



To: Office of the Legal Adviser, ILO

(jur@ilo.org)

Subject: Workers' Group request regarding the interpretation of Convention 87 (Freedom of Association and Protection of the Right to Organise Convention) concerning the right to strike.

FNV and CNV express their full support to the request of the Workers to consider referral to the International Court of Justice (ICJ) to resolve the dispute on the right to strike as part of Convention 87, implementing article 37 of the ILO constitution.

FNV and CNV observe that the ILO supervisory system has consistently held for the last 70 years that the right to strike is an intrinsic part of the right to freedom of association, protected by C87, and has developed extensive guidance on the modalities of its implementation. This view is undisputed by the ILO Workers' and Government Groups, other UN bodies, regional human rights courts and national high courts as well as academic legal opinion around the world.

The employers position is not to accept the CEACR interpretation of C87. Over the past 11 years this has not changed, intents of mediation and social dialogue failed. This means that workers, employers and governments have for over a decade now been unable to benefit from the authoritative guidance and interpretation of the legal boundaries of the right to strike. This increasingly creates legal uncertainty for all parties involved.

The European Court of Human Rights' case-law demonstrates that strike action is clearly protected by Article 11 of the Convention (National Union of Rail, Maritime and Transport Workers v. the United Kingdom, 2014, § 84, with further references). In its case-law, the Court has considered the right to strike to be an important aspect of freedom of association and of the right to form a trade union and for that trade union to be heard and to bargain collectively, *supported by relevant international instruments, among which the European Social Charter*. In The Netherlands the right to strike is based on case-law, referring to the European Social Charter. Neither the Dutch Constitution nor Dutch legislation contains provisions that recognize fundamental trade union rights. This has led to a lack of legal certainty, because from time to time these rights, including the right to strike, are the subject of political discussion. A restriction of this right is always lurking. The dispute on the right to strike as part of Convention 87 weakens this right in the Netherlands and makes it even more susceptible to political discussion.

In many countries in the world there is national legislation that establishes the right to strike, but in almost all of them there are provisions that in practice hinder its effectiveness. We know of examples from Latin American countries such as Peru where the law has established that workers who occupy essential positions (for instance that are responsible for health issues) cannot participate in strikes. In practice companies declare almost all their workers have essential positions, so a strike of the few non-essential workers hardly has effect. In other cases such as in agriculture, zero-hour work contracts prevail, which in practice prevents strike, since they will not be offered work as soon as they announce a strike action. In all these cases international guidance is very essential.

Some governments have taken several steps to infringe the right to strike, including laws that allow replacement of workers on strike by agency workers (not seldomly flown in from abroad), proposals



for a minimum service level on transport and other “critical” sectors, and attempts to overrule caps on damages in relation to industrial action, that had been established in jurisprudence. The right to strike is absolutely the key factor that underpins sound and balanced industrial relations. The ILO has always been the anchor that provides that basis.

As Dutch unions, FNV and CNV think it is time to resolve the matter in order to come out of this deadlock. Within the ILO, the article 37 provides the only constitutionally-based mechanism guaranteeing legal certainty in matters of interpretation of Conventions. We see the referral as the only way to resolve this dispute in a lasting way.