



Faculty of Law

Lund University

**Master of International Human Rights and
Humanitarian Law**

Master thesis

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International Human Rights Monitoring Mechanisms and
their Effectiveness: Emphasis on the Human Rights
Committee, The African Commission and The I.L.O

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Human Rights
Autumn 2002

Contents

INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS AND THEIR EFFECTIVENESS: EMPHASIS ON THE HUMAN RIGHTS COMMITTEE, THE AFRICAN COMMISSION AND THE I.L.O	1
1 INTRODUCTION	3
2 THE HUMAN RIGHTS COMMITTEE	5
2.1 STATUS	5
2.2 COMPOSITION	5
2.3 ORGANISATION OF WORK	7
2.4 FUNCTIONS	7
2.5 EFFECTIVENESS OF THE COMMITTEE	11
3 THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS	17
3.1 CREATION AND COMPOSITION	17
3.2 ORGANISATION OF WORK	18
3.3 FUNCTIONS	19
3.4 EFFECTIVENESS OF THE COMMISSION	23
4 THE INTERNATIONAL LABOUR ORGANISATION	30
4.1 CREATION	30
4.2 MEMBERSHIP	31
4.3 STRUCTURE	31
4.4 MONITORING	34
4.5 EFFECTIVENESS OF THE ILO	38
5 COMPARATIVE STUDY OF THE THREE MONITORING BODIES	43

6 CONCLUSION
ARTICLES

52
57

Acknowledgements

First of all I will start by thanking God for having given me the strength and kept me save throughout this program.

Secondly, I am very thankful to the Swedish Institute for having awarded me a scholarship to study at this program, without this financial aid, I think I would not have had the possibility of doing this program.

Thirdly, I will also like to thank my supervisor Prof Alfredsson, for his constant assistance and guidance throughout the program and especially on this topic and in the course of writing..

Fourthly to thank my family, for their words of encouragement and for always being there for me.

Also I will like to thank Prof Michealo Hansungule, Mr Lee Swepston, Professor Manfred Nowak, Prof Rhamattullah Khan, Professor Ineta Ziemele, Lena Olsson and Habteab Tasfay for their invaluable contributions during research and writing of this paper.

Finally I say thanks to all my friends and classmates whose contributions through our regular discussions have been of immense help to me in the course of writing this paper.

Abbreviations

ACHPR-----African Commission on Human and Peoples' Rights

ECOSOC-----Economic and Social Council

GAOR-----General Assembly Official Records

HRQ -----Human Rights Quarterly

ICCPR-----International Covenant on Civil and Political Rights

ICERD-----International Convention for the Elimination of Racial
Discrimination

ILO-----International Labour Organisation

MLR-----Modern Law Review

NGO-----Non-Governmental Organisation

NHRQ-----Netherlands Human Rights Quarterly

OAU-----Organisation of African Unity

OP-----Optional Protocol

SR-----Special Report

The Committee-----The Human Rights Committee

The Commission-----The African Commission on Human and
Peoples' Rights

UDHR----- Universal Declaration on Human Rights

UN-----United Nations

WG-----Working Group

1 INTRODUCTION

Human rights issues have always occupied a very important part in international fora for a long time and especially after the First World War. The atrocities committed during this war had made the world's leaders to start thinking seriously about the worth and dignity of the human being. This was very evident in the aftermath of the war at the Peace Settlement in Versailles, Paris. For the first time, workers' rights were given international recognition. Workers were allowed to participate in the peace talks and this led to them advocating for the elaboration of an international labour legislation which further culminated in the creation of the International Labour Organisation.

The coming of the United Nations and the adoption of the UDHR and the subsequent adoption of the Bill of Rights ushered in a new era of standard setting on human rights issues. The next important preoccupation was how to give effect to the plethora of treaties that had been adopted. There was the need to move from standard setting to more concrete actions and enforcement measures. This quest led to the creation of the first international human rights treaty body, the Human Rights Committee.

The various regions on their parts also began debates on the establishment of instruments, which will offer adequate human rights protection. This started with the American Declaration on the Rights of Man and Citizen. Due to the fact that it was a non-binding instrument, member states further adopted the Inter American Convention on Human Rights which per se was binding on all member states. In Europe there was the European Convention on Human Rights and Fundamental Freedoms and in Africa the African Charter on Human and Peoples' Rights. The Inter American Commission and Court were established to supervise the implementation of the American instruments, the European Commission¹ and Court to implement the European Convention and lastly the African Commission to oversee the implementation of the Charter.

The purpose therefore of this research is to look at how effective some of these monitoring mechanisms have been since their inception. This will be done by picking three monitoring mechanisms out of plethora of specialised agencies, treaty bodies and regional bodies. Thus the ILO (a specialised body), the Human Rights Committee (a treaty body) and the African Commission (a regional body) will be the case studies and points of departure.

The first chapter will deal with the Human Rights Committee, what status it has, how it organises its work, its functions and how effective it has been and the problems it has been facing so far.

The second chapter will deal with the African Commission and an overview on its creation and composition, how its work is organised, its functions and in greater detail how effective it has been in carrying out these functions. The third

¹ Since the coming into effect of protocol 11, the commission was abolished and the court made the only monitoring organ.

chapter will dwell on the ILO and a cursory look will be made on its history, structure, and membership and how it monitors its treaties and finally how effective it has been in this domain. The last but one chapter will be a comparative study between these three monitoring mechanisms based on criteria such as, follow up mechanism, jurisdiction, state reporting, NGO participation among others. Finally there will be a conclusion predicated on all the issues raised and recommendations on how the various bodies can be made to be more effective

2 THE HUMAN RIGHTS COMMITTEE

2.1 STATUS

The ICCPR and the OP thereto were adopted by the General Assembly on the 16th of December 1966 and entered into force on 23 March 1976 after 35 states parties had either ratified or acceded to the Covenant and 12 had ratified or acceded to the OP. Pursuant to Article 28, of the Covenant, the Human Rights Committee was established to oversee the implementation of the Covenant and OP. It thus became the first universal treaty body control mechanism. Its first session was held in New York on 1st January 1977-1st April 1977.

The question as to what is the status of this Committee is a moot one. This is due to the fact that it carries out functions, which are either judicial or administrative in nature. This therefore makes it difficult to specifically say what the status of the Committee is. However, Uribe Vargas describes it as “a body whose work was of a judicial nature”². Tomuschat says it was not an international court but was similar to one in certain respects, particularly in regard to its obligation to be guarded by exclusively legal criteria which rightly distinguished it from a political body”³. Mr Opsahl describes it as “the executive organ of the Covenant”⁴. Mr Bouziri on his part says that the Committee was not a court of law⁵. Lastly, the former Under Secretary of the UN Mr Herndl sees it as the guardian of the Covenant.⁶ Be it as it may and taking into consideration all the descriptions given by the eminent scholars and personalities, the HRC can suitably be described, as being *sui generis*. It should be seen as a body on its own, meant for the implementation of the Covenant.

2.2 COMPOSITION

Article 28 of the Covenant, which provides for the establishment of the Committee and Rule 18 of the Committee’s rules of procedure go further to state its composition. It consists of 18 members who are to carry out the functions

² Special Report 6 pr 73

³ *ibid* 117 pr 35

⁴ *ibid* 342 pr 68

⁵ *ibid* 231 pr 29

⁶ *ibid* 702 pr 4

provided in the Covenant and the OP. The members are expected to be nationals of state parties to the Covenant, of high moral standing and recognised competence in the field of human rights with consideration given to persons having legal experience, equitable geographical representation and representation of the different forms of civilisation and of the principal legal systems.⁷ It is worth noting that these members serve in their individual and personal capacity and not as representatives of their respective governments. This independence is very fundamental to the Committee and will at least give it the potential to be effective. However, the Covenant does not stipulate that a member must be independent of his government. This explains why in practice, membership of the Committee has included ambassadors, senior government representatives and national judges. Notwithstanding this ever present link between the members and their governments, the former have always stressed on their independence from government and governmental institutions and entitled to be described legitimately as independent experts. Their de facto independence is further evidence by the fact that the UN and not states parties to the Covenant as stipulated by article 38 of the Covenant remunerate them.⁸ This can be totally contrasted with Article 8 (6) of the ICERD, which stipulates that the governments are responsible for the remuneration of the members of the Committee.

The members of the Committee are elected by secret ballot by state parties to the Covenant at meetings convened by the Secretary General of the United Nations. They are elected from a list of nominees presented by the states parties for a regular term of office of four years but members are eligible for re-election if re-nominated under article 29(3) of the Covenant. The term of office for those elected at the first meeting began on the 1st January 1977 while those elected subsequently begins on the date of expiry of the term of office of the out going members whom they replace. However, in accordance with article 32(i) the terms of nine members chosen by the chairperson by ballot expire after two years. This is in a bid to avoid a complete change of the Committee at any one time and ensure continuity in terms of membership status and its work. Article 30 gives a detailed explanation of the election procedure and procedure in case a replacement is sought for. Once elected into the Committee, the members are entitled to all the facilities, privileges and immunities of experts on mission for the UN laid down in the Convention on the Privileges and Immunities of the UN.

⁷ Article 28 (2) ICCPR

⁸ Members of the Committee" shall with the approval of the General Assembly of the UN receive emoluments from the UN resources on such terms and conditions as the General Assembly may decide..."

2.3 ORGANISATION OF WORK

To enhance a smooth functioning of its activities, the Committee has gone further to formulate its own rules of procedure. It holds such sessions as are required for the satisfactory performance of its duties. At inception, it held two sessions annually but due to an increase in the volume of work, it now holds three sessions a year for duration of three weeks for each session. The spring session usually is held in New York while the summer and fall sessions in Geneva. It is worth noting that due to financial constraints in the early years, the sessions were held in Geneva but due to severe opposition by the members, the New York session has since been regular.⁹ Usually, a working group working for one week precedes each of these sessions.

The Rules of Procedure established the offices of chairperson, three vices and a rapporteur all elected for a two year term and eligible for re-election. Furthermore the deliberations of the Committee are to be held in public unless the Committee decides otherwise.¹⁰ But in instances of inter state communications and individual petitions, the deliberations are closed to the public. Added to this, at any one session, twelve members will form a quorum and any decision taken must be by a majority of those present and voting. Notwithstanding, this has hardly ever been used since most decisions are always taken by consensus. This has greatly contributed to the cooperative and conciliatory atmosphere within the Committee. The official languages are English French, Spanish, Chinese, Russian and since 1984 Arabic while its official documents are of general distribution unless it decides otherwise. Recently, it has recognised the importance of publicising as can be seen from its practice of circulating press releases, participating in human rights meetings through its members, articles and other publication on it modus operandi by its members and the publication of the year book of the HRC.

2.4 FUNCTIONS

The Covenant and OP provide for three distinct functions of the Committee. But in practice, it carries out more than these three functions. From inception, It was mandated to oversee the respect and implementation of the ICCPR by the examination and consideration of reports submitted by state parties,¹¹ to consider inter state complaints or communications¹² and lastly to entertain

⁹ Only one session has been held out of New York or Geneva i.e. 14th session in Bonn

¹⁰ Rule 33

¹¹ Article 40(i) (ii)

¹² Supra

complaints made by individuals within the jurisdiction of state parties to the Covenant and OP who claim that their rights under the Covenant have been violated.¹³ Added to these functions, the Committee also submits annual reports to the General Assembly via ECOSOC on its activities .It has also developed the practice of issuing statements.¹⁴ A cursory look will now be made on the three principal functions of the Committee.¹⁵

EXAMINATION OF STATE REPORTS

Upon ratification, or accession, to the Covenant, each state party ipso facto undertakes to submit reports on the measures they have adopted which will give effect to the rights enshrined in the Covenant and progress it has made in the enjoyment of these rights.¹⁶ These reports are submitted to the Secretary General who in turn transmits them to the Committee for examination and deliberation before it issues its final comment. Three types of reports have consequently emerged in practice.

Firstly the initial reports which are submitted a year after the Covenant enters into force for the state party concerned. State parties are required to report on measures they have taken since becoming members to give effect to the absolute respect to the rights therein contained in the Covenant. The word “measures” should be noted was used to give states greater freedom and the possibility to report on a wide range of laws and practices, which show compliance with the provisions of the Covenant. The Covenant is silent on the contents of the reports but due to extreme diversity in the various reports, the Committee resorted to the issuing of guidelines, which have aided in the drafting of these reports and have created some uniformity on the issues to be addressed in each state report.¹⁷

Secondly, supplementary or additional reports are submitted whenever the HRC is not satisfied with the form and contents of the initial report or any other report made thereafter. This is so because some member states do not provide adequate information, which conforms to the guidelines issued by the Committee. In such a situation the Committee will ask for additional information, which can

¹³ Article 1 OP

¹⁴ In 1987 issued Statement on the Fight Against Racism and Racial Discrimination

¹⁵ Supra

¹⁶ Article 40 ICCPR

¹⁷ General Guidelines Regarding the Form and Contents of Reports from states parties under Article 40 of the Covenant .Doc CCPR/C/5:Doc A/32744 Appendix II adopted by HRC 44 meeting (2nd session) 29th August 1977

either be provided orally or in writing. It is worth noting that the legality of such a procedure is debatable but majority of the members share the view that the legal basis of this procedure exist on the obligation of the state to fully comply with its obligation under article 40 (i)(b). In a number of cases the Committee has insisted that it will not examine a report until additional information has been provided.

This has been the case with Uruguay and El Salvador

Lastly periodic reports are submitted every five years after the initial report. In an important “Consensus Statement”¹⁸, the Committee reaffirmed its desire to work in constructive dialogue with member states through the process of periodic reports. These reports are required to provide complete information demanded by the Committee and also to show the progress a state has made since the consideration of its last report by the Committee and also what problems were encountered in implementing the provisions of the Covenant. Due to difficulties encountered in the reporting procedure, the Committee has revised its procedure to the extent that if a state submits its additional report in time, the Committee will defer the date for submission of its periodic report. This amendment has greatly contributed to the filing of additional reports on time. In the event of failure by a state party to submit its report, the Committee in the spirit of constrictive dialogue sends a number of remainders to the state concerned: if this doesn’t work, personal approaches are made by the chairman or his representative to the state and in case of non compliance the matter is sent to the General Assembly for discussion or the country situation examined in the absence of the report.

EXAMINATION OF INDIVIDUAL COMMUNICATION

The second pivotal function of the Committee is the examination of individual communications. Article 1 and 5 of the OP gives it the competence to receive communications from individuals who claim to be victims of a violation by a state party to the OP¹⁹. A complaint is made by simply writing a letter to the Committee care of the Office of the High Commissioner for Human Rights in Geneva .As a matter of procedure, there are no possibilities of parties to appear before the Committee and make oral pleadings. As soon as a complaint has been filed, it remains a confidential issue and may even remain so after the case has been closed. A summary of the procedure used in examining and individual complaint is worth mentioning.

The whole process starts by the registration of the communication. But it should be noted that communications that are obviously inadmissible either because of non-exhaustion of remedies or failure by the author to substantiate his allegations are not registered.

¹⁸ Statement on the duties of the Committee under article 40 of the ICCPR Doc A/36/40 annex iv

¹⁹ Presently 104 states have ratified the Optional Protocol I to the Covenant

The next stage is that of admissibility. The Committee here decides if the registered communication meets the requirements of admissibility; viz that the communication is not anonymous and it is from an individual subject to the jurisdiction of a state party, that the individual is a victim of violations of rights enshrined and protected by the Covenant, that the communication does not constitute an abuse of the process, the matter is not before another international instance of settlement and finally domestic remedies must have been exhausted. Once a communication fulfils all these requirements, it is examined in the Committee's plenary session on its merits.

In situations where the Committee is convinced that the situation may aggravate before it reaches its final conclusion on the matter, it is empowered by virtue of Rule 86 of its Rules of Procedure to request for interim measures to be carried out by the state and prevent irreparable harm from being done to the individual. The Committee has used this in a number of cases to good effect. In *O.E v S*²⁰, it held that the state party should not expel the alleged victim who had sought refuge in country S to another state pending the consideration of the communication. The Committee at its 28th session in 1986 also requested for a stay of execution of a death penalty, which was granted by the state party (Jamaica). Notwithstanding, there have been instances where some of these requests have not been granted and led to the execution of victims or serious violations of their rights.²¹

In the consideration of the communication, the Committee shuns away from the usual practice of putting the burden of proof on the petitioner. This is so because the state is always in a position to gather all available evidence, has access to information which the author hasn't and by virtue of article 4 of the OP is under the duty to investigate in bona fide manner all the allegations made by the author. In the absence of this collaboration from the state, any piece of evidence provided by the author and corroborated by witness will constitute satisfactory evidence.²²

In recent practice, the Committee members append their dissenting opinions on any conclusion reached; this is usually the case with matters where a minority finds the decision unreasonable; for example the case of *Cox v Canada*.²³

Furthermore, the Committee has instituted a new approach in the examination procedure, which is worth commenting on. At its 55th session in 1989, it decided to designate a Special Rapporteur on New Communications who had the powers to request for interim measures. At its 36th session, it authorised the Working Group on Communications to adopt decisions declaring communications admissible when all the five members agree.²⁴ Finally in accordance with Rule 88(ii), the WG on communications may decide to join the consideration of two or more communications. This has positively contributed to the speedy processing of individual communications

²⁰ Case no22/1977

²¹ *Chatat Ng v Canada* (469/1991) and *Kindler v Canada* (47071991)

²² This was the case in case no 10/1977 *Altesor v Uruguay* and Case no 30/1978 *Bleier v Uruguay*

²³ Case no539/1993

²⁴ Rule 87 (ii)

EXAMINATION OF INTER STATE COMPLAINTS

The Committee is vested with the competence by virtue of Article 41(i) of the Covenant to receive communications from a state party, which claims that another is not fulfilling its obligations under the Covenant. For this to be effective, the states concerned must have made a declaration recognising the competence of the Committee to consider the communication. In such a case, the Committee ²⁵ “makes available its good offices to the parties concerned with a view to a friendly solution of the matter on the basis of respect of human rights and fundamental freedoms”. Detail explanation of this procedure is provided by articles 41 and 42 of the covenant and rules 72 .77E under XVI of the rules of procedure. Since there has never been an inter- state complaint it is not worth considering any further.

At the end of an examination of the reports and communications by the Committee, it delivers its final conclusions, which are termed observations or views depending on whether it is a report or a complaint. These conclusions have led to marked improvements especially in the reporting procedure.

2.5 EFFECTIVENESS OF THE COMMITTEE

From its inception till date, it can be submitted that the Human Rights Committee has done a commendable job and experienced a marked improvement in overseeing the implementation of the provisions of the ICCPR. It has played a largely dominant and effective role to ensure the respect of human rights and in putting human issues at the centre of world debates and discussions. These achievements have been due to the following reasons.

Firstly, the Committee has opened up and simplified access to any individual who alleges a violation of his rights under the ICCPR. This liberal approach to access has therefore created an opportunity where in case of a violation, the victim who hasn't got remedies available at the domestic level will always resort to the Committee. It is important to note this was one of the first procedures where an individual had locus standi before an international instance. Added to this, the Committee through its jurisprudence, has positively interpreted Article 1 of the Optional Protocol relating to authorship very widely .By this interpretation,

²⁵ Article 41 i e

an author of a communication must not only be the victim but also includes his relatives and legal advisers and anyone who can demonstrate a genuinely existing link between themselves and the victim. This has been illustrated in some cases especially in *Morais v Madagascar*²⁶ and *Burrell v Jamaica*²⁷ where it was held that the lawyers who prosecuted the cases at the domestic level were competent to make a complaint on behalf of the victims. This however led to a floodgate of claims from victims and their representatives alleging violations. Furthermore, the Committee through its practice has been seen to entertain communications made by groups of persons who have suffered similar violations notwithstanding the fact that the OP refers only to individuals. This also has made it possible for massive violations to communities to be vindicated as was illustrated by *Bernard Ominayak, Chief of the Lubicon lake band v Canada*²⁸ and *Länsman et al. v Finland*.²⁹

Secondly, it has been revealed in a study³⁰ carried out that the jurisprudence of the Committee has led to significant changes in the domestic legislation of some member states. It showed that Mauritius and the Netherlands made significant changes in their legislation after the Committee's consideration of individual communication and adopting its views in the Mauritius Women Case (*Shirin Aumeeruddy- Cziffra et. al v Mauritius*)³¹ and Dutch Social Security System cases (*Broeks v the Netherlands*³² and *Zwaan-de Vries v the Netherlands*)³³ under non-discrimination in article 26.

Furthermore, the Committee has gone further to institute follow up procedures to monitor the implementation of its decisions. At its 17th session, some of its members expressed doubts about its competence to engage in this since it is not expressly stated by either the Covenant or the Optional Protocol. But this competence has been said to be implicit in the preamble of the OP, which states that the Committee can receive and consider communications "to further achieve the purposes of the Covenant and implementation of its provisions". Notwithstanding, the ICJ has held that in the absence of specific powers, an international body may act in ways not specifically forbidden for the achievement of its purposes and objectives³⁴. This therefore gives the Committee the legal basis to carry out follow up procedures and cannot be said (as it is by some states) to be contrary to article 2(7) of the United Nations Charter.

²⁶ G.A.O.R 38th session supplement no40CA/38/40 report on the HRC p 141

²⁷ G.A.O.R 51st session supplement no 40CA/51/40 report on HRC CCPR/C/57/D/546/1993

²⁸ G.A.O.R 45TH session supplement No 40 CA/745/40 report on the HRC pg 1.

²⁹ Case no 671/1995 HRC 1997 Report Vol .II, Annex VI, Sect.5 para 10.7

³⁰ Cohn: "The Early Harvest: Domestic Legal Changes related to the HRC and Covenant on Civil and Political Rights"(1991) 13 HRQ p295-321

³¹ Communication No 35/1978, views adopted on 9th April 1981

³² Communication No 172/1984 views adopted on 9th April 1987

³³ Communication No 182/1984 views adopted on 9th April 1987

³⁴ Reparation for injuries suffered in the service of the United Nations .ICJ reports 1949 p174-188

Conscious of the fact that its views must be implemented for its work to be effective, the Committee in 1990 instituted the mandate of Special Rapporteur for the Follow Up of Views. It further adopted guidelines for the follow up and spelt out the competence of the special rapporteur.³⁵ In the execution of his duty, the rapporteur requests states in respect to which decisions of violations have been made to provide information on the measures they have undertaken to give effect to the decisions of the Committee. When these reports are made, he/she prepares an annual report which is submitted in the Committee's plenary.

In cases of non-compliance by states to provide the information requested for by the rapporteur, he is empowered by Rule 95(ii) of the Rules of Procedure to make such contacts and take actions appropriate for the performance of his duties. By virtue of this, he holds consultations with the representatives of the states concerned. It is worth stating that most of these consultations are held at ambassadorial level evidencing the importance given to this procedure by state parties. These consultations have helped in educating the member states on the consequences of non cooperation and has led to many states submitting their reports in order to avoid the unpleasant experience of being in the "follow up black list" of the Committee³⁶ and being singled out for criticisms.

In situations where state parties after consultations still fail to comply with the Committee's decision, the last resort left for the Special Rapporteur is that of undertaking fact finding missions. This entails the Rapporteur making a visit to the state concerned to meet with the authorities and members of the non governmental organisations, visits to places of detention and other areas of interest to gather first hand information on the implementation of the Committee's decisions. Even though it has been said that this method is an overly extension of the implied powers of the Committee, its importance should always be emphasized. Firstly, it helps the Committee to obtain very reliable information on the country situation, secondly, governments have been reported to have improved their prison and detention facilities prior to the rapporteur's visit, and thirdly, the dialogue between the rapporteur and the personnel in the department concerned for the drafting of the state reports helps in the exchange of valuable information on the appropriate form and content the reports should take and solutions to some of the problems the state may be facing in the implementation of the Committee's decision.

In June 1995, the Rapporteur³⁷ visited Jamaica and this led to marked improvements in the prison facilities and sanitary conditions in particular. The

³⁵ Annual report for 1990, Doc A/45/40 Vol I p144.145: Vol II Appendix XI

³⁶ Between 1994-1997 the Special Rapporteur met with the representatives of the following states: Once: Bolivia, Cameroon, Ecuador, Nicaragua, Madagascar, central African republic, Uruguay and France. Twice: Dominican Republic. Trinidad and Tobago, republic of Korea. Equatorial guinea, Peru. Thrice and more: Suriname, Colombia and Jamaica: Markus .G. Schmidt Follow-up Procedures to the Individual Complaints: International Human Rights Monitoring Mechanisms (Eds) Gudmundur Alfredsson, et al.

³⁷ When the function of the Special Rapporteur was created in 1990, the first Rapporteur was the late Janos Fodor (Hungary) and he was successively followed by Andreas

detailed report of this visit and others have not been made public due to the confidential nature of the procedures. By 1997, about 30% of the follow up replies received were considered satisfactory because they showed that states were willing to offer the right and appropriate remedies to victims of violation. Some states have even gone ahead to adopt enabling legislations, which give the decisions of the Committee a legal title. This has been the case with Peru in 1985³⁸ (even though it was rescinded nine years later by the regime of president Fujimori), and Colombia in 1996³⁹.

As can be observed, this follow up procedure is only used for decisions made after the consideration of individual communications and as at now, there exist no such procedure on observations made on states parties report. It is posited that the institution of a Special Rapporteur on follow up on observations with the same mandate and competence as that of Special Rapporteur on follow up on views will contribute immensely to the implementation of Committee's observation by the parties concerned.

However, the Special Rapporteur on the Follow Up on Views has not been operating without difficulties.

Due to financial constraints, the fact-finding missions have not been regular. Also some member states have not been cooperating with the rapporteur thereby leading to serious difficulties. This was the case of the cancelled visit to Trinidad and Tobago because of lack of cooperation and which led to the state opting out of the OP. The Democratic Republic of Congo (Zaire) has also been noted for not providing adequate information on its follow up procedures..

Thirdly interim measures under Rule 86 have also contributed to the effective functioning of the Committee. It has used this in a number of cases to protect victims and prevent them from suffering irreparable harm. The Committee has requested for stays of execution of death sentences and expulsion of individuals to states where their rights might have been violated. This was the case in *O.E v S*⁴⁰ and *The Lubicon Lake Band* (supra). In the same vein, the appointment of a Special Rapporteur on new communications is worth mentioning; this rapporteur has been vested with powers to issue requests for special measures of protection when the Committee is not in session.

Fourthly, the fact that the Committee through its rules on admissibility display a remarkable degree of generosity by placing a lesser burden of proof on the author has made it very possible and easier for violations to be vindicated. The state is expected to produce evidence to show that there are remedies at the domestic

Mavrommatis (Cyprus), Prafullachandra Baghwati (India) Fausto Pocar (Italy) and Christine Chanet (France)

³⁸ Law 23.506 of 1985 under which Peru undertakes to implement the Committee's recommendations. Rescinded 1996

³⁹ Law no 288 of 1996: recommendations of Colombian Ministerial Committee which approve compensation of victims of the provisions of the ICCPR on the basis of Committee's views also included in Resolution 8/96 to 17/96 11th September 1996. See Annual Report of the Committee for 1997 Doc.A/52/40-Vol I pgh 535

⁴⁰ Case No 22/1977

level and that they are effective. This is but fair enough since it can only be the state, which has access to such information. It will therefore be very difficult on the author if he is expected to provide information of this nature.⁴¹

Fifthly, the Committee has used the embarrassment factor to great effect. In the event of non-compliance, it transmits the matter to the General Assembly of the United Nations via ECOSOC for scrutiny. Since most states will not appreciate being under such form of public scrutiny, they make considerable efforts to comply with its decisions; such compliance is gradually giving the decisions a de facto binding quality.

More so, the fact that the members have asserted and strongly acted on their independence has contributed to the smooth functioning (at least procedural wise) of the Committee. Since they are not state representatives, the deliberations are void of political leanings and much time is saved for discussions on more concrete issues.

In conclusion, the Committee in the course of its operations have encountered a number of difficulties, which must be addressed in order to make it more effective in the protection of human rights. Such measures to be undertaken to improve on this effectiveness will be dealt with in the last chapter.

However some of the problems plaguing the Committee are worth mentioning. Firstly, there is the issue of states not submitting their reports on time or at all. Also and as already mentioned the inability of the special rapporteur to carry out regular visits to member states and verify the level of compliance with the Committee's decisions. Moreover there is the issue of confidentiality in the Committee's procedures and reports especially those of the special rapporteur for the follow up on views. There is also the issue of shortage of and insufficient finances experienced by the Committee. Furthermore there is also a very limited access by non-governmental organisations to the Committee's procedure and the non-binding nature of the Committee's decisions.

All these shortcomings and criticisms on the Committee can be summarised in that of Hartman who says:

“The Committee lacks all the adjudicatory powers of the European Commission and Court of Human Rights. Furthermore, the Committee enjoys neither the flexibility of the Inter-American Commission on Human Rights to decide on its own accord to study the human rights situation in any state party, particularly the capacity to commence on-site investigations, nor the flexible fact-finding methodology of certain ad hoc UN bodies.”⁴²

⁴¹ In *Bleier v Uruguay* (No 30/1978) HRC Report 1982 Annex X, para 13.3, it was held by the Committee that in cases where the author has submitted to the Committee allegations supported by substantial witness testimony, and where further clarification of the case depends on information exclusively in the hands of the state party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary from the state party. Also in *Grille Motta v Uruguay* (No 11/197) HRC 1980 Report, Annex X, para 14, it held “a refutation of the author's allegation in general terms is not sufficient”.

⁴² Hartman made this remark in the context of a convention of international law experts from a number of different countries meeting in Siracusa, Sicily in 1984 to discuss the limitation

But these notwithstanding, when one looks at the remarkable work of the Committee especially its case law which is being cited today in courts all over the world, in university circles and conferences of international law, it will not be an over statement by saying that it has been effective to a large extent in the protection of the rights enshrined in the ICCPR even though much can still be done to increase its effectiveness. The contribution of lawyers, human rights academics, NGOS and other UN bodies should also be stressed; for as Judge Higgins puts it

“...It would be bitterly ironic, if having won the battle to place human rights at the legitimate centre of international concern, the liberal democracies throw away the fruits of that victory by a failure to recognise that in large part, the integrity of the Covenant lies in their own hands.”⁴³

and derogation provisions of the Covenant and entitled “Symposium on the Limitation and Derogation Provisions in the ICCPR”. For details see “Working Paper for the Committee of Experts on the Article 4 derogation provision,(1985)7HRQ pp 1-89

⁴³ The United Nations: Some Questions of Integrity (1989) 52MLR p 1-21at p 20-21

3 THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

3.1 CREATION AND COMPOSITION

With the establishment of the Inter-American and European human rights instruments and their monitoring mechanisms, there were calls by African jurists for the establishment of an African mechanism to monitor, promote and protect human rights in the continent. Added to this, the blatant human rights violations carried out by some African leaders like Idi Amin and Emperor Bokassa further intensified these calls for an African system. Under a declaration entitled "Law of Lagos" the jurists called on the governments of the various African states to establish an African convention on human rights based on the Universal Declaration of Human Rights and the Rule of Law.⁴⁴ These calls culminated in the adoption of the African Charter on Human and Peoples Rights in 1981 under the auspices of the OAU⁴⁵ which came into force in 1986. To further give live and strength to the Charter, its provisions had to be implemented and this can only be guaranteed by the establishment of a mechanism to oversee this. Thus by virtue of Article 30 of the Charter, the African Commission on Human and Peoples Rights was established. It was primarily charged with the protection, promotion and interpretation of rights in the Charter.⁴⁶ This was to be an independent body from creation in 1987 but has been too closely linked with the OAU in the course of its duties and for reasons to be discussed later.

The Commission is composed of eleven (11) members elected to work in their personal capacity and not as representatives of their various states and governments. They can thus be regarded in a sense as independent experts. In practice, members are elected from the main regions of the continent i.e. northern, eastern, central, southern and western Africa. They are elected by the Assembly of Head of States and Governments through secret ballot from a list of candidates nominated by the member states to the Charter.⁴⁷ Those elected are considered to be personalities of the highest reputation and known for their high morality,

⁴⁴ See law of Lagos, the African Conference on the Rule of law, Lagos Nigeria, January 1961

⁴⁵ The OAU has been succeeded by the African Union, but since this is still very new and has not yet set up its organs and for the purposes for this work, reference will still be made to the OAU.

⁴⁶ Article 45 ACHPR

⁴⁷ Today all the OAU members have ratified the Charter

impartiality and competence in matters of human and peoples' rights and with particular consideration given to those persons having legal knowledge and experience.⁴⁸ A commissioner is expected to be involved in matters of human and peoples' rights either as a matter of academic or practical interest. In practice and up until 1995, the first sixteen commissioners have all been lawyers. Once elected and before resuming office a commissioner makes a solemn declaration of impartiality and faithfulness which is evident of the fact that he acts as an independent expert and not a state representative. Once in office and while on mission, he is immune to inspection, detention, or seizure of personal baggage and legal action in respect of words spoken or written when carrying out his duty. They are also issued with laissez-passers of the OAU, which facilitate their movement from one country of the continent to the other in the execution of their duties. They are expected to serve for a six year term with the terms of four of the first commissioners terminated after two years and three after four years to ensure continuity of the Commission's work. Since being a commissioner is a part time portfolio, members do have their full time jobs. In most cases, they occupy top positions in their various governments and this has been a ground for extreme criticisms because it questions the very essence of their independence. In this vein, it was recommended at the second workshop on NGO participation in the work of the African Commission held in Tunis from the 28th of February - 1st of March 1992 organised by the International Commission of Jurists in conjunction with the Commission that holding of certain high offices like a diplomat or a minister of internal affairs was in compatible with the status of a commissioner. It should however be noted that this was a mere recommendation and has not been adhered to in practice

3.2 ORGANISATION OF WORK

At its second session in Dakar, Senegal, the Commission acting upon its independence adopted its Rules of Procedure⁴⁹, that were further amended at its eighteenth session⁵⁰ These rules have contributed in giving more meaning and have been complementary to some of the provisions of the Charter. By virtue of these rules, NGOs are granted observer status⁵¹ in the Commission's sessions

⁴⁸ Article 31 of ACHPR

⁴⁹ Article 42(2) Rules of Procedure of the African Commission on Human and Peoples' Rights first Annual Activity Report of the African Commission on Human and Peoples' Rights 1987-1988, ACHPR/RPT/ 1st Annex V.

⁵⁰ Rules of Procedure of the African Commission on Human and Peoples' Rights (amended) adopted 6th October 1995 ACHPR/RP/XIX. It is worthy to note that the rules stated in this thesis are the amended rules.

⁵¹ Rule 76

and also have the locus standi to propose items on the agenda. This has made it possible for the NGOs to be actively involved in the work of the Commission; it is worth stating that this has contributed enormously to the collecting of information by the Commission. The Rules have expressly given leave to individuals who are victims of violations or someone acting on their behalf, or an organisation to make a complaint before the Commission.⁵² Members of governments, representatives of NGOs, observers and the media usually attend the sessions. But proceedings in the examination of complaints are very confidential and do take place in private sittings. The sessions are presided over by a chairman and vice elected for a two-year term⁵³ and decisions are taken by a simple majority with seven members present forming a quorum. The Commission meets twice a year for a period of ten to fifteen days in Banjul and financing is done by the OAU, but however, any member state is allowed to host the sessions if so requested by the government. The working languages for the commission are English, French and Arabic.

3.3 FUNCTIONS

By virtue of Article 45 of the Charter, the Commission is required to promote, protect and interpret the rights therein contained. It has as main function to see to it that states parties protect these rights while the their citizens are educated on their rights and duties as specified and enshrined in the Charter. The Commission's functions can be classified into promotional, protective, interpretative and the examination of reports and communications.

Looking at the promotional functions, the Commission is required to create awareness on the rights and duties contained in the Charter, how they can be protected and what to do in case any of them is violated. Infact, there has been and is still so much lack of information about the functioning of the Commission due too much confidentiality in its proceedings. In order to make itself more open to the public, the Commission undertakes studies, organises seminars, symposia and conferences and works in cooperation with NGOs and other bodies like the Raoul Wallenberg Institute, International Commission of Jurists and Amnesty International. These activities have helped in publicising its work and led to much awareness on human rights issues within the continent.

Added to this, the NGOs on their part have contributed immensely in the dissemination of information relating to the protection of human rights and have even filed complaints on behalf of victims. The NGOs have reliably acted as a reliable source of information for the Commission due to the direct contact they have with the civil society in general and the victims in particular.

Also in line with its promotional duties, the Commission has assigned its commissioners to various African states wherein they are expected to promote

⁵² Rule 114

⁵³ Article 42 of ACHPR

the respect of the provisions in the Charter especially during intercessional periods.⁵⁴ It is worth stating that the promotional duties are not the sole responsibility of the Commission. Article 25 of the Charter also imposes a corresponding duty on states to promote and ensure through teaching, education and publication the respect of the rights and freedoms enshrined in the Charter.

Added to the above-mentioned function is that spelt out by article 62 of the Charter, which gives the Commission the competence to receive state reports. Since there is no provision expressly giving it the powers to examine the reports, the Commission in its third session sought the permission of the Assembly of Heads of States and Governments to examine state reports. States are expected to submit reports to the Commission after every two years. These reports are expected to contain the legislative and other measures they have taken to give effect to the provisions of the Charter. It is the procedure used to monitor compliance by states of the Charter provisions and it has been described as “the backbone of the mission of the Commission”.⁵⁵ It is also worth stating that this is a similar procedure with the other regional and international bodies and like them states have a poor record of submission. By 2000, only 23 state parties had submitted their initial reports. More so and due to the disparity in the contents of the various reports submitted, the Commission decided to issue guidelines to states which were later amended and reduced to a two page document which list out eleven points states must take into account in the preparation and compilation of their reports.⁵⁶ Added to this, the Commission organised seminars in Banjul and Harare in 1993 and Tunis in 1994 on the rendering of state reports and has always requested the Assembly of Heads of States and Governments to appeal to states to submit their periodic reports since it lacks the capacity to make the states submit these reports. The examination of these reports gave the Commission the opportunity to question the state on matters of violations brought to its notice by the NGOs. It also provided the forum where there could be constructive dialogue between the Commission and the state representative who is usually a senior member of government and who has the competence to answer the questions posed to him. In practice however there have been situations where the state representatives have failed to attend the Commission’s sessions thereby leading to a deferral of the examination of the state’s report. Since this often led to a halt in the Commission’s activities, it decided at its twenty third session that

⁵⁴ Even if a state has not ratified the charter, see distribution of countries for commissioners of the African Commission on Human and Peoples’ Rights for promotional activities as at January 1996, ninth annual activity report of the ACHPR (1995-96); ACHPR/RTP 19th ; AHG /207 (XXXII).annex VI; ACHPR/DIST/COUN/XIX; the Commission explains that it allocated countries to commissioners on the basis of their nationality ,language and distance from their country of residence ;geographical distribution of countries among commissioners for promotional activities DOC/OS/36e(XXII)

⁵⁵ I.Badawi El Sheikh The African Commission on Human and Peoples’ Rights, Prospects and Problems (1989) 7 NQHR 272-3 at 281

⁵⁶ Amendment of guidelines for the preparation of periodic reports by states parties; doc/05/27(XXII). see discussions at various sessions: agenda of the twenty first ordinary session (15-24 april 1997), tenth annual activity report of the ACHPR(1996-7), ACHPR/RPT/10, annex III ;doc OS/1(XXI)Rev.IV item 7e:23rd session transcripts.

those reports of states which failed to send representatives would be examined in absentia.⁵⁷ This interestingly led to more state representatives attending the Commission's sessions.

Thirdly, the Commission is vested with a protective mandate. This consists principally of receiving communications and acting upon them in the manner consistent with the provisions of the Charter. These communications can either come from states parties under Article 47-54 of the Charter or from other sources under Article 55 which has been interpreted by the Commission to mean individuals and NGOs. A state which feels that another has committed a breach of the Charter provisions may call the attention of the infracting state to the matter in writing and send copies to the Secretary General of the OAU and the Chairman of the Commission. The infracting state has three months within which to reply to the allegation supported by documents of the relevant rules including available redress and action taken. If both states fail to reach a satisfactory solution, either of them may refer the matter to the Commission, which in turn tries to seek an amicable solution and then makes a report to the Assembly of Heads of States and Governments. Like other instances of protection, this procedure has never been used save for one instance⁵⁸. The fact that this procedure has hardly been used is questionable taking into consideration the blatant violations of human rights carried out by some governments.

Furthermore, a communication may be received from entities other than states. It is worthy to note that there is no provision in the Charter that expressly gives it competence to entertain communications from individuals and NGOs. This has evolved as a matter of interpretation by the Commission. The only reference in the Charter is in articles 55-59 which merely states "other communications". But since its third session, the Commission has developed the practice of dealing with individual communications.⁵⁹ In this vein NGOs and individuals do have the *locus standi* to bring complaints before the Commission.

When a communication is received, it is registered and given a number⁶⁰ and a copy sent to the state against whom the complaint is made for its comments on admissibility. But for a communication to be held admissible, it is expected to

⁵⁷ At the 23rd session at which the representatives of Chad and Seychelles failed to attend a decision was taken to examine their reports at the following session. See final communiqué of 23rd session. In its state reporting procedure information sheet no 4 at 11, the commission affirmed that reports would be considered after the state had been sent two notifications and failed to attend. the same decision was taken at the 24th and 25th sessions but reports were not examined .however in relation to Seychelles, a final communiqué deplored this lack of representation and it passed a resolution concerning the republic of Seychelles refusal to present its initial report where it held that such persistent behaviour represents deliberate violation of the charter "firmly condemned this unspeakable behaviour". It further invited the OAU AHSG to "express their disapproval of such persistent refusal that amounts to a deliberate violation" and to consider appropriate measures to be taken.

⁵⁸ Libya v USA concerning the removal of Libyan soldiers from Chad after a military coup d'état in 1990. but the communication was declared inadmissible because the state complained against was not a party to the charter

⁵⁹ First annual report no 21 pgh 26

⁶⁰ Some communications have been recorded and later found not to be communications at all e.g. no 63/92 congress for the second republic of Malawi v Malawi

contain the name of the author, be compatible with the provisions of the Charter, not written in insulting and disparaging language, must not be exclusively based on the media, must have exhausted all available domestic remedies and not before any procedure of international settlement.⁶¹

In a number of cases where one or more of the requirements have not been met, the Commission held they were inadmissible. In *Ligue Camerounais des droits des l'homme v Cameroon*⁶² for example, it held that not only was the language used insulting but also the allegations were not established. This has also been the case with communications which are vague⁶³, incoherent⁶⁴ and against a non-party⁶⁵. The rules also bar information exclusively based on the media. This however is intended to avert reliance on more hearsay evidence; but in cases where evidence provided by the media is convincing, it will consequently be held admissible. In April 1991, the Commission received information on violations in Liberia during the civil war, trials and execution of military officers in Sudan and the execution of students of Lumumbashi University by military officers through the radio and acted upon it.

In emergency situations, the Commission under article 58 of the Charter is required to draw the attention of the Assembly of Heads of States and Governments to the matter. This has received so many criticisms because it is time consuming and even leads to irreparable harm being done to the victims. Since it lacks the capacity to request for interim measures (notwithstanding the fact that it is provided for by rule 111 of its rules of procedure) the Commission has taken upon itself to conduct investigations in such situations before making its recommendation to the Assembly. It held in *Lawyers Committee for Human Rights v Zaire*⁶⁶ that allegations of torture, detention and arbitrary arrests were series of serious or massive violations of human and people's rights and requested the Assembly of Heads of States and Governments to address the situation.

The fourth important function of the Commission is to interpret the provisions of the Charter. This is similar to an advisory jurisdiction. By virtue of article 60 and 61 of the Charter, the Commission is called upon to interpret the former's provisions. It has already adapted a number of resolutions interpreting various rights including the right to fair trial and freedom of association.⁶⁷ But it is worthy to note that in relation to provisions on peoples' rights, discrimination against women and on apartheid, the Commission states clearly that it takes its interpretation from the conventions adopted by the UN on these topics.

Lastly article 45(iv) enables the Assembly of Heads of States and Governments to request the Commission to carry out other tasks. But it is still unclear what this

⁶¹ Article 56 ACHPR.

⁶² Communication no65/92

⁶³ Case No 104/94, 109/94 and 126/94 Centre for the Independence of Judges and Lawyers v Algeria and communication no 35/89 S. Ayeh v Togo

⁶⁴ Case No 57/91 Tanko Banga v Nigeria ; 142 /94 Muthuthirin Njoka v Kenya

⁶⁵ Case No 12/88 Mohammed El Nekheily v OAU

⁶⁶ Case No 47/90

⁶⁷ Resolution on the right to freedom of association, fifth annual activity report, resolution on the right to recourse procedure and fair trial

means: commissioners have nonetheless often been requested by the Assembly to observe elections in various African countries.⁶⁸

3.4 EFFECTIVENESS OF THE COMMISSION

Since its inception in 1987, the African Commission encountered numerous difficulties in its struggle for existence. Among the human rights regional monitoring mechanisms, the Commission has so far proven to be the least effective in both the ways it carries out its functions and the effect of its decisions. Scholars have taken their turns in seriously criticising it due to this ineffectiveness and its failure to properly carry out the functions entrusted to it by the Charter.

However all has not been without some positive efforts being made by the Commission to ensure the respect of human and peoples' rights.

Firstly and in line with its promotional duties, the Commission is working hard to create much awareness not only of its work but also on issues of human and peoples' rights. With the collaboration of some partners like the Raoul Wallenberg Institute, the International Commission of Jurists and UNESCO, it has organised seminars, symposia and conferences to publicise its activities and educate the participants who are mainly NGOs and other members of the civil society on the rights and duties under the Charter. At its 11th session in 1992, the Commission adopted a comprehensive program of activities for 1992-1996. Some of these seminars included inter alia the implementation of the African Charter in the internal systems, the role of the African media in the promotion of human rights, the state reporting procedure, the status of women under the African Charter and the situation of refugees and internally displaced persons in Africa.

Furthermore, the Commission works in close ties with NGOs in organising workshops and training seminars at the grassroots level. This relationship does help the Commission in obtaining information on country situations without necessarily going to the field which of course will be a financial burden. Amnesty International's guide to the African Charter⁶⁹ and the brochure on how to file a complaint with the African Commission prepared by the International Commission of Jurists⁷⁰ are all examples of NGOs contributions in complementing the work of the Commission.

It is also worth stating that the Commission had proclaimed the 21st of October each year as Africa Human Rights Day. All the member states are called upon to

⁶⁸ See e.g. ninth annual activity report no54 pgh 15. two commissioners were part of the OAU observer teams presented reports on elections in Tanzania and the Comoros islands.

⁶⁹ Index: IOR63/05/91 Amnesty International (September 1991)

⁷⁰ How to address a communication to the African Commission ICJ (1992)

organise activities in commemoration of this day. This had led to a wide dissemination of information on the rights protected by the Charter and the work of the Commission.

Added to this, some of the visits undertaken by commissioners within the framework of promotional activities have had some positive results on the protection of human rights. One of such visits was that carried out by commissioner Umzorike to the University of Ghana which partly contributed to the creation of the Ghanaian Human Rights Committee.

Secondly under its protective mandate, the Commission has worked within its financial limits and undertaken missions to Togo, Nigeria, Senegal, Mauritania and Sudan where serious violations were reported. Some of these missions were aimed at putting pressure on the governments of the states concerned to respect the rights of their citizens and seek amicable solutions to the problems that gave rise to the violations. Added to this, some commissioners have acted on their own personal capacity to ensure that the rights spelt out in the Charter are protected. This is usually the case when violations occur between sessions. In *Kalenga v Zambia*⁷¹ a commissioner on his own initiative secured the release of the complainant who was wrongfully detained. The Commission has even extended its protective mandate by sending observers to monitor elections in member states as was the case with Mali.

Notwithstanding the lack of cooperation by states, the Commission has gone ahead and acted dynamically in requesting for interim measures in cases of violations. This was the case in *Constitutional Rights Project v Nigeria*⁷² (in respect of Ken Saro Wiwa and 17 others) and *Constitutional Rights Project v Nigeria*⁷³ (in respect of M.K.O Abiola, A. Enahoro etc) and *Jean Y. Degali (on behalf of N. Bikagni), Union Inter africaine des droits de l'homme, Commission Internationale de Jurists v Togo*⁷⁴ where the Commission requested that the state should safeguard the health of the detainees in the former cases and the security of Corporal Bikagni in the latter case pending the final determination of their cases. Whether this was respected by the state is another issue but the fact that the Commission went as far as requesting for such measures needs to be emphasised.

Enforcing resolutions and recommendations has been a serious problem affecting the Commission. But it has gone ahead to adopt a number of resolutions against some states and using very strong language to condemn the violations being carried out.⁷⁵

It has also appointed thematic rapporteurs to follow up the implementation of its resolutions and of the provisions in the Charter.

⁷¹ Communication n0 11/88

⁷² Case No 139/94

⁷³ Case No 140/94

⁷⁴ Communication nos 82/92, 88/93 and 91/93 (joined)

⁷⁵ Resolution on Zaire, tenth annual activity report no67 annex XI; resolution on Burundi, ninth annual activity report no54 annex VII; resolution on Liberia ninth annual activity report no 54 annex VII

There is a Special Rapporteur on Extra Judicial, Summary or Arbitrary Executions appointed at the fifteenth session (1994).⁷⁶ He was mandated to report extra judicial executions, collaborate with authorities and NGOs to find perpetrators, recommend to the Commission on how to intervene and coordinate with states for the punishment of the authors and the rehabilitation of the victims. In his first report presented at the twenty- third session, he was working in collaboration with some NGOS on the situation in Rwanda and Burundi.⁷⁷

Also a Special Rapporteur on Prisons and Conditions of detention was appointed at the 20th session⁷⁸. He had visited places of detention in Zimbabwe, Mali, Mozambique and Madagascar and made recommendations to the Commission.

Lastly the Rapporteur on Women's Rights⁷⁹ who was mandated to study the situation of women's rights in Africa, draft guidelines for states reports on women's rights, monitor the implementation of the Charter on this issue, assist states in their implementation programs, encourage NGO participation in this area and create the necessary links between other bodies like CEDAW and the Commission. However, due to financial and logistical problems the rapporteur has not been able to carry out her duties effectively. It is hope that taking into consideration the importance of issues handled by this rapporteur, the necessary funds will be made available for more effective work to be done especially with the advent of the African Union.

Furthermore, the initiative taken by the Commission to amend its rules of procedure at its eighteenth session is worthy to be mentioned. The new rules transferred to its Secretary most of the powers given to the OAU Secretary General in the old rules. It should be noted that one of the shortcoming of the Charter, which tends to undermine the effectiveness of the Commission is the subordination of the Commission to the OAU, a political body. Under the old rules, the OAU Secretary General was entrusted to draft the provisional agenda for each ordinary session in coordination with the Commission⁸⁰. This led to so much interference in the its activities by the OAU; but the amended rules have rectified the situation with all the powers given to the Secretary of the Commission.⁸¹ Added to this, amended rules 33 and 40 have given the Commission the powers to publicise its activities without necessarily asking for an

⁷⁶ Hatem Ben salam final communiqué of the 15th ordinary session, Banjul the Gambia

⁷⁷ Progress of the report on extra judicial, summary or arbitrary executions in Rwanda, Burundi, tenth annual activity report annex VI

⁷⁸ Dankwa: final communiqué on 20th ordinary session of ACHPR grand bay muaritania21.31 October 1996ACHPR/FIN/COMM/XX pg 18. But today the post is occupied by Dr Vera Mlangazuwa Chinwa who is a commissioner from Malawi

⁷⁹ Commissioner Ondziel Gnelenga appointed to this position at the 23rd session .see final communiqué of the session. Dr Angela Melo from Mozambique is currently occupying this position.

⁸⁰ Rule 6(1) of the old rules

⁸¹ Rule 6(1) of the new rules

express approval from the Assembly of Heads of States and Governments as stated in article 59 of the Charter.⁸²

Furthermore, the Commission is in the process of considering a mechanism for dealing with emergency situations under article 58(iii) of the Charter. A draft, which required the Commission to act promptly in situations of massive violations, was concluded and tabled at the 21st session for adoption.

Lastly at its 32nd session held in Gambia from 17th to 23rd October 2002, the Commission adopted the Declaration of Principles on Freedom of Expression in Africa. This was envisaged to protect the freedom of press and freedom to receive and impart information, which has been seriously violated in the continent within the last decade and till date.

By and large it seems obvious that the Commission has achieved some success by setting up some of the various organs needed for the implementation of the rights enunciated in the Charter, but this is no guarantee for the protection of these rights. More efforts have to be made in terms of their functioning and effectiveness.

Notwithstanding, the Commission has always been the least effective compared to other regional organisations. It has to a large extent failed to protect the rights of those it was meant to protect. This failure has been due to the following reasons.

Firstly, it lacks an effective follow up mechanism to follow up on its recommendations and to see into it that states do comply with them. The absence of this means that the Commission gets no feedback from the states on their compliance with its resolutions. In a sense, the resolutions are mere paper work and they end up in the drawers of governmental departments; this has led to a lukewarm attitude on the part of the states in complying with the resolutions thereby giving the Commission an image of a toothless bull dog.

Also the visits expected to be carried out by the commissioners to the countries they have been assigned to do not take place regularly. The purpose, which is that of keeping the Commission informed on the effect given to its decisions by members states and the total compliance with and implementation of the provisions of the Charter is not realised. More funds should be allocated at the disposal of the commissioners to visit the countries to which they have been assigned to at least once a year. In this vein they can use their presence to exert pressure on the governments to give effect to the Commission's decisions. Notwithstanding, the commissioners are called upon to act dynamically during these visits and in their encounters with government officials. Some commissioners have been seen to be naïve or too scared to use such opportunities to raise issues concerning human rights during such visits. This was the case when a commissioner was sent to Nigeria and had a few minutes audience with the then president General Abacha but failed to demand the release of political prisoners including the late Moshood Abiola, the reputed winner of the 1993 elections. It is

⁸² Rule 33 makes provision for the issuance of communiqués at the end of each private sitting while rule 40 on its part provides leaves the publication of minutes of private and public sessions to discretion of the commission.

submitted that the commissioners should use these visits to convince and if possible pressurise the governments to respect the provisions spelt out in the Charter. In the same vein, they should make it a point of duty to hold sessions with human rights NGOs and leaders of the civil society in these states since this will give the commissioner the opportunity to come in terms with the practical realities.

Secondly, the politicised nature of the Commission and the fact that it is subservient to a political body like the Assembly of Heads of States and Governments have seriously contributed to its ineffectiveness. Most of the commissioners are highly placed government officials⁸³ and this affect their sense of judgement to the extent that they tend to protect the image of their government whenever they are accused of violations. In such situations, political interests will obviously override human right issues. This was very evident when the first state report of Zimbabwe was presented. The chairperson of the Commission spent a long time praising the human rights situation in that country and the way the report was prepared. At the time he was the chairperson, he was his country's ambassador to Zimbabwe. This just goes along way to show how political issues override human rights and questions the independence and impartiality of the commissioners. Also the fact that recommendations from the Commission have to be submitted to a political body like the Assembly of Heads of States makes it the more ineffective and simply goes to buttress the aforementioned point. The Commission should be vested with the competence to issue its own decisions without necessarily submitting it to the Assembly.

Thirdly, there is the acute problem of states not submitting their reports. Presently 20 states are in arrears of their initial reports. This has greatly hindered the smooth functioning of the Commission especially taking into cognisance the fact that this is an important procedure used by the Commission to monitor state compliance with the Charter. Added to this those states which try to report do so episodically. They report once and wait for a long time only to appear later. This impairs the system and hinders effective follow up and monitoring. A solution to this problem will not lie on the Commission. The states are called upon to develop the right attitude in submitting their reports and are also expected to exert pressure on those states, which have not yet presented their initial report during ministerial council meetings.

Fourthly, the confidential nature of the Commission's proceedings has not been of help to its efforts to fight against human rights violations. With respect to article 59 of the Charter, all measures taken during the proceedings are to remain confidential until such time as the Assembly shall decide otherwise. The resultant effect of this is that the public in general and victims in particular are not informed on what the Commission is doing in the examination of individual complaints and

⁸³ Mr Yasser Sayyid Ahmad el Hassan is the Minister of Justice of Sudan, Mrs Sawadogo Tapsoba is the permanent secretary at the Ministry of Justice in Cote d'Ivoire, Dr Nyameko Barney Pityana is the Vice Chancellor of University of South Africa, Mr Andrew Ranganayi Chigovera is the Attorney General of Zimbabwe and Mr Ben Salim is the ambassador of Tunisia to Geneva-Switzerland.

are uncertain on what to do in order to vindicate their rights. Sometimes the names of infracting states are not released to the public in a bid to protect them from any public embarrassment notwithstanding how influential and effective this embarrassment factor can be. Since its 17th session in 1995, the Commission began the practice of sending its decisions on complaints considered to the respective parties. Hitherto, this was not the case and the decisions published in the Activity Reports merely referred to the provision of the Charter alleged to have been violated. It is submitted that the Commission should intensify this practice by including the facts, the applicable rule and the ratio descedendi of the decision. This will lead to much publicity and also strengthen its jurisprudence.

Furthermore, it is worth noting that the effectiveness of Secretariat is very crucial for the success of the Commission since the former handles the bulk of the work. Nonetheless, the Secretariat is still very understaffed and lacks the basic, modern and faster modes of communication like the Internet. This therefore makes it very difficult to liaise with other bodies like NGOs, which are vital partners in its day-to-day functioning. Thus the secretariat's work force should be strengthened by improving the quality of its personnel. The Commission is an international body and should therefore be supported by an international secretariat; most of the workers have been recruited locally and are all Gambian nationals. While there may be important financial considerations for local recruitment, it is not worth the price of effectiveness. Recruitment should include African scholars and NGO representatives,⁸⁴ which should be done through a competitive process and is likely to ensure that those who work at the secretariat are very competent.

The chronic financial state in which the Commission is functioning makes it all the more difficult for it to be effective. Due to lack of finances, it cannot fully promote its activities since commissioners are unable to visit the member states, rapporteurs not able to carry out their functions and even documentation within the secretariat not so easy to find. All these inabilities make it very difficult for effective functioning of the Commission.

At this point it also worthwhile to stress the uncooperative attitude of states. Most states are very reluctant to use their official media to publicise the activities of the Commission. This poses enormous difficulties for the Commission getting right down to the grass roots during its sensitisation encounters. It is hoped that with the growing political will and interest in human rights issues exercised by some states lately, human rights will play a pivotal role in the Assembly's discussions and the much-needed finances channelled down to the Commission.

Added to all of this, most Africans are poverty stricken to an extent that they may not be able to pay the legal expenses at the domestic level and consequently such violations do not go right up to the Commission thereby creating a vicious circle of violations. Even though the solution to this problem may not necessarily be within the realm of human rights, it still worth mentioning.

Also the availability of more effective bodies to seek redress has totally exposed the impotency of the Commission. Since most African states have also ratified

⁸⁴ Intervention of Nana K.A Busia Jr, 3rd ICJ workshop on the work of the African commission, held in Banjul, Gambia October 1992

other international instruments, victims prefer to by-pass the Commission thereby depriving it of the cases it would have entertained and used to strengthen its jurisprudence.

Nevertheless, with the coming of the proposed African Court of Human and Peoples Rights it is hoped that it will complement the Commission in its functions and the confidence, which has long been lost, will be regained. It is hoped that the Court will be independent of all political leanings and like the other Courts will be constituted by independent judges and have the competence to deliver binding decisions on the matters addressed to it. Moreover, it will also entertain individual complaints and unlike the Commission will not be confidential with its proceedings. All these it is hoped will make the human rights monitoring mechanism more effective thus making the rights enshrined in the Charter more enforceable.

But since the Court is still to come into existence, the commissioners are called upon to be more dynamic and act in true spirit of their independence because as we anxiously wait for the Court, violations do occur on a daily basis.

4 THE INTERNATIONAL LABOUR ORGANISATION

4.1 CREATION

The ILO was established in 1919 during the Peace Conference held in Versailles, Paris at the end of the First World War. But this idea had been advocated early in the nineteenth century by two industrialists i.e. Robert Owen of Wales and Daniel Legrand of France. At the conclusion of the Peace Treaties, it was realised that the plight of workers constituted a very important part in averting any future wars. Added to this, the industrial revolution had shown the intolerable and harsh conditions under which the workers were expected to work. Industrialists and trade unionists had started advocating for the respect of workers rights and this was therefore an opportunity for them at the Peace Conference to place their demands at an international forum. This consequently led to the inclusion of workers representatives at the Conference and due to the backing of France and Great Britain for an international labour legislation, the International Labour Organisation was thus included in the Peace Treaty and its constitution was part XIII of the Treaty of Versailles. Three reasons can be advanced for the inclusion of this labour legislation in the Peace Treaty.

Firstly and on humanitarian grounds, the workers were seriously exploited and no attention paid to their lives, family and conditions of work. This was really degrading to their dignity as human beings and therefore unacceptable.⁸⁵

Secondly the population of workers worldwide had increased tremendously and there was the fear of them creating serious unrest or even revolutions that will eventually disturb the peace of the world; so for political reasons, their needs had to be taken care of⁸⁶.

Thirdly, was for economic motives since it was evident that disparity in the way workers were treated in one part of the world will negatively affect international trade. In a bid to boost productivity, workers worldwide were expected to be treated equally.⁸⁷

With all these issues at stake, a commission of fifteen members was elected to deal with the labour legislation. After holding a series of meetings and consultations, it adopted a draft convention of the ILO, which was subsequently

⁸⁵ This was enshrined in the preamble of the ILO thus “conditions of labour exist involving ...injustice, hardship and privation to large numbers of people”

⁸⁶ This is clearly expressed by the first part of the constitution which states that “universal and lasting peace cannot be established only if it is based upon social justice”

⁸⁷ This preoccupation appears clearly in the preamble of the constitution where it is stated “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”

adopted and incorporated into the Treaty of Versailles. At its first meeting the same year, the ILO began its task of adopting international labour legislation in the form of conventions and recommendations. It is worth noting that among these first pieces of legislations were those protecting the human rights of workers viz Conventions on Child Labour, Protection of Women in Work Places and Forced Labour. The outbreak of the Second World War hindered the activities of the Organisation but thanks to the commitment of member states, it was further strengthened by the adoption of the Philadelphia Declaration in 1944, which restated and modernised its aims and was eventually incorporated into the ILO Constitution. This Declaration stated its mandate in terms of human values and aspirations and strongly re-echoed the human rights mandate of the Organisation.

4.2 MEMBERSHIP

Due to the quest for universality and the protection of workers' rights worldwide, the ILO was created as an international organisation with membership open to all the member states of the United Nations. In accordance with article 1(iii) of its Constitution, any member of the United Nations may become a member of the International Labour Organisation by simply communicating to the Director General of the Organisation its formal acceptance of the obligations of the Constitution of the ILO. Once this is received by the Director General, the acquisition of membership is automatic. In cases where the state concerned is not a member of the United Nations, the International Labour Conference will have to decide by a vote concurred in by two thirds of the delegates attending the session and two thirds of the government delegates present and voting⁸⁸. The Organisation has also given observer status to a number of NGOs and has even gone as far as giving status to some liberation movements like for example the Palestine Liberation Organisation. Once a state has acquired membership, it is bound by all the conventions it signs and by the obligations flowing from them. However, the constitution also provides for states to withdraw their membership⁸⁹ and for the conference to request such withdrawal.⁹⁰ Nevertheless, a member state after withdrawal is still permitted to re-apply for admission.

4.3 STRUCTURE

⁸⁸ Article 1 para 4

⁸⁹ Article 1 para 5. This was used by the USA in 1975 and has been used by some other states since then

⁹⁰ As was the case with South Africa .see ILC 45th session 1961 record of proceedings p891. also pp 575-577, 580-584 and 599-616

The ILO is made up of three basic and principal organs, viz the International Labour Conference, the Governing Body and the International Labour Office. But before briefly stating the functions of each of these bodies it is worthwhile to mention the unique and tripartite nature of the Organisation. It is an inter-governmental organisation but it is composed of representatives of workers and employers associations as well as governments. They too form part of each of the principal organs of the organisation.

The International Labour Conference is composed of the 175 member states that make up the Organisation. This is the plenary organ of the Organisation and is usually attended by up to 4000 delegates, which include the government delegates, workers' and employers' representatives, their advisors and delegates representing the international inter-governmental and non-governmental organisations. Each member state is represented by four delegates comprising two government delegates, one worker and one employer delegate. The Conference usually holds yearly sessions in Geneva in June. The government representatives are usually Ministers of Labour and sometimes Heads of States and Prime Ministers take turn to address the Conference. The main tasks of the Conference include the elaboration and adoption of conventions and recommendations and it has acted as a forum where social and labour matters are freely discussed. Decisions are taken by a simple majority of the votes cast by delegates present and voting⁹¹ except for other matters such as the admission or readmission of members whereby a two third majority of members attending the conference and a corresponding two third majority of government delegates is required. For any decision to be valid the total number of votes cast should be equal to half the number of the delegates attending the Conference.⁹² Finally the Conference is responsible for the adoption of the budget of the Organisation, which is solely financed by the member states.

The Governing Body on its part is considered as the executive organ of the Organisation. It is made up of 56 members amongst whom 28 are government representatives while 14 are workers' and the other 14 are employers' representatives. It is worth noting that of the 28 government representatives, 10 are considered permanent members and they come from the states of chief industrial importance.⁹³ The other 18 members are elected by the International Labour Conference every three years. It meets thrice a year in March, June and November and is responsible inter alia for the execution of the decisions taken by the Conference, prepares the budget for adoption, sees into the implementation of the standards set out in the various conventions and elects the Director General who is the head of the International Labour Office. To facilitate its task it has established six committees and a subcommittee to carry out specific duties,

The International Labour Office in Geneva is the permanent secretariat of the ILO. It among other duties prepares the documents and reports including

⁹¹ Article 17(ii) ILO constitution

⁹² Article 17(iii) *ibid*

⁹³ These countries include Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, United Kingdom and the USA.

background material for the conferences and specialised meetings, provides guidance for technical cooperation programs around the world and most importantly, it receives whatever complaint or representation is made against a member state which is not giving effect to a convention it has ratified and also coordinates the activities of the various regional offices functioning in other parts of the world.

Since its inception, the ILO has been very successful in setting labour standards through the elaboration and adoption of conventions and recommendations. Some of these conventions have received wide ratifications and come into effect almost as soon as they are adopted. Presently, the ILO has adopted a total of about 185 conventions under its auspices and has got more than 7000 ratifications.

Since the purpose of this research is basically to look at how effective the Organisation has used its various organs to implement the human rights conventions that have been adopted under its auspices, it is important to state that the incorporation of the Philadelphia Declaration into the constitution of the ILO, ushered in a period of standard setting on human rights. As aforementioned, the Declaration stated its aims in terms of human values and aspirations for example by stating:

“all human beings, irrespective of race, creed, or sex, have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity of economic security and equal opportunity”

This therefore places human rights at an important and pivotal part of its discussions and activities. This inclination towards the realm of human rights is very much evident from the number of conventions it has adopted within its auspices, which has led to both the protection of labour standards and human rights. Within the ILO, these conventions have been termed the fundamental conventions and they include

-The Convention of Freedom of Association and the Right to Organise, 1948(No87)

- Convention on the Right to Organise and Collective Bargaining, 1949(No 98)
- Convention on Forced Labour, 1957(No105)
- Convention on the Abolition of Forced Labour, 1957(No105)
- Convention on Equal Remuneration, 1950(No100)
- Convention on Discrimination (Employment and Occupation), 1958 (No111)
- Convention on Minimum Age .1973(No 138)
- Convention on the Worst Forms of Child Labour, 1999(No 182)

It should be noted that these are considered to be the most fundamental instruments in the field of human rights within the ILO. But it is worthy to also note that the list is not exhaustive but merely illustrative because of the fact that there

are other instruments which provide for the protection of human rights such as those on women, disabled workers, migrant workers, indigenous and tribal peoples and workers with family responsibilities. It can be seen that the rights protected by the aforementioned conventions are also part of those under the protection mandates of either the Bill of Rights or other human rights conventions like the Convention on the Rights of the Child. Having said this, it is worth looking at the various ways through which the ILO monitors compliance of these conventions and how effective this has turned out to be.

4.4 MONITORING

The ILO has proven to be very successful in setting international labour and human rights standards. But all the work involved in the setting of these standards will amount to nothing if there is the lack of an effective monitoring system or procedure. To this end, the Organisation has instituted two principal procedures for the monitoring of compliance by member states and even non-member states in some instances. The Organisation uses its regular procedure to receive and examine reports from states on a number of conventions while on the other hand; it uses its special procedure for the examination of representations and complaints made against member states. A more detailed study will be made on the aforementioned procedures to enhance a better understanding of the monitoring procedure of the ILO.

Regular procedure

Article 22 of the ILO Constitution, provides that states make an annual report to the International Labour Office on the measures they have taken to give effect to the provisions of the conventions which they have ratified. At the beginning the volume of reports received by the Committee in charge of their examination did not constitute a problem since at that time only a few states had ratified the various conventions. But by 1976 when the total number of conventions had risen to 140, member states to 130 and ratifications to 4000, this constituted a problem for the Committee examining these reports. It further got worse by 1994 when the number of conventions had risen to 175 and over 6000 ratifications. There was therefore an urgent need for reforms and the Governing Body began the practice whereby it requested the reports on particular conventions such as those dealing with human rights every other year while the reports on the other conventions were requested after every five years. This consequently led to a reduction of the amount of work handled by the Committee. Furthermore, before submitting their reports, states are required to send copies of these reports to the most

representative organisation of workers and employers in the country.⁹⁴When state reports are received by the International Labour Office, they are transmitted to the Committee of Experts on the Application of Conventions and Recommendations created under the auspices of the Governing Body.

This Committee carries out the examination of states reports at first instance .It is also entrusted with the powers to examine governments reports on the situation in national law and practice as regards selected unratified conventions and also receives information supplied by governments as regard submission of newly adopted conventions and recommendations to the competent national authorities for enactment into their national systems.

It is composed of 20 independent persons of the highest standing with eminent knowledge in the social and legal fields and intimate knowledge in labour matters. They are appointed by the Governing Body on the proposal of the Director General in their personal capacity for a period of three years being renewable for a successive period of three years. This Committee meets each year in November and December. In the examination of state reports the Committee pays much emphasis on the legislative and administrative measures, which have been taken to give effect to ratified conventions, and also to what extent they have been implemented. Nevertheless the Committee also receives information from other sources like the workers´ and employers´ organisations, judicial decisions and labour inspection services which usually provide some additional information not contained in the state reports. At the end of its examination, it may issue its comments in two forms.

Firstly, it may issue an observation, which is usually written in its report that goes to the Labour Conference, or it makes a direct request to the member state concerned. The difference between these is that the former is used in situations where there have been a continuous refusal by a state to submit its report on time with the requested information or in cases of consistent non-compliance with decisions of any of the Committees. Such a matter is sent to the Conference for deliberations; the latter on the other hand is used in a case where the report does not contain the information required and it is issued directly to the state to either furnish the Committee with more information or provide it in its next report. Unlike observations this is not included in the Committee’s final report.

This report is forwarded to the Labour Conference and tabled before the Conference Committee on the Application of Standards⁹⁵. This Committee usually comprises 150 members from the three groups of delegates (i.e. government, workers and employers) and advisers. It examines the report of the Committee of Experts at second instance .It obtains the desired information from governments either in written form or orally, act expeditiously and presents its report to the Labour Conference in a succinct and accurate form. The Labour Conference sitting in plenary adopts the reports of its Committee and this is sent to the governments concerned with their attention drawn to points they should include in their next report.

⁹⁴ Article 23(2) ILO constitution

⁹⁵ Established by virtue of article 7 of the standing orders of the conference

Special procedure

The second main forms of monitoring under the ILO system are through the procedures laid down in articles 24 and 26 of the Constitution and by the Committee on the Freedom of Association. Complaints are made against states, which have failed to give effect to the provisions of the conventions they have ratified and take either one of the three forms; a representation⁹⁶, a complaint⁹⁷ and the procedure established under the Committee of Freedom of Association.

Firstly by virtue of Article 24, organisation of workers or employers may make representations that a government has failed to take measures to give effect to the convention that it has ratified. But in order for this representation to be received and deliberated upon, it should fulfil the following requirements viz, it must be communicated to the International Labour Office in writing⁹⁸, must emanate from an employers or workers organisation,⁹⁹ make specific reference to article 24 of the constitution,¹⁰⁰ must concern a member,¹⁰¹ must refer to a convention to which the member against which it is made is a party¹⁰² and must indicate in what respect the member against which it is made has failed to secure its observance within its territory.¹⁰³ Once the Labour Office receives a representation, the Director General notifies the states against which it is made and transmits it to the Governing Body. The governing body appoints a Committee composed of its members chosen in equal numbers from the government, workers and employers groups to examine the said representation. The Committee's report is presented to the governing body, which further examines the representation and then issues its decision. This decision is then communicated to the member state concerned and the association, which made the representation. On the other hand article 10 of the standing orders provides that the Governing Body can institute a complaint against a state in respect of which it had received and examined a representation.

Secondly, article 26 of the Constitution goes further to provide for a complaint procedure. Complaints can be filed by governments of countries that have ratified the same convention, by workers' or employers' delegates to the International Labour Conference and as already mentioned by the Governing Body. On receipt of a complaint, the Governing Body may appoint a Commission of Inquiry if it deems necessary to examine the said complaint. The Commission is

⁹⁶ This is provided for in article 24 of the ILO constitution

⁹⁷ Provided for by article 24 *ibid*

⁹⁸ Standing orders article 2(ii) (a)

⁹⁹ *ibid* (b)

¹⁰⁰ *ibid* (c)

¹⁰¹ *ibid* (d)

¹⁰² *ibid*(e)

¹⁰³ *ibid* (f)

made up of three prominent independent members of the Governing Body. Due to the complexities involved in their procedure, the Commission is given a wide discretion to carry out its duties in whatever way it thinks appropriate but in accordance with the object and purposes of the ILO. It acts as a quasi-judicial body in carrying out its functions by requesting documentary evidence and hears witness evidence from the parties involved in the complaint with the infracting state also requested to reply to all the allegations raised in the complaint. Furthermore, if the Commission is not satisfied with the response provided by the state, it visits the country concerned for an on-the-spot investigation. The report containing its findings and recommendations and time frame for their implementation are communicated to the Governing Body, published in the ILO's official bulletin and served on the state involved. If a state fails to comply with the Commission's recommendation, the Governing Body in accordance with article 33 of the ILO Constitution can propose to the Conference such measures as it may "deem wise and expedient" to secure observance. But more often, the Committee of Experts does the follow-up of the recommendations to member states. It is also worth stating that the decision of the Commission is considered to have been accepted by the state to which it is addressed if within three months the state does not indicate whether it accepts or rejects the said decision¹⁰⁴. In case of the latter, the state can take the matter to the ICJ whose decision on it is final.¹⁰⁵

The third monitoring procedure is through the Committee on Freedom of Association. This Committee is vested with the competence to examine violations of the constitutional principles of freedom of association and the right to collective bargaining filed by workers', employer's organisations and governments. This is a Tripartite Committee formed in 1951 and since then, it has examined about 2000 cases of violations on the right to freedom of association. It meets thrice a year and examines complaints even against states which have not ratified the ILO conventions on the subject. This, it should be noted, is a unique feature under international law.

To further complement the work of the Committee is the Fact-Finding and Conciliatory Commission consisting of nine independent members working in a panel of three appointed by the Governing Body. This was created in agreement with ECOSOC in 1950 and examines complaints from the Governing Body in respect of both countries, which have or have not ratified the freedom of association conventions¹⁰⁶ even though in the latter case the state's consent is required. It may also receive complaints against non-member states when such complaints are filed by the United Nations and the other state (i.e. the infracting state) gives its consent.¹⁰⁷ It carries out fact-finding missions into allegations of violations of the conventions and presents its report to the Governing Body. It is

¹⁰⁴ Article 29 ILO constitution

¹⁰⁵ Article 31 *ibid*

¹⁰⁶ That is Freedom of Association and the Right to Organise Convention, 1948 no 87 and Right to Organise and Collective Bargaining Convention 1949 no 98

¹⁰⁷ This was the case with regard to the United States during its absence from the ILO and the Republic of South Africa.

worthy to note that all the recommendations emanating from these bodies receive follow up from the Committee of Experts.

Lastly, the ILO may in some circumstances use ad hoc measures in the course of its monitoring duties. This may take the form of request by the Labour Conference to the Director General for reports on particular issues. For example on the situation of workers in the Arab occupied territories. Under another procedure instituted in 1964 a state may request for direct contacts to discuss problems encountered in implementing the conventions. Added to this, is a procedure for Special Study on Discrimination which was adopted in 1973 under which a request can be made for the submission of a report by a member state or employer or worker organisation on specific questions which concern the implementation of the conventions. Finally since 1985, the Governing Body has requested information concerning the implementation of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

4.5 EFFECTIVENESS OF THE ILO

Since it's coming into existence, the ILO has been remarkable in setting international labour and human rights standards. Having already discussed the procedures by which these standards are monitored, it is worthwhile at this point to show to what extent they have been effective in ensuring compliance by states parties to the conventions.

The ILO has to a very large extent been successful in following up recommendations made by any of its organs to member states that do not give effect to the provisions of the conventions they have ratified. Recommendations from the Labour Conference, the Commission of Inquiry in the case of a complaint, the Committee on Freedom of Association and the Fact-Finding and Conciliatory Commission all receive follow up by the Committee of Experts on Application of Conventions and Recommendations. This Committee issues reminders to states in the form of direct requests where the non-compliance is not consistent and observations in more consistent cases. The thorough and strong language used in observations in particular and the publicity they get have led to a remarkable trend of compliance by states. This is the case because states usually tend to avoid the exercise of having their practice being sorted out and criticised in public meetings such as in the International Labour Conference which is not only inter-governmental but at the same time inter-occupational. Most government representatives find it disconcerting to have to answer critical comments directed at their countries. This particular procedure had made the decisions from the organisation's organs to be strictly adhered to and complied with by the states against whom they are made.

Furthermore the practice of spotlighting cases of consistent non-compliance in the “special list” has created the desire effect.¹⁰⁸ The main purpose of this list is to generate a sense of uneasiness and of urgency on the part of the governments. This has led some states to comply while others have given assurances that steps towards fuller compliance will be taken.

Added to this the Governing Body in cases of consistent non compliance with any of the Committee’s decisions is empowered by Article 33 of the ILO Constitution to propose to the Labour Conference such measures it may deem wise and expedient to secure observance. This procedure was invoked in 1961 against South Africa¹⁰⁹, which eventually led to its withdrawal, and in 2000 against Myanmar due to its failure to respect the Forced Labour Convention 1930(no29).

The ILO has instituted a very thorough, elaborate and effective procedure in the examination of state reports, which is one of the means by which it gets information on the degree of compliance. From the time the report is examined by the Committee of Experts on Application of Conventions and Recommendations at first instance, to when it gets to the Conference Committee on Standards, it is sure to have been examined to the least details and the state given the opportunity to present it and answer all the questions that may arise from it. Therefore at the end of the procedure, all the details have been established and whatever decision is made will definitely reflect the quality of the report. This two-tier process and the somewhat “appeal procedure” available at the level of the Conference Committee has given much credibility to the system and in most cases a general compliance by the states.

Next, the tripartite nature of the ILO has acted as a major factor in its effectiveness. The invaluable contribution made by the occupational organisations has greatly aided the Organisation in acquiring vital information on either the examination of a state report, representation and complaint. The reports of these organisations and in particular the workers organisations have proven to be very useful in these procedures because time which had to be used in going into the field to collect this information is used in the examination of the reports or complaint as the case may be. Added to this, the locus standi given to the occupational organisations under articles 24 and 26 of the Constitution to initiate representations and complaints respectively and the integral part they occupy in the organs has been a very positive aspect in the protection of human rights standard within the Organisation. This means that they are not only able to conveniently voice out their grievances but also vote on issues that directly affect them. Since the aims and objectives of the Organisation evolve around the protection of workers, it is but fair and reasonable enough that they should constitute part of the decision-making process. The Organisation has therefore

¹⁰⁸ The employers vice chairman in 1960 put it bluntly when he explained to the Conference that “the idea of this list is to induce some shame on the part of the governments which show a persistent lack of interest in their obligations”(44 R.P 430)

¹⁰⁹ ILC, 45th session 1961, record of proceedings p 891.also pp575-577, 580-584;and 599-616

used workers organisations as conduits for the flow of information from the various member states to the Organisation.

These occupational organisations have also helped the Committee of Experts in its follow-up activities. By virtue of their presence, they have continuously put constant pressure on states to comply with decisions of the various Committees and report directly to the Governing Body in cases of non-compliance. This constant pressure has tended to force states to implement these decisions. The workers organisation in particular has created so much awareness within the working population on the existing international labour standards. This has led to joint and concerted actions at the national level to advocate for the respect of the conventional standards.¹¹⁰

The effectiveness of this tripartite nature of the ILO has encouraged other states to follow the same example by instituting tripartite Labour Advisory Bodies. These bodies carry out reviews on unratified conventions, recommendations made and measures to be introduced in order to give them effect. Australia, Canada and India are some of the countries, which have taken this step.

Fourthly, the technical cooperation that exists between the ILO and its members has led to a wide compliance with the recommendations taken by the Labour Conference or its ancillary bodies. In this wise, the Organisation has used its expertise in assisting states to draft their labour legislations. The ILO has regularly worked in close contacts with governments to identify the obstacles they encounter in the implementation of the conventions, recommendations and observations. Recent visits to Argentina and Guatemala led to these countries enacting Convention no 87 on Freedom of Association into their national legislation. Added to this, this form of cooperation is one of the major reasons for the wide ratifications of the various conventions,¹¹¹.

In practice, countries experiencing difficulties in filling up the forms (of report used for the submission of state reports) for the first time are urged to inform the Director General so that arrangements can be made for advice to be given as to the exact nature of the obligation and as to lines on which they should be met.

The Organisation has also established regional offices and organises regional seminars, which usually act as the focal point of discussions with the states, occupational organisations and the ILO. These actions also lead to more familiarity by states with their various obligations and thus develop their relations with the ILO on a more concrete and regular basis.

Furthermore, article 19(5)(b) and (e) of the ILO Constitution clearly spell out duties on the states which have contributed to the Organisation's effectiveness in monitoring human rights standards. Firstly 5(b) states that member states after ratifying a convention have at most eighteen months to bring the convention before the authorities within whose competence the matter lies for adoption and

¹¹⁰ This had even led to the coming into power of Solidarity Party in Poland in the 1980s which had the full support of the workers due to the state's inability to protect the and guarantee their rights.

¹¹¹ Ratifications today of the various conventions stand at 7078 with 1177 for the fundamental conventions and 5901 for the other conventions.

enactment into national law. This has been done by so many states and the outcome is that most of the ratified conventions have become part of national legislation and has consequently led to the availability of remedies at the national level once there is an infringement of these conventions.

Article 5(e) on the other hand makes it possible for the ILO to also monitor the state practices on conventions they have not yet ratified. States by virtue of this article are required to report (usually referred to as “General Surveys”) on what they are doing to apply conventions they have not yet ratified. This has given the ILO organs an extended functional jurisdiction in holding states responsible even if they have not ratified the convention on the subject matter.

The creation of the various Committees’ within the Governing Body and the Labour Conference leads to an effective functioning of the system. The fact that all the tasks are carefully defined and assigned between these Committees is worth mentioning. More effectiveness is achieved when separate Committees (Committee of Experts and Committee on Standards) examine state reports and receive representation, the Committee on Freedom of Association handle cases on violations of the Convention on Freedom of Association and the Right to Organise while the Commission of Inquiry is solely responsible for the examination of complaints. Most important is the fact that all recommendations of these Committees and the Commission of Inquiry receive follow-up from the Committee of Experts on the Application of Conventions and Recommendations. This well structured and organised system has greatly contributed to an effective functioning of the ILO monitoring procedures.

It is worth stating that the Committee on Freedom of Association presented its report at the 285th session of the Governing Body in November 2002 citing cases of serious infringements of the principle of freedom of association and violation of trade union rights in Belarus, Zimbabwe, Colombia, Venezuela, Ecuador and Japan.

In Belarus, the Committee cited the absence of progress towards the implementation of previous recommendations and a serious deterioration with respect to trade union rights within the country. It further called for an amendment of Presidential decree (no 8) “so that workers’ or employers’ organisations may benefit freely and without previous authorisation from the assistance which may be provided by international organisations for activities compatible with freedom of association”¹¹². In the other countries, it called on the governments not to interfere in the activities of the unions and for them to take measures to ensure the respect of trade union rights .

On the other hand, the ILO monitoring system is not void of problems. Firstly, it has been criticised by some non-occupational non-governmental organisations for not giving them the competence to institute representations or complaints before any of its organs. It should however be noted that these criticisms have not really led to changes within the system since some of these NGOs have an observer status within the ILO. Added to this, they (the NGOs) can always in a joint

¹¹² ILO /02/51

program of action with the occupational organisations request the latter to initiate complaints or representations against infracting states.

The second problem is that of coordination at the level of the states. Since labour matters are handled by the Ministry in Charge of Labour, some foreign ministries insist on maintaining exclusive control over all contacts with the ILO. The result of this is that supervision becomes very difficult and often leads to delays in the flow of information from the state to the ILO and the other way round.¹¹³ The ILO in such cases should insist on working with the labour ministries that have the expertise in such matters.

The third issue is that of empowering the workers organisations especially those in developing countries. Some of these organisations lack the basic means to organise the working population either due to financial problems or disunity that in most cases are created by the governments in order to weaken the bargaining power of these organisations. The ILO is therefore called upon to seriously scrutinise governmental actions and encourage them through their cooperation programs to provide some support to the worker organisations.

In conclusion, the monitoring mechanism operated by the ILO has from inception been very effective in protecting labour and human rights standards. Even with the success it has achieved so far, there are still cases of violations of labour standards in general and the fundamental conventions in particular. Added to this, the Organisation has always stressed that its main purpose is not to sanction states on their inability to comply with convention obligations but to ensure that all the necessary efforts are made and assistance given to these states to ensure a complete adherence to their obligations. The Organisation has always stressed on its administrative role in encouraging states to carry out their obligations rather than on its judicial role, which is often used as a last resort. The most difficult problem has been the lack of the necessary means to implement obligations by states. It is submitted here that the ILO should intensify its technical cooperation programs and ensure that the states are given the means and know how for an effective compliance with their obligations within the ILO mandate.

¹¹³ This was the situation in Ecuador where the ministry of external relations and that of social welfare and labour were locked over the issue of whom to make communications to and receive same from the ILO. the matter had to be settled by the president that the ministry of social welfare and labour would henceforth correspond directly with the ILO. hitherto ,the deadlock had resulted in considerable delays and difficulties by the ILO to transmit technical correspondence thus preventing timely examination of reports and participation of delegates at meetings.

5 COMPARATIVE STUDY OF THE THREE MONITORING BODIES

This comparative analysis has as its main aim to pin point the differences and some few similarities that exist between the Human Rights Committee, the African Commission on Human and Peoples Rights and the International Labour Organisation as they monitor their respective human rights instruments. For clarity, the study will be made on the basis of the following guidelines viz State reporting, jurisdiction, complaint procedure, NGO Access, follow up mechanisms, composition and structure, technical cooperation/assistance and the role of special rapporteurs.

STATE REPORTING

A very vital part of their functions is that of the examination of reports from states that have ratified the instrument whose compliance is sought for by each of the bodies concern. Article 40 of the ICCPR, Article 62 of the ACHPR and Article 22 of the ILO constitution all require state parties to submit their reports for examination.

Unlike the other two instruments, the ACHPR does not expressly give the Commission the competence to examine state reports but nonetheless the Commission obtained permission at its third session from the Assembly to receive and examine these reports and has since then positively interpreted the Charter as giving it the competence to do so.

There are some differences in the procedure of examination in the three systems. The ILO usually has a two-tier system where reports are first examined by the Committee of Experts on the Application of Convention and Recommendations and later by the Conference Committee on Standards, which usually acts at second instance before a final observation is adopted by the plenary session. But in the Human Rights Committee and the African Commission, this not the case. It is just a one step process where examination is done solely by the members and thereafter views or observations are adopted. It is submitted that the ILO procedure is more thorough and effective than the others due to the scrutiny and criticisms, which are done on these reports.

The reports received by ILO are very detailed as compared to those received by the Committee and the Commission. This has partly been blamed on the somewhat lengthy and confusing guidelines issued by these supervisory bodies. The ILO makes it much more easier for a state by providing a form, which clearly indicates what type of information is needed. The Commission on its part at its

twenty first ordinary session adopted a simpler set of eleven points which states are expected to take into consideration when compiling their reports; the Committee, has also instituted consolidated guidelines for reporting. Notwithstanding, reports received by the Commission and the Committee are sometimes far below the level of expectation and lacking in substance. But due to the more detailed procedure in the ILO, governments make every effort to submit adequate reports, which will show the actual state practice.

So far one of the greatest problems plaguing the Commission and the Committee is that of states not submitting their reports and on time. Unlike the Commission where reports are over due with some states not having submitted their initial reports¹¹⁴, the situation in the Committee is improving with majority of the states submitting their reports. The situation is much more encouraging in the ILO which receives 65% of the reports due by the time of the Annual Conference of the Committee of Experts, rising to 85 % by the Annual Labour Conference.¹¹⁵

JURISDICTION

In terms of functional jurisdiction, the universality of the Committee and the ILO is worth mentioning. While ratification of these instruments is open to all states *stricto sensu* under international law, the African Commission is a regional organisation and thus having jurisdiction that extend as far as the geographical limits of the continent. Even though article 60 of the Charter permits the Commission to draw inspiration from other instruments of universal ratification,¹¹⁶ this does not *per se* give it a universal character since it can only apply this with respect to the African states.¹¹⁷

The Human Rights Committee has jurisdiction over all the member states which come from the different regions of the world and which have ratified the ICCPR¹¹⁸, but not on states, which have not ratified the Covenant.

The ILO is similar to the Human Rights Committee due to the fact that it also has jurisdiction over those states which have ratified the conventions adopted

¹¹⁴ Even with the simplified guidelines issued by the Commission, some member states have still failed to submit adequate reports. The Lesotho delegation during the 31st session did not present their report on the grounds that they did not know what to report on.

¹¹⁵ Lee Swepston The International Labour Organisation and Human Rights Access to the ILO: International Human Rights Monitoring Mechanisms (eds) Gudmundur Alfredsson et al .2001 Kluwer Law International

¹¹⁶ “The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights ,the Charter of the United Nations ,the Charter of the Organisation of African Unity ,the Universal Declaration of Human Rights ,other instruments adopted by the United Nations and by African countries in the filed of human and peoples’ rights as well as from the provision of various instruments adopted within the Specialised Agenices of the United Nations of which the parties to the present Charter are members.”

¹¹⁷ Presently there are 53member states which have ratified the Charter

¹¹⁸ Presently there are 148 member states to the ICCPR

under its auspices; but at the same time different because in respect with some of its conventions like no 87 on Freedom of Association and the Right to Organise which is considered as a constitutional principle, its jurisdiction is universal and it (through the Committee of Freedom of Association) can examine complaints made against any state irrespective of whether it has ratified Convention no 87 or not. Furthermore Article 19 (5)(e) makes it possible for the ILO to monitor the practice of states even if they have not ratified the convention on the subject¹¹⁹. By this provision, states are required to submit reports to the Organisation on their practices in respect of conventions that they have not ratified. This therefore gives the ILO a wider functional jurisdiction unlike the other mechanisms.

COMPLAINT PROCEDURE

The procedures used for the initiation of complaints by the three mechanisms may at a glance seem to be similar but do have their differences. Under the Human Rights Committee, the complaint procedure is victim based and very individualistic in nature. *Stricto sensu* it is based on the premise that only the victim who has suffered the violation of his rights can initiate a complaint. Nevertheless, the Committee has been seen admitting complaints filed on behalf of group of individuals¹²⁰ and others filed by persons who can establish a close and genuine link with the victim such as the lawyers who handled the case at the domestic level¹²¹. This interpretation of the OP is very liberal but notwithstanding, this jurisprudence should be noted has not really changed the Committee's approach; that of victim based. In *C et. al. v Italy*, the Committee held as follows

“According to Article 1 of the Optional Protocol only individuals have the right to submit a communication .To the extent, therefore, that the communication originates from the organisation, it has to be declared inadmissible because of lack of personal standing”¹²²

Similarly in *J.T. v Canada*, the committee declared a communication inadmissible, partly because the “W.G Party is an association and not and not an

¹¹⁹ “If the member does not obtain the consent of the authority or authorities, within whose competence the matter lies, no further obligation shall rest upon the member except that it shall report to the Director General of the International Labour Office at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matter dealt with in the convention showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such convention.”

¹²⁰ Chief Bernard Ominayak, Chief of Lubicon Lake Band v Canada no 167/1984

¹²¹ *Morais v Madagascar* (supra) and *Burrell v Jamaica* (supra)

¹²² Case no 163/1984 HRC 1984 Report, Annex XV, para 5

individual and as such cannot submit a communication to the committee under the Optional Protocol”¹²³

On the other hand, the African Commission operates a more open and liberal procedure, which is based on *actio popularis*. It is more liberal than the Committee’s procedure. Under the Commission, victims, their relatives, NGOs and any person who may have sufficient knowledge of the violations can file complaints. This very liberal interpretation has led to a simplification of the whole complaint procedure. This has also led to the development of jurisprudence for the Commission, which has in turn created much awareness among the public of human rights protection.

The ILO on its part operates a completely different procedure. It distinguishes between a representation and a complaint like in the other systems. The Committee of Experts on Application of Conventions and Recommendations examines the former while a Commission of Inquiry examines the latter. Under this system, a complaint is considered more serious than a representation and is usually used in cases of consistent violations. Added to this while a victim or members of his family and NGOs can file a complaint to the Commission, the victim has not got the *locus standi* to initiate a complaint before the ILO. Complaints can only be made by the occupational organisations, governments, the Governing Body and a worker’s or an employer’s delegate in the Labour Conference. This has made it very difficult for complaints to be made especially when the violations occur in countries where the occupational and employers organisations are not well organised.

Another important issue to note is that of exhaustion of domestic or local remedies. Within the Human Rights Committee and the African Commission, domestic remedies are expected to have been exhausted before any complaint is made to any of the two bodies. This rule is waived only in situations where it can be proven that such remedies don’t exist and even if they do are inadequate and their procedures usually take an unreasonably long time. Within the ILO, no such requirement exists.

NGO ACCESS AND PARTICIPATION

NGOs are very active players in monitoring human rights standards all over the world. They usually make invaluable contributions in providing the information needed by the monitoring bodies and create awareness by organising seminars and workshops to disseminate human rights information and materials to the population.

¹²³ HRC 183 Report, Annex XXIV, para 8

Within the Human Rights Committee, NGO access and participation is very minimal. They attend sessions as observers and are not allowed to contribute actively in the debates of the Committee. In a sense they are relegated to the back role. Thus within the Committee's procedure there is a very limited access given to NGOs ..

On the other hand and in the African Commission, the story is quite different. Notwithstanding the fact that they have also been given an observer status, the NGOs are allowed to be active participants in the proceedings and as already mentioned to file complaints before the Commission. NGOs are given air time to speak at the sessions and contribute in the public sessions. To illustrate NGO participation, for example, in the March 2002 session held in Pretoria, Professor Michelo Hansungule presented a lecture on Effects of Slavery on behalf of the African Centre for Democracy and Human Rights an NGO based in Banjul.

The situation in the ILO is much more a different issue. The NGOs are placed on the ILO's "special list of NGOs". Organisations on this list may receive information from the ILO and be invited to meetings on request. Furthermore, under the standing orders of the Labour Conference, NGOs may only attend sessions of the Conference as observers if they have requested and received an invitation from the Governing Body.¹²⁴ Those attending have the right to intervene in a Committee with permission from the Chairman or his vice. It is worthy to note that NGOs do have a very limited access to the ILO and no access at all to the complaint procedure. Even though NGOs are not represented, occupational organisations are very much present and active. They actually form an integral part of the Organisation. They have been seen to play the role played by NGOs in the other monitoring mechanisms. These organisations play a much more powerful role within the system than the NGOs in the other systems. They are represented in all the main organs and take part in all the major decisions of the Organisation.

FOLLOW UP MECHANISM

The degree at which decisions taken by the three mechanisms receive follow up vary at great lengths

. Firstly, the Commission is in dire need of a follow up procedure. More often the decisions taken by the Commission do not receive follow up. This has made these decisions to be mere paper work and has considerably weakened its potential to enforce the rights as spelt out in the Charter. States are fully aware of this weakness and inability to act and thus do not bother to comply with its decisions. The Commission has gone ahead to institute the posts of Special Rapporteurs on women, in charge of prisons and that of extra judicial and summary killings. But due to financial and logistical problems, they have not be

¹²⁴ Standing orders of the International Labour Conference Article 2(3)(j)

able to carry out their respective functions .The general rate of compliance by states with the Commission's decisions has been very discouraging and this to a very large extent has given the latter the image of a toothless bull dog.

Secondly, the case with the Committee is more encouraging. With the appointment of the Special Rapporteur on Follow up of Views, things are beginning to work out well for the Committee. It has been able to receive information from the victims on their compensation by the state against which a decision was made. In 2000, 30 % of cases decided were complied with by the states concerned. This is quite encouraging especially when one takes into consideration the fact that these decisions are not binding and cannot be enforced against the state concerned. Even though the Special Rapporteur on Follow up on Views also suffers from the absence of funds to make as many trips as he may be expected to, his trip to Jamaica was very instrumental in changes that occurred thereafter since it led to an improvement in the prison and detention facilities in that country. With an increase in funds and a little cooperation from states, there is no doubt that the Committee will be able to follow up on a much regular basis the rate at which its decisions have been complied with.

Thirdly, within the ILO, follow up is done principally by the Committee of Experts on the Application of Conventions and Recommendations. States are required to include in their next report the measures they have taken to give effect to the decisions taken against them by any of the organs during the previous year. The part played by the occupational organisations in terms of follow up should be emphasised. Due to their presence in states, these organisations usually put pressure on the governments to comply with decisions and report to the ILO in cases where there has been non-compliance. Through this kind of procedure, the practice of states is closely monitored thus leaving the states with no other options but full compliance.

COMPOSITION /STRUCTURE

It is also worthwhile to look at the differences that exist in composition and structure of the three monitoring bodies.

The Commission is made up of eleven members appointed in their personal capacity. Eventhough they are called independent experts, in reality they are not. Most of them as already mentioned still occupy top governmental positions in their various countries and thus still very much linked with their respective states.

The Committee is made up of eighteen experts also elected in their personal capacity. Notwithstanding the fact that some of the members had occupied governmental positions in their various states, they have insisted on and asserted their independence from their states. They have tended to act more as independent experts unlike the situation in the Commission.

The ILO operates on a tripartite system whereby the workers, employers and government delegates are members of the various Committees¹²⁵ which is totally different from the other two systems. It has four different bodies that are responsible for monitoring. The Committee of Experts on Application of Conventions made up of twenty independent experts, the Conference Committee on Standards made up of 150 members, the Committee on Freedom of Association and the Fact-Finding and Conciliation Commission made up of nine members each and lastly the Commission of Inquiry made up of three prominent members of the Governing Body.

STATUS

The ILO is a specialised agency within the United Nations. It is also an autonomous body in both its executive and financial functions. It adopts its own yearly budget and receives contributions directly from members.

But on the other hand, the Human Rights Committee is a treaty body open to those states which have ratified the ICCPR. But strictly speaking, it is not that completely independent since it receives funding from the contribution made by member states to the United Nations and, its secretariat functions are executed by the secretariat of the Office of the High Commissioner for Human Rights.

The Commission on its part very much subservient to the Assembly of Heads of States and Governments of the OAU in the execution of its functions. It has become an organ of the OAU even though it was intended to be an independent body. It is financed by funds from the Organisation and is required to seek the permission of the Assembly in order to carry out certain functions; for example the publishing of its annual report that reveals the practice of states. This is not the case with the ILO or Human Rights Committee.

TECHINACAL COOPERATION /ASSISTANCE

The ILO within its mandate provides technical assistance to its members especially where there are difficulties in implementing the provisions of its conventions. It has on a number of cases offered its expertise to states in the drafting of labour legislations and in cooperation with states sought solutions to obstacles on the ratification and implementation of conventions. This should be noted is one of the reasons for the huge load of ratifications.

The Committee and Commission on their part do not have the necessary means to do this. In the first place, they are very limited in terms of membership and therefore cannot afford such a huge task. Secondly, they cannot afford the

¹²⁵ Except for the finance committee and the committee of experts which is composed only of government representatives

financial demands of such a venture. The African Commission's practice of allocating countries to its Commissioners for regular visits and to enable them to be in touch with the problems facing its member states has not been effective; this is mainly because of chronic lack of resources.

Added to all of these are some minor but important differences between these mechanisms.

Firstly, the African commissioners also serve as rapporteurs for the Commission while in the Committee members are necessarily not rapporteurs. The rapporteurs are experts contracted by the Commission on Human Rights. It should be noted that the African approach deprives the commissioners the opportunity to concentrate on the Commission's work. Within the ILO, the concept of rapporteur as seen in the Commission and Committee is absent.

Secondly, the Commission separates the finding on admissibility from merit consideration but the Committee on its part has developed the practice treating the two stages as one. The latter of course saves a lot of time. The ILO operates a similar procedure like the Committee at the level of its Committees.

Thirdly, until its 29th session, the African Commission did not prepare concluding observations and comments on state reports. This has been a regular practice of the Committee while the ILO on its part has always prepared observations on state reports.

Lastly, decision making in the Committee is based on unanimity. But in the event of a vote and there is a tie, it is absolutely difficult to arrive at a decision because the chairperson has not got a casting vote. But the composition of the African Commission prevents such a situation from occurring provided all the members participate in the voting process. In the ILO voting is by a simple majority even though in some cases like the admission of a new member, a corresponding two third majority from the government representatives is required.

SPECIAL RAPPORTEUR

Within the Human Rights Committee and the African Commission, the role of rapporteurs has been well established. Individuals are given mandates to carry on specific tasks within the Committee and Commission. With the ILO this is not exactly the case. Its work is done in committees and decisions taken at this level. The Director General is the one who is asked by the Governing Body or the Conference to report back with recommendations; therefore the secretariat has been seen to play a similar role to that of special rapporteurs. However in the Committee of Experts different individuals have initial responsibility for certain conventions but all decisions on their comments are made by the Committee as a whole. The DG recently appointed a Special Representative on the Freedom of Association Convention to Colombia (last two years now expired) and the Special Representative to Myanmar took up her post in October. In a nutshell; special rapporteur is not an ILO phenomenon.

With all these discrepancies associated with these monitoring bodies, some slight similarities can also be drawn.

Firstly, their decisions are not binding on the member states and so need a mode of enforcement.

Secondly, they all have some familiarity in their monitoring procedures based on the fact that they all entertain inter state complaints, examine state reports and entertain individual complaints even though within the ILO it is on a much-localised manner.

Thirdly, these bodies to an extent consist of experts within each field of competence.

6 CONCLUSION

After having looked at the three monitoring mechanisms and the problems and difficulties they encounter it is worth while to propose some measures which will go a long way to improve on their effectiveness.

Starting with the Human Rights Committee, it is recommended that the function of the special rapporteur for the follow up on views can be made more effective if the Committee makes public the follow up reports and publicise its activities to the extent that it doesn't jeopardise the dialogue with the state. It should envisage the appointment of a full time professional staff member to follow up its activities because of the increase in the number of cases coming in and the number of views being adopted by it. In this vein, follow up activities should be budgeted by the Office of the High Commissioner of Human Rights since states are very reluctant to invite the rapporteur to scrutinise their activities at their expense. Moreover, a detailed program for follow up and consultations should be drawn up well ahead of time in order to give states sufficient time to prepare their responses

States on their part should take the responsibility to enact enabling legislations that will give the decisions of the Committee a legal backing and make them easy to implement within their various domestic systems.

The Committee can also be given the powers to hand down advisory opinions. This will enable courts in the domestic legal systems, which are uncertain about the applicability or interpretation of a provision to suspend consideration of the case and approach the Committee for further clarification. This can be achieved by the adoption of an additional Optional Protocol. Such a move will lead to the Committee giving interpretations of the provisions of the ICCPR and secondly this can possibly lead to adequate remedies at the domestic level and consequently reduce the number of cases coming to the Committee.

Added to this, due to the rapid increase in the number of cases coming to the Committee, it is suggested that its secretariat staff strength be improved in order to enable it contain this massive influx.

The duration of the meetings (nine weeks) annually is not sufficient for the Committee to meet up with the ever-growing workload of cases. The number of sessions should be increase in order for the Committee to have sufficient time in the examination of both the reports and communications.

Furthermore, the Committee should put in additional efforts in publicising its activities thereby creating an awareness of its procedure in particular and work in general and insist on this to be carried out by member states within their respective territories.

The Committee should increase the level of participation of non government organisations within its system to enable them play a more active role especially in the filing of complaints against defaulting states.

Lastly states are also called upon to develop the right attitude and political will towards the Committee by providing the required information for the smooth

functioning of its examination procedures and they should be willing to give its decisions the right effect.

It has been posited that the Committee alongside the other treaty bodies should be turned into one international human rights court. This will be a full time standing court with a mandate to oversee the implementation of the various human right treaties within the United Nations. It is hope that such a body with permanent judges will be more effective in the protection of human rights especially due to the fact that it will be able to deliver binding judgements. However, this is still an academic moot point and its development is worth paying attention to.

The African Commission in particular should envisage putting all the structures it has created in full and effective use. It is suggested that the financial and logistical problems faced by the rapporteurs be looked into to enable them follow up the Commission's resolutions and make them more effective.

Furthermore the Commission should envisage stepping up the level of publicity it is currently doing in order to create the much-needed awareness. This can still be done by the organisation of regular regional seminars and putting pressure on member states to commemorate the African human rights day on the 21st of October. Still on this issue member states are called upon to develop the right attitude by educating their citizens on the human rights standards contained in the Charter.

With the coming of the African Union and its subsidiary organs it is expected that the much needed finances be made available to the Commission and the latter will be free from political interference as was the case with the OAU.

Furthermore, the Commission should be empowered by its rules of procedure to directly address emergency situations rather than first contacting the Assembly of Heads of States and Governments. As already noted this procedure takes so much time, which may lead to irreparable harm being done to the victim.

The commissioners on their part are called upon to act dynamically and be apolitical as much as possible during their visits to member states and meeting with government official. As already mentioned they should use this opportunity to pressurise the authorities of infracting states to halt violations. Added to this, with the gradual change in mentality and political will recently expressed by some African leaders, it is hoped that the African Commission will be free from political interference by the African Union.

Also, the choice of having the headquarters of the Commission should be carefully reconsidered. The reason for this choice was because The Gambia had a democratic and stable government at the time. But today, so many things have changed and there is a military leader who came to power through a coup d'état, which is of course at variance with the provisions of the Charter. It should be noted that if the headquarters was based in a capital with big academic institutions like universities and research institutes, the secretariat would have benefited from the services of the students or researchers on a regular basis and as such this would have been a solution to its shortage of personnel. The member states are therefore called upon to give this point some reconsideration.

The African states are also called upon to ratify the Protocol to the establishment of the African Court of Human and Peoples Rights. This, it is hoped will complement the Commission and offer a wider, adequate and more effective form of protection in human rights.

The ILO on its part has also been doing a remarkable job in the protection of human rights especially those enshrined in the conventions adopted within its auspices. But be as it may, there are still abuses on labour standards worldwide.

It is therefore recommended the ILO should envisage giving access to non-occupational organisations to its monitoring processes in general and the complaints procedures in particular. Notwithstanding the fact that the occupational organisations play an active part in this process it is also worthwhile to allow other organisations to play this role taken into consideration the fact that not all the occupational organisations are that strong enough to be able to monitor compliance in their various states. Some of these non occupational organisations (for example Amnesty International and Human Rights Watch) have been seen to possess immense strength in terms of finances and personnel than some of the occupational organisations and are more able to monitor and file complaints in cases of violations.

Furthermore and in almost similar terms, the ILO should endeavour to strengthen the various workers unions in its member states especially those in the developing world, which have been made considerably weaker by the political landscape in which they are operating. More pressure should be put on member states to aid these unions if not financial at least logistically; states should also desist from intervening in the activities of these unions. It should be noted that it is only through a well organised workers' or employers union will monitoring in most cases will be effective.

More so, it is hoped that ILO continues to intensify its technical cooperation programs with member states and the occupational organisations. This is going to facilitate the state's compliance with the conventions since obstacles will be easily detected and solved and will consequently lead to the implementation of these conventions. The ILO should pay much emphasis on its administrative rather than judicial functions.

Lastly and as already mentioned, the ILO should base its cooperation with member states through their ministries of labour and not the ministries of foreign affairs. This is because it is the former, which has the expertise to deal with issues that directly fall within the mandate of the ILO and also will curb the amount of bureaucracy and time wasted when dealing with the ministries of foreign affairs.

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