WRITTEN COMMENTS OF

BUSINESS AFRICA EMPLOYERS' CONFEDERATION

IN RESPECT OF THE

REQUEST FOR AN ADVISORY OPINION BY THE

INTERNATIONAL COURT OF JUSTICE

ON THE RIGHT TO STRIKE UNDER ILO CONVENTION NO. 87

16 September 2024

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I. Introduction

1. BUSINESSAfrica hereby submits its Comments on the Written Submissions made by other parties in the advisory proceedings.

2. BUSINESSAfrica firmly maintains its position, as expressed in its Written Statement of 16 May 2024, on the question before the Court. That is, ILO Convention 87 ('C87') does not protect a 'right to strike' of workers. This is so not only because C87 does not contain express reference to such a right, but is also confirmed by the proper application of the interpretive scheme contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ('VCLT').

3. BUSINESSAfrica agrees wholeheartedly with the detailed submissions on the proper interpretation of C87 in conformity with the VCLT as advanced by the IOE in its Written Statement of 16 May 2024.

4. The following key aspects of BUSINESSAfrica's position are highlighted below:

5. BUSINESSAfrica notes that Government of Somalia is incorrect to affirm that "*the right to strike for workers and their organisations is explicitly protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*."[1] Neither the preamble nor the text of C87, the ILO Constitution, the ILO Declaration of Philadelphia or any other ILO instrument contains the words "*right to strike*".[2]

a. 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 issued by the Committee of Experts ('CEACR').

b. BUSINESSAfrica rejects the CEACR's broad and detailed 'interpretations' on the right to strike. To accept the unilateral and progressive development

[1] Somali Federal Republic, Letter re ILO Supervisory Mechanism and Interpretation of the Right to Strike,13 May 2024, p 2.
[2] This is recognized by governments, workers and employers, as well as ILO standard supervisory bodies: ILO, *Freedom of association and collective bargaining*, ILC 81st Session, 1994, p. 62, para 142-147.

of the interpretation of the 'right to strike' by the CEACR would undermine the established standard setting process by ILO tripartite constituents.

c. As to customary international law, there is an absence of widespread and consistent state practice demonstrating that the right to strike has attained the status of customary international law. Even in the context of the ILO, which is composed of the ILO tripartite constituents from all regions of the world, there is no unanimity or consistent position on the right to strike, let an agreement that the right to strike is regarded as customary international law.

6. These Written Comments do not seek to address all elements of the issues before the Court. Rather, they are focused upon issues pertaining most clearly and distinctly to the position of African states in particular.

II. Domestic legislation & regional human rights instruments

7. In the context of African region alone, there is no widespread and consistent state practice or state understanding that a right to strike amounts to customary international law. In particular, while there are many countries in the African region which contain the right to strike in their constitution or national law, the conditions for exercise of this right vary greatly among these countries, indicating an absence of consistent state practice on this topic.

8. Furthermore, the regional human rights instrument known as the African Charter on Human and People Rights recognizes the freedom of assembly in Articles 10 and 11, but the text of that instrument does not refer to a right to strike.

III. The practice of national courts

9. The submissions of those seeking to persuade the Court that the right to strike is protected by C87 in particular conflate two issues: the question of the formal status of the CEACR and CFA, and the question of whether their views have been accepted such that there is agreement, for the purposes of article 31 of the VCLT, that C87 contains a right to strike. Each will be addressed in turn.

10. The mere fact of reference, by national courts, to the views of the CFA and CEACR regarding the right to strike is not, in itself, subsequent practice establishing the agreement, even in the state concerned, of the proposition that C87 entails a right to strike. The mandates of the CFA and CEACR are indisputably clear that these are technical bodies that provide legally non-binding comments and observations to provide guidance to member States. Neither of these bodies operate in a judicial capacity or produce guidance that could be considered as legally binding.

11. It is noted, in this regard, that there is a stark contrast between the characterisation of the status of the CEACR and CFA in the submissions made to this court by South Africa. The Government of South Africa asserts that "*[b]oth CFA and CEACR operate very much like common law courts do - – they apply the wording of the ILO Constitution or the Convention to the facts presented to them on a case-by-case basis. And over time, in accordance with precedent (uniformity over time) and equal application (uniformity across member states), a jurisprudence is created and developed. This jurisprudence is embodied in different editions of the Digest of Decisions of the CFA and the General Surveys prepared by the CEACR*."

12. Not only is it wrong in principle to characterise the views of the CFA and CEACR as binding, or determinative of the content of a state's treaty obligations, but it is also inconsistent with the position set out in South African domestic case law. In *Association For Mineworkers And Construction Union & Others v Anglo Gold Ashanti Limited And Others,*[3] the Constitutional Court of South Africa held as follows:

> *"[49] The Committee of Experts, established in 1926, monitors compliance by member states with the conventions and recommendations. It offers impartial, technical assessments regarding the status of the application of international labour standards. As such, its opinions are advisory or "soft law". Of course, underestimating the considerable moral authority of these supervisory bodies in the international arena would be a mistake. Nevertheless, the Committee of Experts acknowledges that since 1990 its terms of reference do not allow it to give*

[3] *Association For Mineworkers And Construction Union & Others v Anglo Gold Ashanti Limited And Others*, CCT233/20, [2021] ZACC 42.

> *"definitive interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution of the ILO". Its "opinions and recommendations are not binding within the ILO supervisory process and are not binding outside the ILO unless an international instrument expressly establishes them as such or the Supreme Court of a country so decides of its own volition". […]"*

13. As to the approach taken to strikes in domestic practice, it is clear that the views of the CEACR and CFA are not viewed as determinative. Indeed, there have been no submissions refuting that the question of whether a strike is lawful is a matter of domestic law for domestic courts to determine.

14. Whilst the Government of Tunisia appears to support the position that the right to strike is protected by C87,[4] it expressly indicates its position that the right to strike is subordinated to the laws of each country, not by C87.[5]

15. Even where reference is made by domestic courts to the views of the CFA and CEACR – the outcome of such analysis has been an endorsement of the proposition that the lawfulness of a strike is determined by the concept of proportionality. In the above-mentioned case of *Association For Mineworkers And Construction Union & Others* the South African Constitutional Court upheld the decision of the Labour Court that the test for reasonableness was ultimately a proportionality assessment to determine whether the harm caused by the secondary strike to the secondary employer was proportional to the impact on the business of the primary employer. This is a clear recognition of the centrality of context-specific factors to the question of whether there is a right to pursue strike action. The affirmation of the need for domestic courts to conduct a proportionality assessment, as well as the specific indication of the need to consider the impact on the business of the primary employer, amount to a rejection of the notion that the views of the CFA and CEACR reflect binding agreement as to treaty obligations.

[4] République Tunisienne, Rapport du Gouvernement Tunisien sur l'avis consultatif de la Cour Internationale de Justice concernant le droit de grève, p.3.
[5] Id, pp 2-3.

IV. Climate change and just transition

16. OACPS asserts that the right to strike is important in achieving the goals of just transition and fighting climate change.[6] Clearly, the political engagement of workers is an important factor in pursuing these aims.

17. However, the enforcement of the claims of workers through strike action is not the only means by which workers may engage in dialogue as regards just transition and climate change. The concern to protect and facilitate such engagement emphasises the importance of protecting freedom of association, free speech, and the right to organise. The possibility of strike action is only one means of pursuing these rights. It is an error of logic to assert that such broad rights entail a right to a particular form of action in a given case. As set out above, the question of whether a particular strike is a necessary feature of freedom of association, free speech, and/or the right to organise in a given case is to be determined by national courts on a case-by-case basis applying proportionality as a central consideration. There are many forms of industrial action other than strikes that workers are able to use to solve labour disputes and promote their economic and social interests, including just transition and fighting climate change. BUSINESSAfrica considers OACPS' argument on just transition and climate change as immaterial to the matter at hand, as it exaggerates the importance of the role of right to strike in this context.

18. In any event, the OACPS' Written Statement wrongly assumes that the positions advanced by any workers in the context of any strike necessarily advances the cause of adequate climate control and burden-sharing. It is obviously wrong to suggest that the interests and preferences of workers are *necessarily* aligned with these goals. To the contrary, one can readily anticipate situations in which the pursuit of particular concerns or interests on behalf of workers would have a deleterious impact upon achieving a just transition that meets the goals set out in the Paris Agreement.

[6] Written Statement of the Organisation of African Caribeean and Pacific States (OACPS), 15 May 2024, para 87.

V. Legal certainty

19. The Government of Somalia has invoked the concept of legal certainty in service of the proposition that C87 includes a right to strike. This is misconceived. Somalia considers that the interpretation of C87 as including a right to strike should be accepted in order to maintain a stable and predictable operation of the ILO's system of standards and its supervision, which has functioned effectively for the past seventy years.[7] To the contrary, legal certainty and predictability of the ILO standards supervisory system requires respect for the views of the ILO tripartite constituents who drafted, negotiated and agreed on the content of C87, rather allowing an independent standards supervisory body, such as the CEACR, to create legal obligations outside of the established tripartite standards-setting process.

VI. Conclusion

20. BUSINESSAfrica respectfully submits that the ILO and its tripartite constituents require the necessary room for dialogue and cooperation to resolve matters, 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 and that any outcome achieved would be: (a) based on consensus or at least a broad majority; (b) universally relevant; and (c) accepted by the ILO tripartite constituents.

21. BUSINESSAfrica appreciates the opportunity to submit written comments to this Honourable Court and respectfully invites the Court to answer the referral question in the negative, namely that the right to strike of workers and their organizations is ***not*** protected under C87.

[7] Somali Federal Republic, Letter re ILO Supervisory Mechanism and Interpretation of the Right to Strike,13 May 2024, p 2.

BUSINESSAfrica Employers Confederation humbly submits.

This 16 Day of September 2024

Jacqueline Mugo

Secretary General

BUSINESSAfrica