

**BUSINESSAFRICA EMPLOYERS' CONFEDERATION'S WRITTEN SUBMISSION**

**IN RESPECT OF THE  
REQUEST FOR AN ADVISORY OPINION OF THE INTERNATIONAL COURT OF  
JUSTICE**

**ON THE RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87**

**16 May 2024**

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## **I. BUSINESSAfrica**

1. BUSINESSAfrica – Employers’ Confederation (‘BusinessAfrica’), founded in 1986, is the recognized continental voice of businesses in Africa. It is the leading advocate for the interests of companies across Africa and actively campaigns on the issues that most influence African enterprise growth and competitiveness. The membership of BUSINESSAfrica is drawn from Employer and Business Member Organizations (‘EBMOs’) spread across all the five regions of the African Continent (7 North African countries, 11 West African countries, 8 Central African countries, East Africa 10, 9 Southern African countries). The EBMOs aim to represent the collective interests of African businesses on the continental and global stages, fostering cooperation, advocacy, and development across the entire African continent.

## **II. BUSINESSAfrica’s Mandate and Objectives**

2. BUSINESSAfrica seeks to influence policy by enhancing the African business voice in international, continental and regional bodies such as the International Labour Organisation (‘ILO’), the United Nations Economic and Social Council (‘ECOSOC’), the African Union Commission (‘AUC’), the African Development Bank, the European Union, the Regional Economic Communities (‘RECs’) in Africa, and other continental bodies.<sup>1</sup>
3. BusinessAfrica is particularly active within the ILO including during the 14<sup>th</sup> ILO African Regional Meeting held in Abidjan, Cote d’Ivoire, where the ILO tripartite constituents from 54 countries were present to discuss topics including skills, youth, informality and gender equality in the realization of decent work in the African region.

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<sup>1</sup> BusinessAfrica, Continental Policy Issues that are of Priority to Employers’ Organisations (2020).

4. In addition, BusinessAfrica is a member of the Steering Committee jointly created by the AU, ILO, the International Organization for Migration ('IOM') and Economic Commission for Africa ('EAC') on Labour Migration Programme in Africa which oversees and validates the overall direction and policy of the Joint Labour Migration Program ('JLMP') in African region.
5. BUSINESSAfrica also promotes the African business' voice in the United Nations system, in particular, in the International Monetary Fund ('IMF'), the World Bank, the World Trade Organization ('WTO'). For example, BusinessAfrica participates in key policy discussions, provide input on policies, and advocates for positions that support the growth and development of businesses in the region. In addition, BusinessAfrica collaborates with international organizations to provide capacity-building support to businesses in Africa. BusinessAfrica has also formed partnerships and coalitions with other stakeholders to amplify their advocacy efforts and to increase their influence with organizations like the OECD.
6. BUSINESSAfrica also seeks to strengthen regional integration to boost economic opportunities, jobs, wealth creation and intra-African trade. To that end, the development of rail, road and energy projects through Public Private Partnerships ('PPPs') to facilitate trade and business links is a key objective. BusinessAfrica has a significant interest in the Africa Continental Free Trade Area ('AfCFTA') given its focus on promoting economic growth and fostering entrepreneurship across the continent and has been actively participating in AfCFTA events and conferences.
7. The objectives of BusinessAfrica are, *inter alia*:<sup>2</sup>
  - a. To work for the promotion of industrial peace in all enterprises in Africa by the development of sound industrial relations, and personnel management practices.
  - b. To provide for consultation between employers' organizations, to ascertain their views on matters of common concern and to represent those views to any intergovernmental body.

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<sup>2</sup> BusinessAfrica, Continental Policy Issues that are of Priority to Employers' Organisations (2020).

- c. To co-operate with all international employers' organizations whose objects align with those of BUSINESSAfrica and to maintain contact with international and regional organizations such as the ILO, the AU (and the AU Labour and Social Affairs Commission), the Arab Labour Ministers' Conference and the IOE, whose mandates include economic development and social progress.
- d. To assist in the formation of national employers' organizations in Africa.
- e. To respect the principles underlying the economic and social order of every African country.
- f. To promote the principle of tripartism in the solution of social and economic problems in collaboration with the Governments and Workers.

### **III. BUSINESSAfrica's Position on the Question before the Court**

8. BUSINESSAfrica's position on the question before the Court is that the ILO Convention 87 ('C87') does not protect the 'right to strike' of Workers and their organisations. The basis for that position is set out further below. However, at the outset, BUSINESSAfrica wishes to emphasise that:

- a. By bringing together representatives of Governments, Employers and Workers in its executive bodies (namely, the International Labour Conference ('ILC') and Governing Body ('GB')), the ILO's founders pioneered the multi-stakeholder dialogue that has substantially gained traction today at the continental, regional, and national level. As will be seen, the principles of social dialogue and tripartism serve as the lifeblood of the ILO and the Africa Continent, forming the bedrock for its priorities, actions, and aspirations and the most effective and legitimate way of managing and regulating labour relations and the world of work.

- b. The African Region places significant emphasis on advancing social dialogue and tripartism in order to foster full, productive, and decent employment throughout Africa. While there is, to an extent, diversity of practice of social dialogue owing to the cultural, historical, economic and political settings straddling Africa, social dialogue (and tripartism) remain a fundamental feature of labour relations and regulation in Africa.
  - c. International Labour Standards are crucial to the employer – employee relationship across Africa, with the social dialogue and tripartism that has led to those International Labour Standards providing them with legitimacy and acceptance amongst divergent groups and interests.
9. BUSINESSAfrica has structured its submissions as follows:
- a. First, BUSINESSAfrica sets out its understanding of the ILO's organs, standard setting and supervisory processes – all of which emphasise the critical function of tripartism and resultant social dialogue within the ILO generally and to the International Labour Standards that the ILO sets and supervises.
  - b. Second, BUSINESSAfrica sets out its position that the right to strike is not covered in C87.
  - c. Third, BUSINESSAfrica addresses the proper interpretation of C87 pursuant to Articles 5, 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (VCLT).
  - d. Fourth, BUSINESSAfrica wishes to provide the court with information and context specific to the Africa Continent, in particular, the diversity of positions on and/or regulation of any 'right to strike' within Africa.

- e. Finally, BUSINESSAfrica wishes to highlight the critical importance of Tripartism and Social Dialogue to labour relations and regulation in Africa.

#### **IV. The ILO – its Organs, Standard Setting and Standards Supervisory System**

##### **1. The ILO**

10. The ILO, founded in 1919, is a unique tripartite organisation which brings together, on an equal footing, Employer, Worker and Government representatives from all of its 187 Member States.<sup>3</sup> Tripartism is one of the four fundamental principles on which the ILO<sup>4</sup> is based and the tripartite nature of the organisation has been widely considered to provide the ILO with a ‘unique advantage’<sup>5</sup> and to provide its actions (and in particular, the International Labour Standards that it sets and supervises) with legitimacy.<sup>6</sup>
11. The ILO is primarily regulated and governed by the ILO Constitution (first set out in Part XIII of the Treaty of Versailles 1919) (‘ILO Constitution’) and its Standing Orders and Rules.<sup>7</sup> Its aims, purposes, principles and mandate are as expressed (and confirmed), in particular, in the preamble to the ILO Constitution, the ILO Declaration of Philadelphia 1944 and the ILO Centenary Declaration for the Future of Work.
12. Article 2 of the Constitution provides that the ILO consists of three main organs: i.) a General Conference (known also as the International Labour Conference) (‘ILC’); ii.) a Governing Body (‘GB’); and iii.) an International Labour Office controlled by the GB (‘Office’).<sup>8</sup>

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<sup>3</sup> ILO, Member States, available at <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/member-states/lang--en/index.htm>.

<sup>4</sup> ILO Declaration of Philadelphia, 1944, Art 1(d).

<sup>5</sup> ILO Declaration on Social Justice for a Fair Globalisation (2008).

<sup>6</sup> Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart, Oxford, 2013), p.7.

<sup>7</sup> See for example, the Standing Orders of the International Labour Conference (as amended) and the Compendium of Rules applicable to the Governing Body of the International Labour Office.

<sup>8</sup> ILO Constitution, Art 2.

13. The ILC is the highest decision-making and most representative organ of the ILO, which plays a role akin to the legislature of the Organisation, indeed it is widely known as the “*International Parliament of Labour*”<sup>9</sup> and referred to as the ILO’s “*supreme body*”.<sup>10</sup> The ILC is composed of four representatives from each (and every) of the 187 Member States, including two Government delegates, an Employer delegate and a Worker delegate.<sup>11</sup> During its annual session in June (‘Session’), the ILC meets for two weeks to carry out its functions, which include, the drafting and adoption of new International Labour Standards in the form of Conventions, Protocols and Recommendations.<sup>12</sup> The ILC takes place in plenary sessions in which each delegate has the right to vote individually<sup>13</sup> and in tripartite committees.<sup>14</sup> It is ILC that has the sole competence and authority under the ILO’s Constitution to adopt International Labour Standards and/or to revise, abrogate or withdraw the same.<sup>15</sup> It follows that the ILC has full authority and competence to clarify the meaning (and therefore the legitimate interpretation) of any existing International Labour Standard through standard setting as and if required.

14. The GB is the executive body of the ILO and is composed of 28 persons representing Governments, 14 persons representing Employers and 14 persons representing Workers.<sup>16</sup> The period of office of the GB is three years and the elections therefore take place on a triannual basis. The GB regulates its own

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<sup>9</sup> ILO, About the ILO, International Labour Conference.

<sup>10</sup> ‘The ILO Governing Body at a glance’, p 2; ‘ILC Guide for the secretariat’, p 1; ILO, Improving the functioning of the International Labour Conference and the Regional Meetings, para 5; ILO, PR No. 1 - Report of the Chairperson of the Governing Body to the International Labour Conference for the year 2011-12, p. 1/ 5; ILO Report of the Working Party on the Functioning of the Governing Body and the International Labour Conference, para 6.

<sup>11</sup> ILO Constitution, Art 3.

<sup>12</sup> Conventions are international treaties that, once adopted by the Conference, are open to ratification by Member States. Ratification creates a legal obligation to apply the provisions of the Convention in question. Recommendations, on the other hand, are intended to guide national action, but are not open to ratification, and are not legally binding. Protocols are a special type of Convention which can only be ratified by a country that has ratified - or ratifies at the same time - the Convention to which it is linked.

<sup>13</sup> ILO Constitution, Art 4.

<sup>14</sup> In which Governments, Employers and Workers are all represented with the exception of the Finance Committee (comprised solely of Governments) and the Selection Committee.

<sup>15</sup> ILO Constitution, Art 19(1) and see Art 44 – Art 52 of the Standing Orders of the International Labour Conference (as amended).

<sup>16</sup> ILO Constitution, Art 2 and 7.

procedure.<sup>17</sup> In practice it meets three times a year to make decisions on various ILO matters, including:<sup>18</sup> i) setting the agenda of the ILC;<sup>19</sup> and ii) the supervision of International Labour Standards.<sup>20</sup> Usually, it is the GB who decides whether an item should be placed on the agenda of the ILC for standard setting,<sup>21</sup> whether by adoption, revision, abrogation or withdrawal of a Convention, Protocol or Recommendation.<sup>22</sup> In deciding on a potential topic for standard setting, the tripartite constituents within the GB attempt - through negotiation and compromise - to reconcile any the divergent interests.

15. The Office is an ILO organ under the control of the GB and its mandate, role and function are as assigned to it by the GB and ILC.<sup>23</sup> The Office is not a tripartite body, it follows that the Office does not represent the views and interests of particular individuals or groups amongst the ILO's tripartite constituents and has a duty to be objective and impartial. The Office's functions are primarily administrative and are intended to execute the decisions of the (tripartite) GB and the ILC.<sup>24</sup> The Office does not have any powers or duties other than those that have been directly assigned to it by the ILO Constitution, the ILC or the GB.

## **2. The Setting and Supervision of International Labour Standards**

16. The setting and supervision of International Labour Standards is a key part of the ILO (and in particular, the ILC's) mandate. International Labour Standards are defined as: "*principles and norms concerning labour and related issues which take the form of Conventions and Recommendations adopted by the annual ILC of the*

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<sup>17</sup> ILO Constitution, Art 7.

<sup>18</sup> For a list of the GB's full duties, see ILO, Compendium of Rules applicable to the Governing Body of the International Labour Office (ILO, Geneva, 2021), paras. 4–6.

<sup>19</sup> ILO Constitution, Art 14(1).

<sup>20</sup> ILO Constitution, Art 19(5)(e), (6)(d), (7)(b)(iv) and (v), Art 22, Art 24, Art 25, Art 26(2), (3), (4), Art 33, Art 34.

<sup>21</sup> Note that the ILC itself may, by two-thirds of the votes cast by the delegates present, decide to include a subject on the agenda of the following session, ILO Constitution, Art 16(3).

<sup>22</sup> ILO Constitution, Art 14(1) and see Art 5.1 – 5.4 and Art 6.2 of the Compendium of rules applicable to the Governing Body of the International Labour Office.

<sup>23</sup> ILO Constitution, Art 2 and 10.

<sup>24</sup> ILO Constitution, Art 10.

*ILO*".<sup>25</sup> To that end, the ILO has developed sophisticated, specialised and carefully balanced standard-setting and supervisory processes.

17. ILO standard-setting is a well-established process involving the ILO's tripartite constituents. Typically, ILO standard-setting is conducted in the 'double discussion procedure' over two consecutive ILC Sessions.<sup>26</sup> However, a 'single discussion' at one ILC Session may be permitted in exceptional or urgent circumstances.<sup>27</sup> The same process is also used for formally revising a Convention either through the adoption of a new self-contained Convention or by supplementing a Convention through the adoption of a Protocol.<sup>28</sup>
  
18. ILC standard setting is the only legitimate and constitutionally permissible procedure for developing internationally recognised labour standards at the ILO.<sup>29</sup> The relevant procedures and rules, which protect legal certainty and ensure that the interests and views of the ILO constituents are duly considered and can be freely negotiated, have been applied ever since the ILO came into existence, regardless of the topic to be regulated. Those rules and procedures entail a carefully balanced participatory process, which, in the usual case, begins at the GB and ends at the ILC. This process enables all ILO tripartite constituents to engage in the negotiation and thus, the determination of, the nature and scope of relevant instruments. As a result, the instruments have the legitimacy conferred by tripartism (and the compromise and consensus that it entails) and are therefore of real and lasting significance at the national level.

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<sup>25</sup> Glossary of Labour Administration and Related Terms, 1999, p.4.

<sup>26</sup> Standing Orders of the International Labour Conference, Art 46; Handbook of Procedures Relating to International Labour Conventions and Recommendations (ILO, Geneva, 2019), para 3; The ILO supervisory systems – A guide for constituents, pp. 4-6.

<sup>27</sup> Handbook of Procedures Relating to International Labour Conventions and Recommendations (ILO, Geneva, 2019), paras 3 and 4; ILO, Compendium of Rules applicable to the Governing Body of the International Labour Office, Article 5.1.5: "*In cases of special urgency or where other special circumstances exist, the Governing Body may, by a majority of three fifths of the votes cast, decide to refer a question to the Conference for a single discussion with a view to the adoption of a Convention or Recommendation*".

<sup>28</sup> ILO Constitution, Art 14(1); Standing Orders of the International Labour Conference (as amended), Arts 44-52; ILO, Compendium of rules applicable to the Governing Body of the International Labour Office, Arts 5.1 – 5.4 and Art 6.2.

<sup>29</sup> ILO Constitution, Art 19.

19. The founders of the ILO recognised that for International Labour Standards to have any real meaning, they had to be effectively implemented in law and practice at the national level. To promote the effective implementation and application of ratified ILO International Labour Standards, the ILO developed a complex system of accountability based on regular supervision through reporting<sup>30</sup> and special supervision through the filing of complaints<sup>31</sup> and representations.<sup>32</sup> For present purposes, the most important ILO supervisory bodies are the CAS, CEACR and CFA, whose mandates and roles are set out below.

### **3. Conference Committee on the Application of Standards (CAS)**

20. The CAS is a standing tripartite committee of the ILC, which is established at each Session of the ILC and consists of ILC delegates representing Governments, Employers and Workers.<sup>33</sup> The CAS is specifically responsible for the supervision of standards-related obligations of ILO Member States and in particular, the application of ratified Conventions. In fulfilling that responsibility, the CAS discusses failures to comply (and/or poor compliance) with ratified Conventions with representatives of the Governments of the Member States concerned. The CAS report, which contains the conclusions of those discussions, is then submitted for to the ILC plenary for its adoption and, if appropriate, particular cases of noncompliance as found by the CAS are discussed at the ILC plenary. The CAS, as

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<sup>30</sup> ILO Constitution, Arts 19(5)(e) and Art 22.

<sup>31</sup> ILO Constitution, Art 26. A complaint can be brought by a Member State or the GB (of its own motion or on receipt of a complaint from a delegate to the ILC) if it considers that another Member State is acting in breach of a ratified Convention. The GB may seek a response from the Government of the Member State concerned but if that is considered unnecessary or the response considered unsatisfactory, the GB will proceed to set up a Commission of Inquiry (usually made up of three individuals who are chosen in their personal capacity for their independence and expertise) to examine, report on the case and make recommendations. The Commission of Inquiry report is then published and the Member States concerned must confirm whether they accept the recommendations or intend to refer the Report to the ICJ (which can affirm, vary or reverse any finding or recommendation of the Commission of Inquiry). Should a member State fail to carry out the recommendations of the Commission of Inquiry, the GB can recommend to the ILC '*such action as it may deem wise and expedient to secure compliance*', see ILO Constitution, Art 33.

<sup>32</sup> ILO Constitution, Art 24. Any Workers' or Employers' organization can make a 'representation' to the ILO alleging that a Member State is not complying with or executing a ratified Convention. If they do so, the GB will establish a tripartite committee from its members to consider the case, seek a response from the Government of the Member State concerned and if unsatisfied with the response, make the representation (and response) public.

<sup>33</sup> Every ILC delegate/adviser can register for the CAS; the ILC Standing Orders provide no numerical limits of participation in the CAS. There is therefore no need for nomination/selection of CAS members, see, for example, the 2023 CAS report at para. 1.

a representative and standing body of the ILC (which is itself, the ILO's "*supreme body*"), whose reports are adopted by the ILC plenary,<sup>34</sup> carries tripartite and supreme authority in the supervision of International Labour Standards.

#### **4. Committee of Experts on the Application of Standards (CEACR)**

21. The CEACR is comprised of 20 members appointed (by the Office with the GB's approval) for their legal expertise and independence. CEACR members are appointed by the GB for renewable terms of three years. The CEACR is not tripartite and is expected to function in full independence, objectivity and impartiality.
  
22. The CEACR's General Survey and Annual Report are not approved by the ILO tripartite constituents. Instead, the CEACR's General Survey and Annual Report are intended to reflect the technical opinion of the members of the CEACR at the relevant time.<sup>35</sup> Further, given the large volume of reports received each year (more than 2000 on ratified Conventions alone), the CEACR heavily relies on the assistance of the Office, and, in particular the International Labour Standards Department ('NORMES'). Indeed, NORMES prepares the draft CEACR General Report, as well as the draft General Survey, which the CEACR then discusses, amends (as required) and adopts at its two weeks of meetings held in late November and early December each year.

#### **V. The Right to Strike is not Protected Under C87**

23. In relation to C87, the CEACR has, over time, developed broad and extensive comments and observations on the scope and limits of the 'right to strike' in the context of C87 and has insisted that Governments conform to those comments and observations.

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<sup>34</sup> Compared to the CEACR, an external body, whose reports are only ever "noted" by the GB.

<sup>35</sup> Monitoring compliance with international labour standards: The key role of the ILO Committee of Experts on the Application of Conventions and Recommendations (2019), p 23.

24. In particular, the CEACR have 'interpreted' Article 3(1) of C87 as a codification of the 'right to strike', on the premise that the 'right to strike' is inextricably linked to and an inevitable corollary of the right to freedom of association.

25. Article 3(1) provides that:

*Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*(emphasis added)

26. BUSINESSAfrica does not agree with the CEACR's 'interpretation', particularly, given the absence of any express reference to the "right to strike" in the actual text of C87. To legitimize this purported progressive development and interpretation of the 'right to strike' by the CEACR would infringe and violate the tripartite consultative mechanisms.

27. The CEACR's actions are not only outside its mandate but also undermine the legitimacy and authority of the ILC, setting a precedent for external bodies to introduce 'interpretations' and rules contrary to the drafters' intentions. The drafters had no intention to regulate the 'right to strike' under C87 but to only address it in the context of a later standard-setting process, either through conciliation or arbitration.

28. In this regard, BUSINESSAfrica recalls that in its 1994 General Survey, the CEACR recognized that: "*the right to strike is not explicitly stated in the ILO constitution or in the Declaration of Philadelphia, nor specifically recognized in Conventions Nos. 87 and 98*",<sup>36</sup> but went on to state that "*in the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to*

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<sup>36</sup> ILC, 81st Session, 1994, Report III (Part 4B), *Freedom of Association and Collective Bargaining*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, pp. 61–78, p. 62, para 142.

*determine the exact scope and meaning of the Conventions on this subject.*<sup>37</sup> This statement testifies to the CEACR's misunderstanding as to its mandate and role.

29. In our view, standard setting would ensure that any International Labour Standard on the 'right to strike' (its modalities, conditions and limits) would have the consideration and support of the ILOs tripartite constituents. It would underscore the importance of upholding tripartism in resolving any dispute that may arise between the social actors so that they can own the outcomes.
30. While there have been several attempts in the ILO to adopt a Convention on the right to strike or to include a right to strike in Conventions on related topics, none have materialized so far. But there is nothing to prevent the ILO from recognising and regulating a "right to strike" through its standard-setting procedures.

## **VI. Application on the Vienna Convention on the Law of Treaties (VCLT)**

31. The effect of Article 5 of the Vienna Convention on the Law of Treaties 1969 ('VCLT'), which applies to C87 on the basis that it is a treaty adopted within an international organization, is that the VCLT is to apply to C87 *"without prejudice to any relevant rules of the organisation"*. The principle *"relevant rules"* of the ILO are the pre-eminence given to tripartite interaction and cooperation in standard setting; the special importance attached to preparatory work; and the ILO's well-established practice of ensuring fidelity to the ILO's Constitution. These must be held in the forefront of the Court's mind when conducting its interpretative task pursuant to Articles 31 and 32 of the VCLT.
32. Articles 31 and 32 VCLT provide the core rules of interpretation that are applicable to ILO Conventions, including C87.

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<sup>37</sup> Ibid, p. 64, para 145.

33. Article 31(1) of VCLT requires that interpretations have to be made “*in accordance with the ordinary meaning to be given to the terms of the treaty in their context ...*” The terms “strike” or “right to strike” are nowhere mentioned in C87. While the term “*activities ... of workers’ organizations*” in Article 3 of C87 could potentially also include strike action, the absence in C87 of any indication on the scope and limits of the right to strike and on who is competent to determine them suggests that the right to strike cannot be seen as part of the ordinary meaning given to the terms in the context of C87. As ILO Conventions create obligations for ratifying States at the international level, it is essential that they use terms that are precise and unambiguous in legal systems worldwide in order to comply with the principle of legal certainty.
34. Article 31(1) of VCLT also requires that the treaty has to be interpreted “*in the light of its object and purpose*”. The Preamble of C87 confirms that the object and purpose of the adoption of C87 was to codify the freedom of association in the wider context of promotion of better working conditions and peace. However, there are no indications that the object and purpose is more specific than that so as to include any regulation of the right to strike.
35. CEACR guidance on the “right to strike” could nevertheless be part of C87 if there had been an “*agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty*” or “*an instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*” But there is no evidence whatsoever that either an agreement or an instrument on the right to strike for the purposes of Article 31(2) of VCLT was made in connection with the conclusion of C87.
36. Furthermore, the interpretations on the right to strike could have become part of C87 if there had been a “*subsequent agreement between the parties regarding the interpretation*” on the right to strike in C87 pursuant to Article 31(3)(a) VCLT. There is no evidence of any agreement amongst State parties to C87 subsequent to the

entry into force of C87 that could be considered as recognition of the CEACR interpretations on the scope and limits of the “right to strike” by all State parties to C87. On the contrary, various State parties to C87 at different occasions over the past decades have acknowledged that C87 does not expressly or impliedly include the right to strike. At no point in time has there been an agreement of all parties to C87 suggesting that C87 contains obligations regarding the right to strike, let alone that it contains obligations incorporating the guidance on the right to strike made by the CEACR. In particular, the 23 February 2015 Government Group Statement<sup>38</sup> does not constitute a “*subsequent agreement between the parties regarding the interpretation of [C87] or the application of its provisions*” pursuant to Article 31(3)(a) VCLT.

37. There is also the possibility under Article 31 that interpretations can become valid through “*subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*” pursuant to Article 31(3)(b) VCLT. However, there has been no such practice amongst State parties to C87 establishing their agreement on the CEACR interpretations on the right to strike. The fact that numerous countries bound by C87 have never aligned their law and practice with all the CEACR interpretations on the right to strike is clear evidence for the absence of such a practice. The fact that a “right to strike” in general exists at national level in many countries does not mean that this right is derived from C87 nor that there is agreement to the CEACR interpretations on the right to strike in C87. It has been pointed out on numerous occasions that there is great diversity among national laws and practices in the area of industrial action owing to the vast differences in industrial dispute settlement systems in member States. Further, the conclusions and recommendations of the CFA do not constitute “*subsequent practice in the application of [C87] which establishes the agreement of the parties regarding its interpretation*” pursuant to Article 31(3)(b) of VCLT.

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<sup>38</sup> ILO, GB.323/INS/5/Appendix II, The Standards Initiative, Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, March 2015.

38. Article 32 VCLT provides for recourse to supplementary means of interpretation, including the preparatory work of the treaty, among others “*in order to confirm the meaning resulting from the application of article 31.*” The preparatory reports for C87 unambiguously prove that there was no intention to regulate the right to strike in C87 but instead to address it in the context of a later standard-setting process on arbitration and conciliation. Consequently, the right to strike was not raised in the discussion of C87. Further, the preparatory work (*‘travaux préparatoires’*) to C87 indicates that it was never conceived to be a detailed regulation of questions related to the freedom of association. Any detailed interpretations, including those developed by the CEACR on the right to strike, therefore are not compatible with the nature and intention of C87 as a “*concise statement of certain fundamental principles*”.

## **VII. Right to Strike in Africa**

39. BUSINESSAfrica notes that, outside the context of the ILO, the ‘right to strike’ has been encapsulated in certain international and national instruments.

40. In the context of Africa specifically, the 1981 African Charter on Human and Peoples’ Rights (‘Banjul Charter’)<sup>39</sup> recognizes freedom of assembly but does not recognize the ‘right to strike’ explicitly:

*Article 10:*

*1. Every individual shall have the right to free association provided that he abides by the law.*

*2. Subject to the obligation of solidarity provided for in 29,<sup>40</sup> no one may be compelled to join an association.”*

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<sup>39</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights*, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981, Arts 10, 11.

<sup>40</sup> See also, *Ibid*, Art 29 provides: “*To preserve and strengthen social and national solidarity, particularly when the latter is threatened*”.

*Article 11*

*Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.*

**1. National Legislation**

41. At the national level within Africa, the position on freedom and association and/or the 'right to strike' is far from homogenous, as the following summaries of the positions in Kenya, Ghana, Uganda, Malawi, South Africa and Nigeri<sup>41</sup> demonstrate:

**i. Kenya**

42. Article 41 of the Constitution of Kenya<sup>42</sup> stipulates the right to fair labour practice, which includes the right "to go on strike". However, Article 24 of the Constitution of Kenya qualifies the right to go on strike by making it explicit that the right, like other elements of the Bill of Rights, are not absolute. In the context of the strikes organised by medical doctors, the Kenyan Cabinet Secretary for Labour and Social Protection recalled the position as follows: "*whereas the framework to exercise Freedom of Association and the Right to industrial action is provided for in the Constitution under Article 41, the right to strike is not absolute and is limited by the Constitution under Article 24 to the extent defined by law.*" (emphasis added).<sup>43</sup> In addition, the Labour Relations Act No 14 of 2007 under Part X (sections 76 – 81) clearly elucidates on matters strikes and lock-outs with section 81(3) prohibiting strikes or lock-outs in essential services.<sup>44</sup>

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<sup>41</sup> All such countries, with the exception of Kenya, have ratified C87.

<sup>42</sup> Kenya, Constitution, 2010.

<sup>43</sup> Perpetua Etyang, 'CS Bore to doctors: End strike and give dialogue a chance' (Nairobi, 12 April 2024) *The Star*.

<sup>44</sup> Kenya, Labour Relations Act, No.14 of 2007, ss 76-81, 81(3).

## ii. Ghana

43. Article 24(3) of the Constitution<sup>45</sup> provides that every worker has a right to form or join a trade union of his choice for the promotion and protection of his economic and social interests. Article 24(4) further provides that restrictions shall not be placed on the exercise of the right conferred by clause (3) of this article except restrictions prescribed by law and reasonably necessary in the interest of national security or public order or for the protection of the rights and freedoms of others.<sup>46</sup> The constitution however makes no express reference to 'right to strike'.
44. The Labour Act 2003 consolidates laws relating to labour, employers, trade unions and industrial relations.<sup>47</sup> The Act expressly provides for procedures and legal effects of lawful strikes and lockouts under sections 159 to 169. Section 159 provides for a seven day notice of intention to strike after parties fail to agree to refer the dispute to voluntary arbitration. The Act underscores the essence of engaging in negotiation, mediation and arbitration proceedings before embarking on industrial action. Section 169 stipulates that any termination of an employment relationship during the conduct of a lawful strike as void. It equally places a form of moratorium on any civil proceedings brought against any worker, employer organization, trade union in respect of any lawful strike or lockout done in conformity with the provisions of other Act. Section 163 of the Act prohibits strikes in respect to essential services. Further, section 81 elucidates that every trade union or employers' organization has the right to: organize its administration and activities and formulate its own programmes; take part in the formulation and become a member of any federation of trade unions or employers' organization and participate in its lawful activities; and affiliate to and participate in the activities of, or join an international workers' or employers' organizations.<sup>48</sup>

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<sup>45</sup> Ghana, The Constitution of Republic of Ghana 1992, art 24(3).

<sup>46</sup> Ibid, art 24(4).

<sup>47</sup> Ghana, Labour Act, 2003, Act 651, ss 159-169.

<sup>48</sup> Ibid., s 81.

### iii. Uganda

45. Industrial action is governed by the Labour Disputes Arbitration and Settlement Act 2006 ('LDAS 2006').<sup>49</sup> An Employee's right to participate in industrial action or to act in contemplation or furtherance of an industrial action in connection with a labour dispute is enshrined under section 30, which further provides that civil action shall not be taken against an employee who participates or acts in contemplation or furtherance of an industrial action in connection with a labour dispute. However, the right is a qualified one and can be limited by the LDAS 2006 or any other law. For example, persons offering essential services can engage in industrial action but subject to several conditions stipulated under section 34 of the Act. There has to be a notice in writing of the intended participation in the withdrawal of labour from an essential service. The notice can be given not earlier than 14 days before the action and not later than 22 days from intended collective withdrawal of labour. Failure to adhere to these procedural requirements may attract penal sanctions pursuant to section 29 of the Act. Finally, the overriding objective of industrial relations in Uganda is consultation between the Ministry, the Federation of Employers and the Trade Unions for equitable and amicable resolution of disputes. Therefore, where there is a reference clause to arbitration and conciliation in a collective agreement, parties ought to submit to that process before seeking remedy at the industrial court under section 6 of the Act.

### iv. Malawi

46. Pursuant to section 46 of the Labour Relations Act 2014, Chapter 54:01: "*where there is an unresolved dispute under section 45 either party may take action by way of a strike or lockout any time after the dispute is deemed unresolved*".<sup>50</sup> However, that right is subject to strict procedural and/or dispute resolution requirements contained in sections 44-45 of the Act which requirements have been considered by the Malawi Courts to represent the laws policy "to make recourse to strike action a

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<sup>49</sup> Uganda, Labour Dispute (Arbitration and Settlement) Act, 2006.

<sup>50</sup> Malawi, Labour Relations Act, 31 December 2014, s 46.

matter of last resort” in the case of *S v Council, University of Malawi |Ex Parte: University of Malawi Workers Trade Union (2015)*.<sup>51</sup> It is also noteworthy that strike or lockout are not permitted for employers or employees carrying on or engaged in an essential service under section 47 of the 2014 Act.

#### **v. South Africa**

47. Section 23(2)(c) of the Constitution of the Republic of South Africa 1996<sup>52</sup> accords all employees the right to strike, as elaborated under the 1995 Labour Relations Act ('LRA').<sup>53</sup>
48. Section 64 of the LRA 1995 provides for the Right to strike and recourse to lock out if the issue in dispute has been referred to a council or to the Commission as required by the Act, and a certificate stating that the dispute remains unresolved has been issued; or a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission.<sup>54</sup>
49. In the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, trade union that is a party to the dispute, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated.<sup>55</sup>

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<sup>51</sup> Malawi, *S v Council, University of Malawi|Ex Parte: University of Malawi Workers Trade Union* (Misc. Civil Cause 1 of 2015) [2015] MWHC 493 (2 March 2015).

<sup>52</sup> South Africa, Constitution, 1996, s 23(2)(c).

<sup>53</sup> South Africa, Labour Relations Act 66 of 1995.

<sup>54</sup> *Ibid.*, s 64.

<sup>55</sup> *Ibid.*, s 64 (b).

50. Section 67 sets out Strike or lock-out in compliance with this Act while section 68 sets out Strike or lock-out not in compliance with this Act which, may constitute a fair reason for dismissal.<sup>56</sup>

#### **vi. Nigeria**

51. Section 40 of the 1999 Constitution of the Federal Republic of Nigeria as amended provides that: “[e]very person shall be entitled to assemble freely and associate with other persons, and in particular, he may form or belong to any political party, trade union, or any other association for the protection of his interests”.<sup>57</sup>

52. Nigerian labour laws strengthen and expound the constitutional provisions. In particular, Section 31 (6) of the Trade Unions Act CAP T14, Laws of the Federation of Nigeria (LFN), 2004<sup>58</sup> prohibits industrial action and proceeds to put conditions on when it can be exercised. This provision provides that no person, trade union or employer shall take part in a strike or lock out or engage in any conduct in contemplation or furtherance of a strike or lock out unless- (a) the person, trade union or employer is not engaged in the provision of essential services; (b) the strike or lock out concerns a labour dispute that constitutes a dispute of right; (c) the strike or lock out concerns a dispute arising from a collective and fundamental breach of contract of employment or collective agreement on the part of the employee, trade union or employer; (d) the provisions for arbitration in this Act have first been complied with.

53. Section 4 of the Trade Disputes Act 2004<sup>59</sup> provides for the procedure before disputes. It recognizes resolution of disputes as per clauses provided for in agreements (if any) and under section 4(2) provides that if the method of settling disputes under the agreement fails or no such agreed means of settlement exists, the parties shall within seven days of the failure (or, if no such means exists, within

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<sup>56</sup> Ibid., s 67-68.

<sup>57</sup> Nigeria, Constitution 1999, s 40.

<sup>58</sup> Nigeria, Trade Union Act, s 31(6).

<sup>59</sup> Nigeria, Trade Dispute Act 2004, s 4.

seven days of the date on which the dispute arises or is first apprehended) meet together by themselves or their representatives, under the presidency of a mediator mutually agreed upon and appointed by or on behalf of the parties, with a view to the amicable settlement of the dispute.

54. Section 18 of the Trade Disputes Act<sup>60</sup> 2004 prohibits lock-outs and strikes in connection with any trade dispute where (a) the procedure specified in section 4 or 6 of this Act has not been complied with in relation to the dispute; or (b) a conciliator has been appointed under section 8 of this Act for the purpose of effecting a settlement of the dispute; or (c) the dispute has been referred for settlement to the Industrial Arbitration Panel under section 9 of this Act; or an award by an arbitration tribunal has become binding under section 13(3) of this Act; or the dispute has subsequently been referred to the National Industrial Court under section 14(1) or 17 of this Act; or the National Industrial Court has issued an award on the reference.

## **2. The Position of the Courts within Africa**

55. BUSINESSAfrica acknowledges that the importance of the 'right to strike' has been underscored by some of the higher courts within Africa. Decisions of these Courts have confirmed that the 'right to strike' is by its nature a qualified right which may (and must) justifiably be limited in certain situations. Further, these judgments show that the different nations of Africa have taken divergent approaches to both the conditions on the lawful exercise of the 'right to strike' and the limits on any 'right to strike'. Indeed, many African nations take the view that, in light of their socio, political, geographical and economic contexts, strike action should only be utilised as a matter of last resort.

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<sup>60</sup> Nigeria, Trade Dispute Act 2004, s 18.

## i. Malawi

56. In *S v Council, University of Malawi* [Ex Parte: *University of Malawi Workers Trade Union* (Misc. Civil Cause 1 of 2015) [2015] MWHC 494 (27 July 2015),<sup>61</sup> the High Court of Malawi considered the ‘right to strike’ and emphasised that it is a measure of last resort as demonstrated by the “*very rigorous*” procedure and obligations of conciliation<sup>62</sup> that were imposed by national legislation which workers must “*scrupulously*” comply with. In reaching that view, the High Court of Malawi recalled that:

*The law is not blind to the real and potential adverse consequences of strike action, but it also recognizes its fundamental importance to humanity, and guarantees it as a fundamental human right. Regard being had to the competing interests and tensions inherent in the very nature of strike action, the law strictly regulates how and when it may be exercised. The law's policy is to make recourse to strike action a matter of last resort.*”

[...]

*The length and magnitude of the procedural requirement before parties proceed on lawful strike may appear too onerous, but the law deliberately made them onerous because, the policy of the law is to require that strike action must truly be an action of last resort by employees under organized labour. It is the law, and not this Court, that spells out these requirements.* (emphasis added)<sup>63</sup>

## ii. Nigeria

57. The National Industrial Court of Nigeria has equally discouraged industrial action due to its effects of public and general economic growth of the country. For example, in *Federal Government of Nigeria & Minister of Education Academic*

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<sup>61</sup>Malawi, *S v Council, University of Malawi* [Ex Parte: *University of Malawi Workers Trade Union* (Misc. Civil Cause 1 of 2015) [2015] MWHC 494 (27 July 2015).

<sup>62</sup> *Ibid.*, para 13.

<sup>63</sup> *Ibid.*, paras 8, 9, 14.

*Staff Union of Universities (ASUU) 2022*<sup>64</sup> the National Industrial Court of Nigeria issued an interlocutory injunction restraining teachers from taking further steps and doing any act or otherwise continuing with the indefinite strike. In doing so, the court took into consideration the larger interests of the public, particularly the students whose interests were being harmed by the protracted strike.<sup>65</sup>

## **VIII. The Importance of Social Dialogue and Tripartism in Africa**

58. Social dialogue holds immense significance within Africa and is critical to the regulation of work and resolution of labour disputes. National laws and international conventions, such as, C87, and the Right to Organise and Collective Bargaining Convention, 1948 ('C98') constitute the fundamental pillars of social dialogue within any society and African countries have fully embraced social dialogue through freedom of association and the right to collective bargaining.

59. To assist the Court's understanding of Africa's reliance on and embrace of social dialogue as a key means of resolving labour disputes and adopting labour standards, BUSINESSAfrica has opted to highlight some national situations within Africa in South Africa, Kenya, Ghana, and Nigeria.

### **1. South Africa**

60. On 18 February 1995, South Africa established the National Economic Development and Labour Council ('NEDLAC')<sup>66</sup> as an apex social dialogue institution whose aims were (and are), *inter alia*.<sup>67</sup> (i) to strive to promote the goals of economic growth,

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<sup>64</sup> Nigeria, *Federal Government and Minister of Education v. Academic Staff Union of Universities*, NICH.ABJ/270/2022, 28 March 2023, para 22.

<sup>65</sup> Nigeria, *Federal Government and Minister of Education v. Academic Staff Union of Universities*, NICH.ABJ/270/2022, 28 March 2023, para 22.

<sup>66</sup> National Economic Development and Labour Council Act, Act 35 of 1994, s.2.

<sup>67</sup> National Economic Development and Labour Council Act, Act 35 of 1994, s 5.

participation in economic decision making and social equity; and (ii) to seek to reach consensus and conclude agreements on matters relating to social and economic policy. NEDLAC brings together representatives from government, labour, business and community organizations to cooperate - through problem-solving and negotiation – on the socio-economic challenges facing South Africa.

61. Over the years NEDLAC has succeeded in establishing social dialogue as an accepted and invaluable part of South Africa’s policy making and national decision-making system. For example:

- a. It has given birth to a range of tripartite bodies such as the Commission for Conciliation, Mediation and Arbitration (‘CCMC’) (1995), and the National Minimum Wage Commission (2019).
- b. NEDLAC spearheaded social dialogue in line with South Africa’s vision of just transitions (i.e. a just transition towards a sustainable and inclusive economy that generates decent jobs, being aware of the potential impacts of clean energy transitions on employment sector).<sup>68</sup>
- c. A protest cannot be protected unless the parties have first engaged in a NEDLAC Process of negotiation to resolve the protest. Section 77 of the Labour Relations Act seeks to protect protest action to promote or defend socio-economic interests of workers after giving disputing parties an opportunity to find a resolution through a NEDLAC process. A NEDLAC Standing Committee exists to oversee this process made up of social partners from Business, Community, Government and Labour. Parties can only go on strike if they have exhausted the NEDLAC Process of social dialogue. See section 5(1)(d) of the NEDLAC Code of Good Practice: Protest Action to Promote or Defend Socio-economic Interests of Workers.<sup>69</sup>

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<sup>68</sup> NEDLAC, Nedlac Connect Newsletter August/ September 2023.

<sup>69</sup> NEDLAC, Code of Good Practice on Protest Action to Promote or defend Socio-Economic Interests of Workers (September 2022).

62. A further example of the critical importance of tripartism and social dialogue within South Africa's labour regulation and Labour dispute resolution is the ground-breaking settlement agreement on employment equity signed by the South African Government and the Trade Union 'Solidarity' on 28 June 2023.<sup>70</sup> The Settlement agreement arose after a nine-month mediation process initiated by the ILO and facilitated by the CCMA. This mediation resulted from a complaint to the ILO from Solidarity in 2021.<sup>71</sup> In its complaint, Solidarity alleged that the South African Government had failed to observe ILO Discrimination (Employment and Occupation) Convention, No 111 ('C111') by applying affirmative action too rigidly (and without sufficient nuance) in South Africa. Business Africa associates itself with views of the South Africa Employment and Labour Minister, who stated:

*the signing of the Settlement Agreement with the Solidarity Trade Union today (28 June 2023), is a pinnacle in the history of social dialogue and employment equity not only in this country, but also globally, where the Government and the workers' organisation / trade union with opposing policy views are able to reach an amicable settlement.*<sup>72</sup>

## 2. Kenya

63. The structure of Kenya's social dialogue reflects the interplay between the country's historical background, Kenya's current socio-economic conditions and finally the effect of global influences. The historical backdrop must be seen from the context of the trade unions and employers' organisations being part of the push towards the attainment of political independence in the late 1950s running to independence in 1963.

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<sup>70</sup> Loubser, 'South Africa: Ground-breaking Settlement Agreement on Employment Equity Signed', (Bowman's Law, 29 June 2022); Gvoernment of South Africa, 'Employment and Labour: Solidarity Trade Union Settlement Agreement' (28 June 2023).

<sup>71</sup> ILO, CEACR Observation , 2018.

<sup>72</sup> Gvoernment of South Africa, 'Employment and Labour: Solidarity Trade Union Settlement Agreement' (28 June 2023).

64. Kenya's tripartite approach involves Government, Employers and Workers. In this tripartism setup: (a) the Government is represented by the Ministry of Labour which is the focal government agency that is responsible for operationalizing the tripartite mechanism when dealing with labour and related social issues; (b) Employers are represented by the Federation of Kenya Employers ('FKE') which is the national umbrella organization for employers and a member of the East African Regional Employers' confederation; and (c) Central Organisation of Trade Unions ('COTU'), which is the apex body for Workers' unions in Kenya.
65. As intimated, the Tripartite model of social dialogue is a historical concept in Kenya. It birthed the Industrial Relations Charter<sup>73</sup> of 1962 (as amended in 1984) which is the tripartite foundation on which industrial relations in Kenya are premised, the Charter having been negotiated by the Government, Workers and Employers. As the Kenyan Industrial Court has noted that:

*[t]he Industrial Relations Charter is a product of tripartite engagement. It is the glue that has bound Employers, Employees and the Government for the life of the Republic of Kenya. The Charter has been used widely by the stakeholders in mediating the parameters of industrial relations. It has widely been applied by the Industrial Court in defining the rights and obligations of parties. Through its wide acceptance, it has become a cornerstone of Industrial Jurisprudence.*<sup>74</sup>

66. Similarly, in *Teachers Service Commission v Kenya National Union of Teachers (KNUT); Ministry of Labour & Social Protection (Interested Party)* [2019] eKLR, Kenya's Employment and Labour Relations Court considered that:

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<sup>73</sup> Kenya, The Labour Relations Act 2007, s. 2 "A tripartite agreement between the Government, the most representative employers' organisation, and the most representative employees' organisation for the regulation of labour and industrial relations in Kenya."

<sup>74</sup> Kenya, *Kenya Game Hunting and Safari Workers Union v Lewa Wildlife Conservancy Limited* [2014] eKLR at §9.

*[t]he Industrial Relations Charter is a tripartite agreement that nevertheless falls short of law or legislation. However, the Charter draws its relevance and binding force by reason of the parties' agreement or consent. The Industrial Relations Charter is an agreement of general application for the regulation of labour and industrial relations in Kenya. In the opinion of the Court... the provisions of the Charter apply where the recognition agreement and collective bargaining agreement (CBA) are silent and have not specifically provided for the issue at hand or the Charter serves by way of filling the gaps not agreed upon by the parties and further as a point of reference in concluding the recognition agreement and CBA in individual cases.*<sup>75</sup>

67. Not only is the Industrial Relations Charter the Product of Tripartite social dialogue but the Labour Laws currently in place in Kenya arose from the work of a tripartite taskforce constituted by the Attorney General in or around May 2001.<sup>76</sup> The taskforce comprised of members from the Government, FKE and COTU whose terms of reference were:

*to examine and review all the labour laws including the Employment Act (Cap.226); the Regulation of Wages and Conditions of Employment Act (Cap. 229); the Trade Unions Act (Cap. 233), the Trade Disputes Act (Cap. 234), the Workmen's Compensation Act (Cap. 236), the Factories Act (Cap. 514) and make recommendations for appropriate legislation to replace or amend any of the labour law statutes; To make recommendations on proposals to reform or amendment of labour laws to ensure that they are consistent with the Conventions and Recommendations of the International Labour Organization to which Kenya is a party; and To make*

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<sup>75</sup> Kenya Law, *Teachers Service Commission v Kenya National Union of Teachers (KNUT)* [2019] eKLR

<sup>76</sup> ILO, National Labour Law Profile: Kenya, 17 June 2011.

*recommendations on such other matters related to or incidental to the foregoing.*<sup>77</sup>

68. Following their review, the Taskforce handed over a set of five new draft laws to the Attorney General in April 2004. Those draft laws were taken through the legislative process and were later enacted into law to replace the Kenya's previous Labour laws.

69. The Kenyan Courts likewise encouraged conciliation and dialogue between the tripartite constituents throughout the COVID 19 pandemic. For example:

- a. In *Kenya Aviation Workers Union v Kenya Airways PLC; Central Organization of Trade Disputes (K) & another (Interested Party) [2020] eKLR*,<sup>78</sup> a consolidated suit was instituted by a number of Unions who opposed pay cuts and the implementation of unpaid leave because of business loss attributed to COVID – 19, but the remedy determined by the Employment and Labour Relations Court was for the parties to submit to a conciliation process within 30 days of the Court's judgment. In effect, the Court upheld the sanctity of social dialogue in matters where it would have otherwise declared the rights of the workers to resort to industrial action.
- b. In *Kenya Union of Commercial, Food and Allied Workers v Tusker Mattresses Limited [2020] eKLR*,<sup>79</sup> the Court, in dealing with an application for an injunction made by the petitioner Unions, considered the 2020 tripartite agreement referred above and, as an interim measure, *inter alia*:  
(i) restrained the Respondent Employers from effecting any further wage or salary reduction in respect of its unionised Employees; and (ii) ordered that:

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<sup>77</sup> Ibid, p.6.

<sup>78</sup> Kenya, *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others* [2012] eKLR.

<sup>79</sup> Kenya, *Kenya Union of Commercial, Food and Allied Workers v Tusker Mattresses Limited* [2020] eKLR.

*[p]ending the hearing and determination of the suit herein or further orders by the Court, the respondent to renegotiate and consult with the claimant in good faith towards amicable resolution of the dispute herein as per the recognition agreement and the tripartite agreement dated 30.04.2020 and to do so in 10 days from the date of this ruling with the view that the rate of agreed monthly pay or salary to be due to the unionisable employees to be paid according to the renegotiation agreement between the parties as may be appropriate and starting end of July 2020; and failing such agreement parties are bound by the terms in the CBA and the applicable law.<sup>80</sup>*

### **3. Ghana**

70. Ghana has a long history of social dialogue, pre-dating its political independence. However, the nature and functions of social dialogue have primarily been shaped by prevailing political and economic demands<sup>81</sup> - whereas multi-party democracy has promoted spaces for enhanced social dialogue, military dictatorships have stifled social dialogue in the country. The relationship among social partners has thus varied from an adversarial to a cooperative one under different political and economic regimes. In recent decades, extensive multi-stakeholder, national consultations, and discussions have characterised Ghana's constitutional review processes. As will be seen, the process of developing Ghana's labour law is a good example of social dialogue in practice.

71. The current legislative and institutional framework for tripartism and social dialogue in Ghana is defined by both the 1992 Constitution<sup>82</sup> and the Labour Law Act 2003,

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<sup>80</sup> Ibid.

<sup>81</sup> Prince Asafu-Adjaye, *Developmental Relevance of Social Dialogue in Ghana*, Labour Research and Policy Institute - Ghana TUC.

<sup>82</sup> Ghana, The Constitution of Republic of Ghana 1992.

Act 651.<sup>83</sup> In addition, Ghana has ratified both the Tripartite Consultation Convention (C144) and C87 which have further influenced social dialogue in the country. This is evidenced under Article 21(1)(e) of the 1992 Constitution of Ghana which guarantees freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest.<sup>84</sup>

72. The Labour Act (Act 651) under section 79 guarantees every worker the right to form or join a trade union of his or her choice for the promotion and protection of the worker's economic and social interests. Several institutions are also established under the Labour Act for the conduct of social dialogue in the country.<sup>85</sup>

73. A study undertaken by Trade Union Development Cooperation Network on the contribution of social dialogue to development particularly in Uruguay, Indonesia and Ghana published in 2016, highlighted the developmental relevance of social dialogue in Ghana.<sup>86</sup> It noted, in particular, Ghana's effective use of social dialogue in the formulation of the National Pensions Act 2008, Act 766 which arose following concerns being raised by trade unions and workers and which, following tripartite discussion and negotiation, reformed pensions in Ghana and introduced a contributory three-tier pension scheme for enhanced pensions in the country. This is just one example, of many, where the the adoption and application of social or labour standards, through social dialogue, has helped reduce the inequalities that are likely to follow economic growth.

74. BUSINESSAfrica's position is that the importance of social dialogue for inclusive economic and social development outcomes cannot be overemphasized. Ghana has derived notable gains and/ or benefits from the long standing tripartism and social dialogue, such as the National Pensions Act 2008, Act 766 and the increase in the national minimum wage through the National Tripartite Committee. The

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<sup>83</sup> Ghana, Labour Act 2003 (Act 651).

<sup>84</sup> Ghana, The Constitution of Republic of Ghana 1992, art 21(1)(e).

<sup>85</sup> Ghana, Labour Act 2003 (Act 651), s 79.

<sup>86</sup> Ghana, National Pensions Act, 2008, Act 766.

National Tripartite Committee in line with Section 113 (1) (a) of the Labour Act, 2003 passed an increase in the national daily minimum wage by 22%, which became effective on 1<sup>st</sup> January 2024.<sup>87</sup> These gains cannot be underestimated in circumstances where the majority of Ghanaians are making a living from the informal economy where wages are low and working conditions are poor.

#### 4. Nigeria

75. In Nigeria, the Nigeria Employers' Consultative Association ('NECA') has been at the forefront in advocating for social dialogue in light of the industrial strife in Nigeria. For example, the theme of the second Annual National Labour Adjudication and Arbitration Forum<sup>88</sup> organized by the NECA, was "*Strengthening Tripartism and Social Dialogue (Including Alternative Dispute Resolution Mechanism) for Sustainable Industrial Relations Systems in Nigeria*". The forum as a platform for social partners and stakeholders promotes fair and just resolution of labour disputes, fosters harmonious employer-employee relations, and upholds the social partners shared commitment to a productive and progressive labour eco-system. It has also encouraged meaningful discussions between experts from Academia and the public and private sectors to share their perspectives on the importance of dispute resolution mechanisms that uphold the rights and welfare of workers while supporting sustainable development and growth for business.<sup>89</sup>

76. At the 2024 Forum, President of NECA, Mr Taiwo Adeniyi, noted that the country had witnessed several Labour upheavals in recent times and stated that:

*[w]e must, therefore, remind ourselves to embrace Social Dialogue and the Alternative Dispute Resolution Mechanisms. This include mediation, adjudication, or arbitration that have been established by both Local and International Labour institutions. These mechanisms are based on the*

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<sup>87</sup> Ghana Ministry of Employment and Labour Relations, *Communiqué by the National Tripartite Committee (NTC) on the 2024 National Daily Minimum Wage (2024)*.

<sup>88</sup> Nigeria, [National Labour Adjudication and Arbitration Forum, 2023 (Part 1)] 2023.

<sup>89</sup> Editorial Board, *'Peace accord, foreign observers: What relevance?'*(7 March 2023) *The Guardian*. Accessed 14 April 2024.

*principles of impartiality, transparency, and adherence to legal frameworks which are upheld by the International Labour Organisation (ILO) and our Labour Laws. We recommend that employers and employees along with government consistently engage in social dialogue to improve Industrial harmony in the country.*<sup>90</sup>

## **IX. Conclusion**

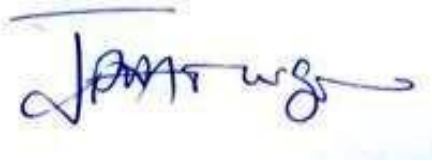
77. In conclusion, the benefits of social dialogue cannot be overstated. At the national, industry, company, or workplace level, social dialogue serves as a foundation for good governance, social development and economic growth. Furthermore, it generates a better understanding of the divergent views expressed by the various stakeholders.
78. BUSINESSAfrica respectfully submits that the ILO and its tripartite constituents need the necessary room for dialogue and cooperation to move closer to consensus, including on the issue of the right to strike. Standard setting on the 'right to strike' would ensure that all ILO constituents could actively engage in the process, that any solution achieved would be based on consensus or at least a broad majority, and finally that any outcome adopted is universally relevant and accepted.
79. BUSINESSAfrica is grateful to the Honorable Court for taking its submissions into account when considering the question put and respectfully invites the Honorable Court to answer that question in the negative - the right to strike of workers and their organizations is plainly not protected under C87.

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<sup>90</sup> Joan Nwagwu 'Industrial harmony: NECA calls for consistent engagement in social dialogue' (Nigeria, 14 February 2024).

**BUSINESSAfrica** Employers Confederation humbly submits.

This 16 Day of May 2024

A handwritten signature in blue ink, appearing to read 'J Mugo', with a horizontal line above the first part of the name.

**Jacqueline Mugo**  
**Secretary General**  
**BUSINESSAfrica**