the different interests at stake, resulting in a purely arbitrary process. It is impossible to see how orders issued in response to unilateral applications that take no account of human rights legislation can constitute a source of law. Restrictions prescribed by law, that is legal restrictions, should exclude any arbitrary element.

67 It is all very well to say that these orders only result in a temporary or provisional suspension of certain forms of collective action, but they can easily make such action ineffective and, worse, dissuade employees from using their rights, under the threat of exorbitant financial penalties. Yet such collective action serves to promote and defend employees' interests by influencing employers' behaviour during "critical" periods.

68 Finally, giving urgent applications judges this role could result in bans on strikes themselves, the legality of which was not subject to review.

5. Conclusions

30 (See: Cass. 31 January 1997, *Pasicrisie* 1997, I, 56; *Chroniques de droit social* 1998, 1, 23-26 (Appendix 10).

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69 *The complainant parties maintain that so far, despite the Committee's non-compliance conclusions in cycles XVI, XVII and XVIII, the situation in Belgium is not compatible with Article 6§4 of the revised Charter and therefore ask the Committee to find that judicial intervention in collective disputes in Belgium, particularly the restrictions imposed on the activities of pickets, is incompatible with the revised Charter.*

III Appendices

1 Authorisations of the Secretary General of the ETUC and the presidents of the signatory representative organisations

2 Cass. 21 December 1981, *Pasicrisie.* 1982, I, 531

3 Services of Public Interest in Peacetime Act (in French)

4 Cass. 28 January 1991, *Chroniques de droit social* 1991, 296

5 Cass. 27 January 2003, *Journal des Tribunaux de Travail* 2003, 121.

6 Brussels court of first instance (urgent application), 5 August 1987, *Revue de Droit Social* 1987, 464

7 Article 310 of the Belgian Criminal Code (in French)

8 Correspondence between Eddy Van Lancker, Federal Secretary of the FGTB and the President of the Mechelen court of first instance

9 Antwerp court of appeal, 6 September 2006, No. 2005/RK/372, *unpublished*

10 Cass. 31 January 1997, *Pasicrisie* 1997, I, 56; *Chroniques de droit social* 1998, 1, 23-26

11 Cass. 4 February 2000, *Pasicrisie* 2000, I, 92

12 B. Adriaens and D. Dejonghe, "De rechterlijke tussenkomst bij stakingen. Een analyse van de rechtspraak inzake de oktoberstakingen tegen het Generatiepact", *Journal des Tribunaux de Travail* 2006, 69-80

13 Orders issued following unilateral applications for the period from 3 October to 7 November 2008

14 Antwerp labour court, 18 May 2001, *unpublished*

15 UN Committee on Economic, Social and Cultural Rights

16 Gentlemen’s agreement

17 Comments of the UN Committee on Economic, Social and Cultural Rights on the Belgian government's third report on the application of the International Covenant on Economic, Social and Cultural Rights

18 Report to the 97th session of the International labour Conference by the ILO Committee of Experts on the Application of Conventions and Recommendations

19 Comments of the International Confederation of Free Trade Unions in its most recent reports (2006 and 2007)

20 FGTB and CSC observations (16th supervision cycle)

21 M. Jamoulle, “Le droit de grève en Belgique. Evolutions et perspectives", *Chroniques de droit social*, 2003, 374

22 European Commission of Human Rights, no. 13079/87, decision of 6 March 1989, *G v. Federal Republic of Germany*

23 Collective agreement no. 5 of 24 May 1971

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24 European Court of Human Rights, 25 April 1996, *Gustafsson v. Sweden*

Signatures

For the European Trade Union Confederation (ETUC)

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For the Centrale Générale des Syndicats Libéraux de Belgique (CGSLB),

Jan Vercamst, President

For the Confédération des Syndicats chrétiens de Belgique (CSC)

Luc Cortebeeck, President

For the Fédération Générale du Travail de Belgique (FGTB)

Rudy De Leeuw, President,