EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON THE MERITS

Adoption: 13 September 2011

Notification: 7 October 2011

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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

The European Committee of Social Rights, a committee of independent experts set up under Article 25 of the European Social Charter ("the Committee"), during its 252th session attended by:

Mr	Luis JIMENA QUESADA, Président
Mrs	Monika SCHLACHTER, Vice-Président
Mr	Jean-Michel BELORGEY, General Rapporteur
Mrs	Csilla KOLLONAY LEHOCZKY
Mssrs	Andrzej SWIATKOWSKI
	Lauri LEPPIK
	Rüçhan IŞIK
	Petros STANGOS
	Alexandru ATHANASIU
Mrs	Elena MACHULSKAYA
Mr	Giuseppe PALMISANO
Mrs	Karin LUKAS

Assisted by Mr Régis BRILLAT, Executive Secretary,

After having deliberated on 15 and 17 March, on 10 and 12 May and on 13 September 2011;

On the basis of the report presented by Mrs Monika SCHLACHTER;

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint submitted by the European Trade Union Confederation ("the ETUC"), the Centrale Générale des Syndicats Libéraux de Belgique ("the CGSLB"), the Confédération des Syndicats Chrétiens de Belgique ("the CSC") and the Fédération Générale du Travail de Belgique ("the FGTB") was registered on 22 June 2009. The complainant organisations claim 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 of the Revised Charter.

2. The Committee declared the complaint admissible on 8 December 2009.

3. Pursuant to Article 7§§1 and 2 of the Protocol providing for a collective complaints system ("the Protocol") and the Committee decision on the admissibility of the complaint, the Executive Secretary sent the text of the decision on 11 December 2009 to the Belgian Government ("the Government"), the CES, the CGSLB, the CSC and the FGTB, the States Parties to the Protocol, the states that have ratified the Revised Charter and made a declaration pursuant to its Article D§2, and to the organisations referred to in Article 27§2 of the Charter.

4. In accordance with Rule 31§1 of the Committee's Rules of Procedure, the Committee set 20 March 2010 as the deadline for the Government to make its submissions on the merits. These submissions on the merits was registered on 17 March 2010.

5. Pursuant to Article 7§2 of the Protocol, the Committee invited the international employers' and workers' organisations mentioned in Article 27§2 of the Charter to submit observations before 20 March 2010. Observations presented by the International Organisation of Employers (IOE) were registered on 18 March 2010.

6. In accordance with Rule 31§2 of the Committee's Rules of Procedure, the President set 15 June 2010 as the deadline for the complainant organisations to present a reply to the Government's submissions. The reply from the ETUC, CGSLB, CSC and FGTB was registered on 11 June 2010 and transmitted to the Government on 17 June 2010.

CONCLUSIONS OF THE PARTIES

A – The complainant organisations

7. The ETUC, CGSLB, CSC and FGTB 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 of the Revised Charter.

B. – The Government

8. The Government contends that the allegations made by the complainant organisations are unfounded, and asks the Committee to reject the complaint.

RELEVANT DOMESTIC LAW AND CASE-LAW

9. In Belgium, neither the Constitution nor domestic legislation formally establishes a right to strike. This right as well as its limitations has instead been defined by case-law (see below). In their submissions in the instant complaint, the parties refer additionally to the following provisions of relevant legislation:

10. The Law of 24 May 1921 on freedom of association, which sets out regulations on the freedom to strike, abolishing Article 310 of the 1887 Belgian Penal Code and decriminalising the exercise of the right to strike.

11. The Law of 19 August 1948 on public interest benefits in peacetime, which provides for requisitioning workers in the event of social conflicts in order to guarantee essential and vital needs. The Law provides for joint commissions that are responsible for requisitioning the workers:

12. The Judgment of the Court of Cassation of 21 December 1981 (*Société anonyme "SIBP" v. De Bruyne*) 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".

13. The decision of the Brussels labour court, 5.11.2009, 2009/AB/52381 has interpreted Belgian law as including peaceful picketing among the rights enjoyed by workers.

14. Many decisions of the courts, on the basis of unilateral requests by employers, have ordered the cessation of picketing activities: Gand court of appeal, 21.10.2008, 2008/EV/50 (Carrefour), Antwerp court of appeal, 24.10.2008, 9023 (N-Allo), Charleroi court of first instance, 3.10.2008, 08/RR/2521/B (Deli XL), Brussels court of first instance, 14.10.2008, 08/RR/5881/B (Cytec), Brussels court of first instance, 15.10.2008, (Carrefour), Courtrai court of first instance, 22.10.2008, 08/1732/B (BIG Floorcoverings), Courtrai court of first instance, 23.10.2008, 08/1743/B (BIG Floorcoverings), Tournai court of first instance, 23.10.2008, 08/7876 (Carrefour), Charleroi court of first instance, 24.10.2008, 08/RR/2660 (Carrefour), Mons court of first

instance, 24.10.2008, 08/1290/B (Carrefour), Gand court of first instance, 28.10.2008, 08/2257/B (Eandis), Termonde court of first instance, 29.10.2008, 08/2326/B (Eandis), Brussels court of first instance, 30.10.2008, 08/6247/B (Elia),
Termonde court of first instance, 30.10.2008, 08/2327/B (Carrefour), Brussels court of first instance, 4.11.2008, 08/6329/B (Sibelgas), Nivelles court of first instance, 6.11.2008, 08/1254/B (UCB), Tongres court of first instance, 6.11.2008, 2008/1599/B (Carrefour), Furnes court of first instance, 7.11.2008, 08/539/B (Carrefour), etc.

15. Other court decisions have ruled in similar instance that picketing activities should not be prohibited, e.g. Mons court of first instance, 25.03.2009, 08/506/C (Rochefort and others v. S.A. Carrefour), Charleroi court of first instance, 08-3802-A, 22.04.2009 (Goelens v. S.A. Carrefour).

16. The parties refer primarily to decisions taken under a procedure of emergency relief, the “unilateral applications procedure”, governed by Articles 1025 to 1034 of the Belgian Judiciary Code. Under such procedure, the judge has to verify the facts as presented by the applicant, usually the employer, and for that purpose “may” summon the applicant and the intervening parties, usually trade unions (Article 1028). The Committee observes however that, in practice, intervening parties appear to be rarely heard, and applications by trade unions to intervene are often not granted by the judge. The decision is therefore usually based on the facts as presented by the applicant. According to Article 1029, the court’s decision is enforceable, notwithstanding any appeal, unless the judge decides otherwise (Article 1029). The decision is notified to the applicant or intervening parties by letter sent by the court, within three days of its pronouncement (Article 1030). The applicant or any intervening party may afterwards lodge an appeal within one month from the notification of the decision (Article 1031).

RELEVANT INTERNATIONAL STANDARDS AND TREATIES

17. Article 8 of the International Covenant on Economic, Social and Cultural Rights which reads as follows:
Article 8
“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. (...)”

18. Observations of the UN Committee on Economic, Social and Cultural Rights on the third Report submitted by the Belgian Government on the application of the International Covenant on Economic, Social and Cultural Rights read:

“(…) The Committee notes with concern the 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, as well as from the possibility that workers may be dismissed as a result of their participation in a strike.
(…)”

19. The Report submitted at the 97th session of the International Labour Conference by the *Committee of experts on the Application of ILO Conventions and Recommendations* on Belgium regarding *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)* moreover, states:

"The Committee (…) notes the Government's reply to the comments made by the International Confederation of Free Trade Unions (ICFTU), now International Trade Union Confederation (ITUC), on 10 August 2006 concerning (…) the adoption of a circular by the Minister of the Interior and the resulting orders with a view to limiting recourse to strike pickets. (…) Moreover, according to the Government, a strike in the automobile sector was characterized by intimidation and violence. The Committee recalls that (…) 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."

IN LAW

20. Article 6§4 of the Revised Charter reads as follows:

Article 6 – The right to bargain collectively

Part I: "All workers and employers have the right to bargain collectively".

Part II: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
(…)
and 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."

21. Article G of the Revised Charter reads as follows:

Article G – Restrictions

"(1) 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.

(2) The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

22. The Appendix to the Revised Charter, Part II, Article 6§4, reads as follows:

Appendix to the Revised Charter, Part II, Article 6§4

> "It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G."

23. The Committee has already ruled on the issue raised by the present complaint in the context of the procedure of examination of national reports. In its Conclusions XVIII-1 on the Social Charter of 1961, the Committee found the situation in Belgium not to be in conformity with Article 6§4 on the ground that the restrictions on the right to strike resulting from judicial decisions went beyond the restrictions permissible under Article 31 of the Charter (Conclusions XVIII-1, Belgium, p. 76). The latter provision corresponds to Article G of the Revised European Social Charter which entered into force in respect of Belgium on 1 May 2004. The Committee recalls however that the collective complaints procedure facilitates in-depth consideration of matters already addressed under the reporting procedure (International Commission of Lawyers (ICJ) v. Portugal, complaint No. 1/1998, decision on admissibility of 10 March 1999, §§10-12).

24. The question raised by the complaint is whether the right to collective action is recognised by Belgian law, whether there do exist any restrictions to the enjoyment of the right secured under Article 6§4 of the Revised Charter, and if so, whether these restrictions fulfil the conditions set out in Article G of the Revised Charter.

(i) <u>The right to collective action recognised under Belgian law</u>

A. Arguments of the parties

25. The complainant organisations refer to the fact that there is no statutory right to strike in Belgian law, but through case law, "collective and intentional cessation of work" is guaranteed. The complainant organisations consider that this definition is too restrictive and does not sufficiently take into consideration the different purposes of strikes but also of other forms of collective actions as means to put pressure on the other party to enter into negotiations or accept demands. Especially the right to engage in pickets could be put into question when such a narrow definition, much more restrictive than the one guaranteed in Article 6§4 of the Revised Charter, is to be applied.

26. The Government disagrees by emphasizing that also picketing activities are included in the rights given to Belgian workers. As long as the relevant actions remain peaceful, they could base themselves on the right to free gathering and to freedom of expression as enshrined in Articles 19 and 26, respectively, of the Belgian Constitution.

B. Assessment of the Committee

27. The Committee notes that the mere fact that Belgian statutory law does not recognise the right to strike does not in itself constitute a violation of the Charter as long as such a right is guaranteed in law and in fact through an established and undisputed case law of the domestic highest courts.

28. The Committee also underlines the fact that the Belgian Court of Cassation does not explicitly refer to Article 6§4 of the Revised Charter when establishing the right to strike, does not amount to a violation of the Revised Charter. The Committee emphasizes nevertheless that when the task of implementing the State's obligations resulting from the Charter, in the absence of statutory law, rests on the case law of domestic courts, the latter need be reasonably precise and exclude contradictions.

29. Article 6§4 of the Revised Charter encompasses not only the right to withholding of work but also other relevant means, *inter alia*, the right to picketing. Both these components deserve consequently a comparable degree of protection. Thus, if the right to picketing is linked only to the right to freedom of assembly and freedom of expression, it runs the risk to being restricted more easily than if it were guaranteed as being a part of the right to collective action. In the present case, the right to free gathering does not apply to open air meetings which are entirely subjected to police regulations.

30. Both parties nevertheless agree that picketing activities will usually be accepted as lawful as long as they remain peaceful in nature. The Committee therefore considers in this respect that the right to collective action as guaranteed in Article 6 § 4 appears to be recognised. The fact that picketing activities are legally based on different articles of the Constitution and not included in the judge-made "right to strike" does not appear in itself incompatible with the Charter, as long as the same level of protection is effectively guaranteed to all aspects included within the scope of Article 6 § 4.

(ii) <u>Restrictions to the right of Article 6§4</u>

A. Arguments of the parties

31. The complainant parties bring examples of orders of Belgian civil courts prohibiting i.a. "to […] directly or indirectly prevent, in whatever way, the operations of the applicant or of the applicant's stores. This includes the firm's owners, managers, suppliers, personnel and customers […]" (extract of the order of 23.10.2008 of the Tournai court of first instance)." They also refer to the fact that such decisions have provided for the application of coercive fines, amounting in the complainants view to undue restrictions to the right to peaceful picketing.

32. The Government disagrees. It maintains that the right to peaceful picketing is not restricted by Belgian courts but it makes part of the right to collective action, along with the right to distributing leaflets, demonstrating and other aspects that form part of the freedom of assembly and association (Article 27 of the Constitution). It cites for an example the decision of the court of appeal of Antwerp in which the Court ruled that the trade union could have a different opinion of and criticize policies applied within an undertaking, even if those criticisms were likely to cause offence, shock or create confusion. The Court in that case dismissed the employer's claims for damages from employee representatives who had distributed tracts (decision of Antwerp court of appeal, 7.2.1996, Auteur & Media 1996, 357).

B. Assessment of the Committee

33. The Committee notes that the parties do not contest the fact of there being conflicting case law. Whereas labour courts seem to interpret Belgian law as including peaceful picketing into worker's guaranteed rights (Brussels labour court, 5.11.2009, 2009/AB/52381), there are decisions of civil courts interpreting Belgian law differently, when forbidding also indirect prevention of the operation of businesses by trying to influence personnel to participate in a strike by orders against trade unions (see paragraph 14).

34. The exercise of the right to strike necessitates striking a balance between the rights and freedoms, on one side, and the responsibilities, on the other, of the natural and legal persons involved in the dispute.

35. If the picketing procedure operates in such a way as to infringe the rights of non-strikers, through for example to use intimidation or violence, the prohibition of such activity cannot be deemed to constitute a restriction on the right to strike as recognised in Article 6§4.

36. On the other hand, where picketing activity does not violate the right of other workers to choose whether or not to take part in the strike action, the restriction of such activity will amount to a restriction on the right to strike itself, as it is legitimate for striking workers to attempt to involve all their fellow workers in their action.

37. The Committee has no jurisdiction to decide on the legal classification of these facts in domestic law or to state, for each of the cases which are brought before it as examples (see the non-exhaustive list of cases under domestic law, brought by either parties in support of their submissions, paragraphs 12-15) whether the judges were right or wrong to consider that the picketing activity fits into either of the aforementioned categories. The national courts do hold such jurisdiction, and the Committee bases its arguments on the classification which these authorities adopt.

38. The Committee considers that the Belgian courts, at least in some of the cases listed above, did not rule that the picketing activity in question hinder the freedom of employees to choose whether or not to take part in the strike. Therefore it appears that restrictions were imposed on picketing activities that clearly come within the scope of Article 6§4, and which therefore interfered with the exercise of the right to strike.

39. The Committee therefore holds that the obstacles to the functioning of strike pickets posed by the operation in practice of the "unilateral application procedure" under Belgian law should be understood as constituting a restriction on the exercise of the right to strike as laid down in Article 6§4 of the Charter.

(iii) Justification of the restriction

40. Pursuant to Article G, a restriction on the exercise of a right recognised by the Charter can be seen as compatible with the Charter if it fulfils the following conditions:

- it must be prescribed by law;
- it must pursue one of the aims set out in Article G;
- it must be proportionate to the aims pursued.

A. Arguments of the parties

41. The complainants allege that they are excluded from participating directly or indirectly in the procedure applied when employers prevent picketing activity by making emergency relief applications. This has the effect of ensuring that unions become unable to present a justification for their decision to strike and make use of specific types of picketing activity at issue before the court takes a decision, so that the adversarial principle of justice is not respected in the instant cases.

42. The Government disagrees. It maintains that the procedure in question is governed by law and subject to strict conditions. It argues that any person who considers him or herself the victim of an unjust restriction on the right to strike can make a third party application and subsequently appeal the decision.

B. Assessment of the Committee

43. In providing that restrictions on the enjoyment of Charter rights must be "prescribed by law", Article G does not require that such restrictions must necessarily be imposed solely through provisions of statutory law. The case-law of domestic courts may also comply with this requirement provided that it is sufficiently stable and foreseeable to provide sufficient legal certainty for the parties concerned. The decisions of the domestic courts adopted under the emergency relief procedure, as brought to the Committee's attention by the parties to the complaint, do not meet these conditions (see paragraphs 14-16). In particular, inconsistencies of approach appear to exist as between similar cases, and the case law lacks sufficient precision and consistency so as to enable parties wishing to engage in picketing activity to foresee whether their actions will be subject to legal restraint.

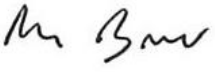
44. In addition, the Committee considered that the expression “prescribed by law” includes within its scope the requirement that fair procedures exist. The complete exclusion of unions in practice from the so called “unilateral application” procedure poses the risk that their legitimate interests are not taken into consideration. Unions may only intervene in the procedure after an initial binding decision has been taken and the collective action has been stopped. As a result of the unilateral nature of this procedure, the judge “may” summon other affected parties, but if he elects not to do so, the decision can be taken without such parties making submissions at the initial hearing or in its immediate aftermath. As a result, unions may be obliged to initiate collective action again, or else must go through a time-consuming appeal procedure. Consequently, the exclusion of unions from the emergency relief procedure may lead to a situation where the intervention by the courts runs the risk of producing unfair or arbitrary results. For this reason, such restrictions to the right to strike cannot be considered as being prescribed by law.

45. Furthermore, any restriction on the right to strike may not go beyond what is necessary to pursue one of the aims set out in Article G. The application of such procedure as described above (§44) may intend to pursue the aim of protecting the right of co-workers and/or of undertakings, but in its practical operation goes beyond what is necessary to protect those rights by reason of the potential lack of procedural fairness.

46. Therefore, the Committee considers that Belgian law does not provide guarantees for employees participating in a lawful strike within the meaning of Article 6§4 of the Revised Charter.

CONCLUSION

For these reasons, the Committee concludes by 8 votes against 4 that the restrictions on the right to strike constitute a violation of Article 6§4 of the Revised Charter, on the ground that they do not fall within the scope of Article G as they are neither prescribed by law nor in keeping with what is necessary to pursue one of the aims set out in Article G.



Monika SCHLACHTER	Luis JIMENA QUESADA	Régis BRILLAT
Rapporteur	Président	Executive Secretary

In accordance with Rule 30 of the Committee's Rules, a dissenting opinion of Mr Petros STANGOS and a dissenting opinion of Mr Luis JIMENA QUESADA, jointed by Mr Jean-Michel BELORGEY and Mr Rüçhan IŞIK,, are appended to this decision

DISSENTING OPINION OF MR PETROS STANGOS

I voted against the Committee's decision, but not because I disputed the finding that Belgium had violated Article 6§4 of the revised Charter. In fact, I agree, but for different reasons than those given in the decision adopted by the majority of the members of the Committee.

The substantive basis for Complaint No. 59/2009 is private law relationships, which are also referred to as interpersonal relationships or relationships between individuals. In this case the relations are between company employees and their employers arising from collective labour disputes and relate specifically to the method of collective action known as "picketing", in response to which employers systematically make unilateral applications under the urgent procedure to the presidents of courts, who in turn issue orders finding unilateral proceedings to be well-founded in principle and requiring this form of collective action to cease. Considering that this is the substantive basis of the complaint, the Belgian state, against which the collective complaint is supposed to be directed, is not the complainants' true opponent. If there is state intervention in collective labour disputes, it takes the form of state intervention *de jure imperium*. The Belgian state is most certainly involved in collective labour disputes (and, more specifically, in relationships between private individuals), but only by virtue of its legislative power, whose actions and omissions are reflected, in a state governed by the rule of law such as Belgium, in the aforementioned conduct of the courts.

Consequently, and first and foremost, I cannot agree with the arguments deployed by the rapporteur and the members of the Committee in §§ 33-39 of the decision, which culminate in §§ 38 and 39 with the conclusion that it is, in some ways, the Belgian courts that are responsible for the violation of Article 6§4 of the Revised Charter (this violation can certainly be attributed to the Belgian state). As I shall also consider below, it is only because they are applying the Belgian law governing this legal remedy, namely the Code of Civil Procedure, which requires them to act in this manner, that the Belgian courts are able, under the unilateral application procedure, to order the cessation of picketing without taking the workers' interests into consideration.

Secondly, I can not agree with the reasoning in the decision which in my eyes leads (in §44) to the conclusion that practically there is an *interference* by the Belgian judicial authorities in the exercise of the right established by Article 6§4 of the Charter, interference embodied in the present case in the form of a "restriction" on the right to strike under that provision.

Authorities on the law of the European Convention on Human Rights restrict the concept of interference, which is generally applied in the form of restrictions, to situations which involve a negative obligation of the state, in other words the one originally contained in

the Convention. This type of obligation requires the state to refrain from interfering in private individuals' affairs. However, it is clear that if non-interference by the state is not enough to protect human rights, the European Court also requires intervention by the authorities, referred to as a positive obligation. Consequently, failure to comply with this obligation constitutes passive conduct, not interference. This vocabulary, which was largely coined by judges, has also been fleshed out by legal writers. According to Sudre, active interference equates with the violation of a negative obligation while passive interference equates with that of a positive obligation[1]; according to the former Court judge, Mr Wildhaber, positive obligations are infringed by positive interference and negative obligations by negative interference[2]. However, the Court is reluctant to accept that there is a clear-cut dividing line between the infringement of a negative obligation and that of a positive obligation. The term "interference" might seem to apply only in situations where there are negative obligations (see for example ECHR, *Marckx v. Belgium* judgment of 13.6.1979, Series A No. 31, §31) but some other judgments contradict this interpretation. This is the case, for example, with the *Fuentes Bobo v. Spain* judgment, which acknowledges a positive obligation to protect the right to freedom of expression from infringements by private persons, but finds that there has been interference by the state (ECHR, judgment of 29.2.2000, application no. 39293/98). Furthermore, it sometimes happens that the same actions by the state can be interpreted either as a violation of a positive obligation or as a violation of a negative obligation. Accordingly, in the case of *Gül v. Switzerland* (ECHR, judgment of 19.2.1996, application no. 23218/94), the applicant accused the Swiss authorities of failing to help his son come to Switzerland. The Swiss government could be criticised for its rejection of the parents' application, in other words an act impeding family reunion, or conversely for failing to take a positive measure (the requested authorisation to enter Swiss territory) serving the same purpose.

In the present case, irrespective of whether there was state interference (in the form of restriction) in the right guaranteed by Article 6§4 of the Charter, there was, in my view, a clear violation by the Belgian state of its positive obligation under that article to intervene in relationships between individuals (the striking employees and their employers), that is to say horizontal relationships, to safeguard the right protected by this Charter provision.

What I would recommend here is the "transposition" to the Charter and the Committee's case-law of the methods that the Court has so commendably adopted where it comes to recognising the horizontal effect of many of the Convention's provisions. The judges use both the positive obligations principle and Article 1 of the Convention to justify the Charter's horizontal effect. The Charter does not, of course, have a similar provision to Article 1 of the Convention, under which "*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms …"* enshrined in the Convention, which is one of the most persuasive bases in the Convention's rules for the argument that its provisions have a horizontal effect. However, the Committee has clearly accepted the principle that states party to the Charter have an obligation to

[1] F. Sudre, "Les 'obligations positives' dans la jurisprudence européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme* 1995, p. 369.

[2] Concurring opinion of Judge Wildhaber, annexed to the Court's judgment on *Sternja v. Finland* , 25.11.1994, Series A No. 299-B, p. 15.

protect the rights of persons who do not fall within the personal scope of the Charter (Article 1 of the Appendix to the Charter) but are within the jurisdiction of the state concerned (Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, decision on the merits of 20 October 2009, §§ 64 and 71). Nor are the positive obligations identified by the Court, which were originally established to force states to abandon their passive attitude to human rights but then spread to relations between individuals, entirely absent from the interpretation that the Committee makes of many Charter provisions. This applies, for example, to Article 6§1, which is interpreted by the Committee to mean that states must take positive measures to encourage consultation between trade unions and employers' organisations (*Centrale Générale des Services Publics* v. Belgium, Complaint No. 25/2004, decision on the merits of 27 May 2005, §41). It is also the case with Articles 16 and 31 read in conjunction with Article E, which are interpreted to place the state under certain *special* positive obligations, namely the duty to collect data to gauge the extent of the discrimination suffered by a particular group of the population with regard to the right of families to social and economic protection (European Roma Rights Centre (ERRC) v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §27), and the duty, when it assigns local bodies the responsibility to perform a function entering the scope of the Charter, to check and ensure that this responsibility is being properly fulfilled (ERRC v. Italy, Complaint No. 27/2004, decision on the merits of 7 December 2005, §26). A further argument for "transposing" the Court's application of the horizontal effect of the Convention is that one of the latter's leading judgments extending the horizontal scope of its provisions[3] (more specifically, Article 11) related to collective organisation and action in the workplace (this judgment, moreover, is also one of those alluded to above which include findings of Article 11 violations of both negative and positive obligations). The judgment in question is that of 25 April 1996 on *Gustafsson v. Sweden* (application no. 15573/89), in which the Court found that "*although the essential object of Article 11 is to protect the individual against arbitrary interferences by the public authorities with his or her exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights*" and concluded that "*national authorities may, in certain circumstances, be obliged to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the … right*" enshrined in the Convention (§ 45).

In the present case, the horizontal effect of Article 6§4, for which I argued during the plenary meeting and which I am now defending again in the form of this dissenting opinion, is a kind of indirect horizontal effect[4]. It would stem from the Committee's decision to examine a private dispute by virtue of the positive obligation on the defending state to safeguard the right established by Article 6§4 with regard to interpersonal relationships. This would make the horizontal effect indirect as the verdict would not be aimed at the private persons – and would not have settled their dispute – but would be aimed at the state, which would consequently act as an intermediary. In concrete terms, the Committee should have charged Belgium with the obligation to

[3] B. Moutel, *L' "effet horizontal" de la Convention européenne des droits de l'homme dans le droit prive français*, thesis, University of Limoges, 2006, roneoed document, p 58.

[4] See, in this connection, P. de Fontbressin, "*L'effet horizontal de la Convention européenne des droits de l'homme et l'avenir du droit des obligations*", *Liber Amicorum Marc-André Eissen*, 1995, p. 162.

ensure that the remedy available to employers in response to the collective industrial action of strike picketing respected the adversarial principle, so that the national courts could pass judgment in such matters entirely objectively and impartially, taking account in each case of the conflicting interests of the private parties involved (employers and workers).

My suggestion is corroborated by another aspect of the dispute, which is also connected with our working methods within the two administrative procedures managed by the Committee (the national reports and collective complaints procedures). During the last reporting cycle, the Committee adopted the following conclusion on the application by Belgium between 2005 and 2008 of Article 6§4 of the revised Charter: "*The Committee has previously held that restrictions on the right to strike resulting from judicial decisions go beyond the restrictions admitted by Article E of the Charter and therefore the situation was not in conformity with the Charter. However the Committee notes that this is the subject matter of … collective complaint No. 59/2009 …, which is currently being examined by the Committee. Therefore it does not examine the issue in this conclusion*". Refraining from taking a decision when examining a national report because the subject would be addressed in the course of the other procedure managed by the Committee does not mean that it would have been justified, during this second procedure, for the Committee to overlook the factual and legal material made available to it by the state during the first procedure. In point of fact, and regardless, at that time, of all that it relies on for its defence in its observations on the merits of the complaint, the Belgian government emphasised, in the part of its 4th report on the application of the revised Charter relating to Article 6§4, how much it would have liked, in the past, to reform the remedies available to employers when they sought to combat their employees' collective action in the form of picketing. On page 42 of the national report, the government states that in 2001-2002, it drew up proposals to improve judicial proceedings by making them adversarial. Furthermore, in its observations on the merits of the current complaint, the Belgian government points out how feasible in legal terms such a reform would have been. Under the Code of Civil Procedure (of the Judicial Code), unilateral applications are only permitted in specific areas of civil law including labour law[5]. This means that, by amending the ordinary law of the Judicial Code, unilateral proceedings in the area of collective action constituted by strikes (and strike pickets) can be removed from this list at any time.

A decision on the merits which moved in the direction of inferring from Article 6§4 that Belgium has a positive obligation to reform the remedy available to employers by making it adversarial would have encouraged Belgium to pursue a matter which it has already broached. In the collective complaints procedure, it is not the Committee's duty simply to "condemn" guilty states because they have infringed a Charter provision. When it finds against a guilty state, it is also part of its remit to do so by means of a decision which is likely to be willingly applied by the state, thus compensating for the lack of other binding legal instruments available within the Charter system and, in particular, the collective complaints procedure.

[5] Other than labour law, these are company law, media law, administrative law, the termination of agreements, attachment and seizure, criminal law and prison law, family difficulties, inheritance, liquidation and partition and patently illegal action in the broadest sense.

DISSENTING OPINION OF MR LUIS JIMENA QUESADA JOINED BY MR. JEAN-MICHEL BELORGEY AND MR RÜÇHAN IŞIK

I. I voted against the operative provisions agreed to by the majority, not because I disagreed with the finding of a violation of Article 6§4 of the revised Charter but because I could not subscribe to the exclusively procedural approach which the majority of the Committee had taken in its legal reasoning and the purely procedural grounds which derive from this and are included in the final provisions.

II. It is my view that the key aspect of the complaint lodged by the complainant organisations is a substantive one in that it relates to the very essence of the right to strike, in the form of its fundamental corollary which is the right to take part in strike picketing.

Initially, the Committee's reasoning (paragraph 27) seems to herald this substantive approach. However, the Committee refuses to take this approach any further when, in the very same paragraph, it adds the words "as long as such a right is guaranteed in law and in fact through an established and undisputed case law of the domestic highest courts" and makes it clear that it considers this to be true in the instant case when it seems to conclude in paragraph 30 that the right to take part in strike pickets is effectively guaranteed in a way that is compatible with the Charter.

On the other hand, in the same paragraph, the Committee states somewhat inconsistently that "picketing activities will usually be accepted as lawful as long as they remain peaceful in nature", which, in my opinion, shows that the right to take part in pickets is not *always* recognised as a fundamental right (only "usually") and then only as an "authorised activity".

This approach is also at odds with the assertion that the right to take part in strike picketing is a component of Article 6§4 of the revised Charter, which therefore deserves "a comparable degree of protection" (paragraph 29). These inconsistencies are highlighted in Mr Belorgey's dissenting opinion. Furthermore, as Mr Stangos points out in his dissenting opinion, the Committee could have dealt with the case in terms of its substance.

III. In this context, I would argue that the Committee has passed up a major opportunity to consolidate its case law by stating clearly that participation in strike picketing forms an integral or essential part of the *fundamental* right to strike enshrined in Article 6§4 of the revised Charter rather than an activity which may be authorised or a simple restriction on other fundamental rights and freedoms (the *secondary* stance).

Neither Belgian legislation nor its courts' controversial case law recognises this fundamental role of the right to participate in strike picketing. This main reason to find a violation of Article 6§4 does not form part of the Committee's rationale for its decision or, therefore, the conclusion which the majority comes to. These are the main reasons for my dissenting view.

IV. In truth, the existence of the unilateral application procedure gives rise to a substantive infringement of the right to strike with regard to one of its essential components, which is the right to take part in strike pickets. Of course this procedure

does have the drawbacks described by the Committee in terms of legal certainty and due process. However, it is the very existence of the procedure which affects the essence of the right (seen from a substantive viewpoint) and hence constitutes a substantive infringement of Article 6§4 of the revised Charter.

In my opinion, dwelling solely on the procedural aspects as the Committee has done (the procedural approach) has clear shortcomings when it comes to making the right to participate in strike pickets effective and ensuring that the Committee's decision is implemented.

In particular, the majority's procedural approach runs the risk of leading the Belgian authorities to feel that it would be enough for the national courts to check on a case-by-case basis that the procedure for each unilateral application is run in accordance with the Committee's case law, which may result in the continued delivery of inconsistent judicial decisions.

A substantive approach, on the other hand, should lead to the immediate amendment of Belgian legislation to ensure that the right to participate in strike pickets has a universal effect and hence does not remain subject to potentially differing *inter partes* decisions given by each national court.

Lastly, in the absence of any irrefutable case law from the highest Belgian courts (instead of specific legislation), the national courts should be able to promote the review of treaty-compatibility through the direct application of the Social Charter as interpreted by the Committee.