BEFORE THE INTERNATIONAL COURT OF JUSTICE

REQUEST BY THE INTERNATIONAL LABOUR ORGANISATION FOR AN ADVISORY OPINION ON THE FOLLOWING QUESTION: 'IS THE RIGHT TO STRIKE OF WORKERS AND THEIR ORGANISATIONS PROTECTED UNDER THE FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948 (NO. 87)

WRITTEN COMMENT ON STATEMENTS MADE BY INTERNATIONAL ORGANISATIONS AND STATES

SUBMITTED BY

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

16 SEPTEMBER 2024

CONTENTS

I. INTRODUCTION

1. The Government of the Republic of South Africa wishes to avail itself of the opportunity to briefly comment on the Statements filed by the International Organisation of Employers (IOE), Business Africa, and certain of the submissions made by one or more Governments.

II. BRIEF RECAPITULATION OF THE GOVERNMENT'S STATEMENT ON THE WORDING AND LOGIC OF CONVENTION 87

2. Although the IOE, as do other States, make reference to the dictionary meaning of the terms "activities" and "programmes" in their Statements, there is no need to do so. The meaning of both terms draw their content from the context in which these words find themselves and the object and purpose of the Convention.

3. Firstly, the activities and programmes are those of worker and employer organisations, not political parties or churches or other organisations of civil society. The activities and programmes of workers' and employers' organisations are determined by their objects and purpose which is to "further and defend the interests of workers or of employers" (article 10). The conjunction *"or"* is important because it recognises that although the rights of the organisations to pursue their interests are similar, their interests may not be.

4. Secondly, the activities and programmes of worker and employer organisations are collective activities – hence the referral in article 8 to the obligation on these organisations in exercising the right to organise their activities and programmes to respect the law like other "organised collectivities".

5. Thirdly, at the time the wording of the Convention was formulated, and ratified by States, those activities were understood to include recruiting members, establishing and joining federations, affiliating with international organisations, expressing their views in public, engaging in collective bargaining, exerting economic pressure on each other (in the form of strikes or lockouts) engaging

in demonstrations, protests, petitions to pressure government – all of which were in order to "promote or defend the interests of workers or employers".

6. Fourthly, since the very nature of these collective activities require regulation to ensure their orderly and peaceful pursuit, the principal reason for article 8 is the requirement that worker and employers and their respective organisations "respect the law of the land" like any other "organised collectivity".

7. In conclusion, the Convention is a carefully constructed interlocking set of provisions, indicating that rights in article 3(1) are not only designed to provide for the internal autonomy of these organisations but also to provide for their right to lawfully pursue their objects and purpose. While there is a duty on the organisations to respect the law in pursuing those objects and purpose, the law itself may be such as to impair those rights.

8. The context also requires an analysis of Convention 98. If Convention 87 establishes rights to freedom of association with specific reference to the lawful exercise of those rights, Convention 98 requires government to put "machinery" in place to protect workers from acts of anti-union discrimination, protection against acts of interference as between worker and employer organisations, and "measures to promote the full development and utilisation of machinery for voluntary negotiation between employers or their organisations and worker organisations with a view to the regulation of terms and conditions of employment by means of collective agreements".

9. To that extent Convention 98 provides part of the regulatory environment envisaged in Convention 87 for the workers, employers and their respective organisations to exercise the right to freedom of association envisaged in article 3.

III. COMMENT ON THE IOE STATEMENT THAT CONVENTION 87 ONLY GUARANTEES THE INTERNAL AUTONOMY OF WORKER AND EMPLOYER ORGANISATIONS

10. The IOE and several States advance an interpretation to the effect that there is a 'conceptual thread' running through article 3 to the effect that the right to engage in 'activities' is limited to the organisation establishing and ordering itself only – 'the ability of an organisation to organise itself *per se*'. Accordingly, the term 'activities' does not 'relate to *all* activities, but instead those only concerning the ability of the organisation to come together as a coherent body, govern itself and conduct activities amongst members'.

11. There are several reasons why the terms 'activities' and 'programmes' are not limited to the purely internal activities of the organisations.

12. Firstly, for the reasons advanced above, the ordinary meaning of the terms in their context must be interpreted to include the collective and external activities and programmes of worker and employer organisations.

13. Secondly, the Preamble specifically states that the principle of freedom of association is "a *means* of improving conditions of labour" (emphasis added). The principle accordingly can only be fully realised if an organisation's right to organise its activities and formulate its programmes includes the kinds of activities and programmes that can improve the conditions of labour.

14. Thirdly, if the rights in article 3 paragraph 1 are limited only to the establishment, internal administration and internal functioning of worker or employer organisations, it would mean that although the organisation can be established without government interference, it would not have the right to lawfully pursue its objects or purpose. It is like a right to establish a company but no right to pursue its lawful business. Without the right of an organisation to lawfully pursue its object or purpose, there would be no reason to establish it.

15. Fourthly, the act of organising is an external activity. Workers are recruited outside factory gates or at public meetings or through public statements in the media – all of which would have been known at the time that the Convention

was agreed and for which the enabling "machinery" envisaged in article 4 of its sister Convention 98 requires the State to establish.

16. Fifthly, "improving the conditions of labour" is an external activity – whether through collective bargaining or through mobilising members in order to pressure government. Why would a detailed set of rights to establish an organisation be guaranteed in Convention 87, articles 2, 3 and 4 of Convention 98 protect workers from anti-union discrimination, establish enabling "machinery' to ensure the right to organise and to encourage and promote voluntary negotiations between employers or employers' organisations and workers' organisations, if a workers' organisation has no right under Convention 87 to engage in its principal purpose of "improving conditions of labour" through negotiating and concluding collective agreements?

17. All of which accords with (a) the Preamble to Convention 87 namely to improve the conditions of labour and (b) the Preamble to the ILO Constitution, which specifically holds that peace and harmony are imperilled by social injustice and accordingly requires improvement in conditions of labour through regulation, freedom of association and education.

IV. A COMMENT ON THE STATEMENT MADE BY THE IOE AND THE GOVERNMENT OF JAPAN THAT BECAUSE BOTH WORKER AND EMPLOYER ORGANISATIONS HAVE THE SAME RIGHTS, A RIGHT, THAT ONLY A WORKER ORGANISATION CAN EXERCISE (THE RIGHT TO STRIKE), IS NOT COVERED BY THE CONVENTION

18. In its Statement the IOE argues that the rights accorded under article 3 are of equal value to both workers' and employers' organisations and accordingly the right to strike is "plainly not such a right to organise with equal value".

19. In its Statement the Government of Japan argues that because the wording in article 3 paragraph 1 states that "[w]orkers' *and* employers' organisations" (emphasis added) are the bearers of the rights, the only rights contemplated in the article are those that can be attributed to *both* workers' and employers'

organisations. Since the right to strike is a right that only a workers organisation can exercise, it is not a right contemplated in the article. There are several reasons why this construction does not hold water.

20. A strike is the cessation of work initiated by the trade union in order to put pressure on the employer either to accede to its demands or to prevent the employer from imposing its demands. Both sides are exerting economic pressure on the other – the employer's resistance places pressure on the workers and the workers persistence places pressure on the employer. As an exercise of economic pressure imposed on both sides, it does not matter who initiates the cessation of work since both are exerting pressure on each other. A strike is a cessation of work initiated by employees or employer organisations. A lock out is a cessation of work initiated by employers or employer organisations.

21. Accordingly, the "activities" and "programmes" of employer organisations has been recognised as including an employer's or an employers' organisation's exercise of economic pressure in the form of a lock out or protest action.

22. The Committee on Freedom of Association has recognised the right of employers to lockout in its findings in respect of a Norway complaint[1] and to take protest action arising from employer organisation complaints concerning Uruguay[2] and Venezuela[3].

23. In the Venezuela complaint the IOE on behalf of the Venezuelan Federation of Chambers of Commerce and Manufacturers' Associations alleged a raft of allegations against the Government including "repressive and hostile action against Venezuelan employers and their officials in order to restrict and obstruct the exercise of civic, trade union and employers' organisations' freedoms that

---

[1] Report No 372, June 2014, *Case No 3038 (Norway).* https://normlex.ilo.org/dyn/normlex/en/f?p=1000:70006:0::NO:70006:P70006_COMPLAINT_TEXT_ID,P70006_PARAGRAPH_NO:3173689,470

[2] Report No 348, November 2007, *Case No 2530 (Uruguay)*. https://normlex.ilo.org/dyn/normlex/en/f?p=1000:70006:0::NO:70006:P70006_COMPLAINT_TEXT_ID,P70006_PARAGRAPH_NO:2910501,1190

[3] Report No 334, June 2004, *Case No 2254 (Venezuela (Bolivian Republic of).* https://normlex.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2907673

are necessary to defend their interests, as well as their right to demonstrate peacefully". After finding that the national civic work stoppage was an act of protest by the Association for employer reasons, the Committee held:

> "Consequently, the Committee cannot share the point of view of the Government that this national civic work stoppage had nothing to do with issues relevant to employers' organizations. Moreover, the Committee recalls the principle that "in a situation in which workers' organizations *[and employers' organizations]* consider that they do not enjoy the freedoms essential for the performance of their functions, they should be entitled to demand the recognition of these freedoms and such claims should be considered to form part of legitimate trade union activities."[4] (emphasis added)

24. Accordingly it is not correct to state that the right to strike or more properly the right to engage in industrial action is limited to worker organisations only. A proper construction then of 'activity' or 'programme' includes industrial action on the part of both worker and employer organisations.

25. CEACR has in its observations in respect of statutory provisions relating to the suspension or termination of protected industrial action in Australia observed that lockouts in a harbour towage enterprise and a gas company do not fall within essential services in the strict sense of the term ("whose interruption would endanger the life, personal safety or health of the whole or part of the population") and accordingly should not be fully restricted.[5]

26. The CEACR expressed "deep regret" in its observation respect of Bangladesh that certain of the Committee's requested changes had not been given effect in

[4] Ibid par 1082

[5] https://normlex.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4378434,102544,Australia,2023

particular the power given to an official to prohibit strikes *and lockouts* in the Export Processing Zones.[6]

27. The CEACR expressed its deep concern in its observation in respect of Cameroon that the Act on the suppression of terrorism could apply to "the legitimate exercise of activities by trade unions or employers' representatives in accordance with the Convention. The Committee refers in particular to protests, demonstrations and strikes that would have direct repercussions for public services".[7]

28. Accordingly both conceptually and as a matter of application, the right to to engage in industrial action as an "activity" in terms of article 3 of Convention 87 applies equally to both workers' and employers' organisations.

V. A COMMENT ON THE STATEMENT MADE BY THE IOE CONCERNING CUSTOMARY INTERNATIONAL LAW

29. The IOE argues in its Statement that the two conditions required for the recognition of customary international law, namely (a) the general practice accepted by States and (b) the practice must stem from a sense of legal obligation, have not been met.

30. It is submitted that both requirements have been met for the following reasons[8]:

31. 187 States out of the 195 in the world are members of the ILO and accordingly bound by its Constitution. Article 1 states that the ILO is established "for the promotion of the objects set forth in the Preamble". The Preamble recognises

---

[6]https://normlex.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4322754,103500,Bangladesh,2022

[7]https://normlex.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3959185,103038,Cameroon,2018

[8] See James J. Brudney, 'The Right to Strike as Customary International Law', The Yale Journal of International Law, Vol. 46:1, 2021, for a fuller exposition. Note too that the quote in paragraph 263 of the IOE Statement is incorrectly referenced as page 56. The quote is at pages 5 to 6 in the introduction of the article before the argument is laid out on detail.

"principle of freedom of association" as a means to achieve social justice. The Committee on Freedom of Association has since 1950 interpreted the principle to include the right to strike in its decisions on complaints for 74 years.

32. 158 States[9] have ratified Convention 87 with most States having ratified the Convention knowing either knowing or having full notice that the ILO supervisory bodies have held that the right to strike is integral to the principle of freedom of association on a consistent basis for six to seven decades.

33. 172 States have ratified the International Covenant on Economic, Social and Cultural Rights. Article 8(1)(d) requires State parties to undertake to ensure "the right to strike, provided that it is exercised in conformity with the laws of the particular country" and article 8(3) which states that nothing in the article authorises States parties to ILO Convention 87 to pass or apply laws which "would prejudice the guarantees provided for in" the Convention.

34. 174 States have ratified the International Covenant on Civil and Political Rights. Although text only guarantees the "right to freedom of association" in article 22, the Human Rights Committee has interpreted the article to include a right to strike.

35. The right to strike is also explicitly or implicitly contained in 101 national constitutions, and 170 member States have legislation at different levels of intensity recognising the right or freedom to strike.[10]

36. The European Court of Human Rights has interpreted article 11 of the European Convention of Human Rights guaranteeing "freedom of association" as including the right to strike.[11]

---

[9] Although Kenya, Brazil and South Korea have not ratified Convention 87, the Kenyan and Brazilian courts have relied on international labour standards to recognise the right to strike. South Korea, although contesting the factual basis of a complaint before the Committee on Freedom of Association that it was in breach of trade agreements that included freedom of association obligations, recognised the principle that the right to strike was embedded in international law. See Brudney at pages 25, 28-29.

[10] See paragraph 61 of Written Statement by the Government of the Republic of South Africa and the references cited.

[11] Ibid at paragraph 60(c).

37. The widespread practice of States in concluding trade agreements since 2003 indicates recognition of freedom of association and the right to strike.[12]

38. The 2016 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association states that the right to strike has been established in international law for decades, in global and regional instruments, and is also enshrined in the constitutions of at least 90 countries. The right to strike has, in fact, become customary international law".[13]

39. It is submitted that State practice is thus sufficiently widespread and representative to satisfy the generality of practice required to establish customary international law.

40. As for *opinio juris*, the range of sources discussed above (ILO structure and operation, UN human rights treaties, national constitutions and legislation, national and transnational judicial decisions, trade agreements, and contemporary UN leadership statements) establish beyond doubt that the general practice reflects a sense of acceptance stemming from legal obligation.

41. In so far as the right to strike is established as customary international law, it is a right that is subject to national law[14] and although variations may exist on a country by country basis, there is a sufficiently discernible core to the right. As Brudney states:

42. "In sum, the principles of [Freedom of Association] including the right to strike would appear to satisfy both prongs of the [Customary International Law] test. The *widely recognized general practice on strikes has sufficient shape and contours:* a basic right, three substantive exceptions (public servants involved in administration of the state, essential services in the strict sense of the term, and acute national emergencies), a recognition that strikers retain their

[12] See Brudney at page 25-26 and authorities cited.

[13] See paragraph 61(d) of the Written Statement by the Government of the Republic of South Africa and the references cited.

[14] Article 8 paragraph 1 of Convention 87; Article 8 paragraph 1(d) of the International Covenant on Economic, Social and Cultural Rights; and Article 22 paragraph 1 of the International Covenant on Civil and Political Rights. Note that in respect of each Convention, national law may not impair or prejudice the guarantees contained in the Conventions.

employment relationship during the strike itself, and certain procedural prerequisites or attached conditions. There are variations in national practice and also disagreements at the margins about what the right to strike protects, but *these aspects are not different in kind from diversity and contests regarding international rights prohibiting child labor, or for that matter domestic constitutional rights involving freedom of expression or the right to bear arms."*[15]

VI. A RESPONSE TO THE STATEMENT BY BUSINESS AFRICA THAT THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS DOES NOT RECOGNISE THE RIGHT TO STRIKE.

43. Although the African Charter on Human and Peoples' Rights in article 10 only states that "[e]very individual has the right to free association provided that he abides by the law" and accordingly does not explicitly recognise a right to strike, the African Commission on Human and Peoples' Rights has, in its Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004), interpreted article 15 on the right to work to include the "right to freedom of association, including the rights to collective bargaining, strike and other related trade union rights".[16] Article 47 of the Charter mandates the Commission to interpret the provisions of the Charter.

44. The Commission has also previously regarded violations of the right to strike in its Concluding Observations and Recommendations as a matter of concern under article 15 and specifically recommended that "measures to respect the right of workers to organize and the right to strike" be taken.[17]

45. It is also important to recognise the Southern African Development Community's Charter of Fundamental Social Rights, which entered into force in 2003. The Charter states in article 5 that, for the purposes of attaining the objectives of the Charter, member States shall "take appropriate action to ratify and implement

[15] Brudney at page 30-31 (emphasis added).

[16] https://achpr.au.int/en/node/876

[17] https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-egypt-9th-17th-combined-period

as a priority the core ILO Conventions" (which specifically include Conventions 87 and 98) and in article 4 requires member States to "create an enabling environment consistent with ILO Conventions on freedom of association, the right to organise and collective bargaining so that ... the right to resort to collective action in the event of a dispute remaining unresolved shall ... for workers include the right to strike..."

46. Fifteen African States in the Southern African Development Community again agreed in 2014 to "give effect to the ILO core conventions" (which includes Conventions 87 and 98) and to "promote and protect the social and economic rights" in line with the African Charter (which has been interpreted by the African Commission to include the right to strike) in the Community's Protocol on Employment and Labour (2014). The Protocol states in article 6 that the State Parties shall, consistent with ILO Conventions on Freedom of Association, the Right to Organise and Collective Bargaining, ensure that workers have the "right to collective bargaining" and the "resort to lawful strike action".[18]

.....

VP Madonsela

Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands

FOR AND ON BEHALF OF THE GOVERNMENT OF SOUTH AFRICA

DATE: 16/09/2024.....

[18] https://www.ilo.org/resource/southern-african-development-community-protocol-employment-and-labour