The Ploughing of Two Furrows: The International Labour Organization (I.L.O.) Commissions of Inquiry of 1961 and 1962

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The motto of the International Labour Organization (I.L.O.) is: "If you wish peace, cultivate justice". The Governing Body of the I.L.O. was breaking new ground when it established a Commission of Inquiry in 1961 to investigate a complaint by the Government of Ghana that the Government of Portugal was not securing the effective observance in its overseas territories of Angola and Mozambique of the Abolition of Forced Labour Convention of 1957. This was the first time that a member Government had invoked the complaint procedure contained in Article 26 and the following articles of the Constitution of the Organization. While the Commission appointed in 1961 was still engaged in its examination of the complaint by Ghana, the Governing Body received a complaint by the Government of Portugal alleging that the Government of Liberia was failing to secure the effective observance of the Forced Labour Convention 1930. A second Commission was set up under Article 26.[1] The Reports of the two Commissions[2] have received very little attention from lawyers,[3] yet not

1 The two Commissions were quite separate bodies. The first comprised Paul Ruegger (Switzerland), Ambassador, Member of the Permanent Court of Arbitration, Chairman of the I.L.O. Committee on Forced Labour 1956-1959, as Chairman; Enrique Armand-Ugon (Uruguay), former judge of the International Court of Justice and Isaac Forster (Senegal), now a judge of the International Court of Justice and then First President of the Supreme Court of the Republic of Senegal, Member of the I.L.O. Committee of Experts on the Application of Conventions and Recommendations, as Members.

The Portugal-Liberia Commission comprised Enrique Armand-Ugon as Chairman; T. P. Goonetilleke (Ceylon), former District Judge, Member of the I.L.O. Committee on Forced Labour 1956-1959, and Erik J. Castren (Finland), Member of the International Law Commission, Member of the Permanent Court of Arbitration and of several arbitral tribunals, Professor of International Law and Constitutional Law at the University of Helsinki, as Members.

2 *I.L.O. Official Bulletin*, vol. 45 (1962), No. 2, Supplement II (Ghana-Portugal Commission); ibid., vol. 46 (1963) No. 2, Supplement II (Portugal-Liberia Commission).

3 See Blamont, "Human Rights and the I.L.O.", 11 Howard L.J. (1965), p. 413; Partan, "Development of International Law by the International Labour Organization", *Proceedings of the American Society of International Law* (1965) p. 139; Vignes, "Procédures Internationales d'Enquête", *Annuaire Français de Droit International*, 9 (1963) p. 438.

only do they record the initiation of a unique supervisory procedure aimed at ensuring the full compliance by Member States with their obligations under International Labour Conventions, they are also worthy of attention for their substantive content, which includes consideration of issues of State responsibility, treaty interpretation, the relationship between treaties and statutes, and many questions concerning the procedure appropriate to international tribunals.

In a relatively short article it has been necessary to be selective. No claim is made that the following pages contain an exhaustive account of all the issues raised in the two Reports. It is intended to focus upon the role of the Commissions in ensuring supervision of the national law and practice of parties to I.L.O. Conventions.

The constitutional provisions

The procedure by which a Member Government may bring a complaint alleging the non-observance by another Member of an International Labour Convention which they have both ratified is contained in Articles 26 to 29, and 31 to 34 of the Constitution. Upon a complaint being filed with the International Labour Office, the Governing Body must consider it and decide whether or not to refer the matter to a Commission of Inquiry. Thus, the "right" of complaint given to Members is limited to a right to seise the Governing Body of the allegation; if the Governing Body considers that the reply from the government whose observance of a Convention has been called in question is satisfactory, it will not proceed to appoint a Commission of Inquiry. The complainant government cannot insist upon the establishment of a Commission. However, a Member government remains free to bring a fresh complaint, supported by new, or additional evidence.

It is convenient to quote the text of Articles 26 to 29 of the Constitution at this point.

Article 26

"1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.

"2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in Article 24.

"3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.

"4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.

"5. When any matter arising out of Article 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter

is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question."

Article 27

"The Members agree that, in the event of the reference of a complaint to a Commission of Inquiry under Article 26, they will each, whether directly concerned in the complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject matter of the complaint."

Article 28

"When the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken."

Article 29

"1. The Director-General of the International Labour Office shall communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments concerned in the complaint, and shall cause it to be published.

"2. Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice."

Articles 32 to 34 relate to the appellate function of the International Court of Justice, and have not yet been invoked. The Court is empowered to affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry. Article 34 confers a potentially valuable right upon the defaulting government. It may "at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the Commission of Inquiry or with those in the decision of the International Court of Justice, as the case may be, and may request it to constitute a Commission of Inquiry to verify its contention". The same procedure applies to the establishment and functioning of this second Commission of Inquiry as to an initial Commission appointed under Article 26, and both governments have the same right to resort to the International Court of Justice after the second Commission has reported.

The judicial function of the Commissions

The frequent references made by the Portugal-Liberia Commission to the guiding principles and the procedural rules adopted by the Ghana-Portugal Commission are one indication of the high value to be placed upon that Commission's work. The Ghana-Portugal Commission had to blaze a trail in virgin territory, with the "common practice" of other international tribunals and the general principles of international law relating to treaty interpretation and State responsibility as its only aids.[4]

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4 In addition, the reports of the Technical Committees of the United Nations and the I.L.O. on Forced Labour were of considerable help to the Commission. See Report, Chapter 9.

The Governing Body in appointing both Commissions put great emphasis upon the judicial nature of their task.[5] In the concluding section of its Report the Ghana-Portugal Commission said:—

> "The Commission has been conscious throughout that both the complainant and the Government against which the complaint has been filed are entitled under the Constitution, if they do not accept the findings or the recommendations contained in the Report, to refer the complaint to the International Court of Justice."[6]

This statement was adopted by the Portugal-Liberia Commission which expressly declared itself to have been guided by the considerations set forth by its predecessor.

In the opening paragraphs of its Findings and Recommendations, the Ghana-Portugal Commission stated the principles that must apply to any complaint brought under Article 26. The generality and vagueness of the allegations in Ghana's original complaint had not led the Governing Body to decline to refer the complaint to a Commission of Inquiry, but they were factors which clearly troubled the Commission. The Government of Ghana had contended before the Commission that "it was not for it to substantiate the complaint, as it had no access to Angola and no means of protecting its sources of information from reprisals". Ghana urged that it was the Commission's function to ascertain whether or not the complaint was justified.

Not surprisingly, the Commission rejected this contention, which would have enabled a government to bring a complaint quite unsupported by verifiable evidence and "to throw upon the International Labour Organization the responsibility for making a full investigation of the matter".[7] It was for the complainant government to make out a prima facie case, and the Governing Body in the first instance and the Commission of Inquiry thereafter retained a discretion to discontinue the investigation of a complaint which was not supported at least to this extent by the complainant government. This discretion was essential both to protect the interests of the Organization and to ensure fair treatment for both parties.

As will be seen below, the Ghana-Portugal Commission heard many witnesses and made an extended visit to Angola and Mozambique. It felt constrained to refer to the extent of its inquiry in this particular case, in the context of possible future Commissions acting under Article 26. The Commission said that it was not to be assumed that so full an inquiry was called for "as a matter of course in the absence of the submission by the complainant of *substantial evidence* or a *strong prima facie* case that there has been a failure to give effect to the provisions of the Convention".[8] The Portugal-Liberia Commission considered it "important to place on record its concurrence in

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5 The Members of each Commission made a solemn declaration in terms corresponding to those made by the Judges of the International Court of Justice.

6 Report, par. 702.

7 Report, par. 705.

8 Report, par. 709. Italics added.

[this] view expressed by the Ghana-Portugal Commission".[9] In the complaint against Liberia the Commission found that a prima facie case had been made out, principally by extrinsic evidence in the form of successive reports by the Committee of Experts on the Application of Conventions and Recommendations and the discussions at the International Labour Conference over many years. Despite the paucity of the factual evidence led by Portugal in support of the complaint,[10] the Commission was able to find sufficient grounds for exercising its discretion and continuing the investigation. In the first place, there were patent discrepancies between Liberian legislation and the requirements of the Convention. Secondly, there was the long history of the matter, manifested in these reports and discussions and by the repeated failure of the Liberian Government to give the requisite annual reports to the I.L.O. on the application of the Convention.

The competence of the commissions

1. *Preliminary objections—the admissibility of complaints*

Apart from Articles 27 and 28, quoted above, the Constitution does not contain express provisions governing the procedure to be followed by a Commission of Inquiry. In both the cases under review, the Governing Body adopted a report from its Officers recommending that the Commission should determine its own procedure in accordance with the Constitution and with an earlier report from the Officers submitted shortly after the filing of the respective complaints. Pursuant to these initial reports, the Governing Body had requested the Governments concerned to communicate "observations" to the Director-General by a certain date. In the Portugal-Liberia case, the observations submitted by the Liberian Government contained what were, in effect, preliminary objections to the admissibility of the complaint. One of these objections was dealt with by the Governing Body; the other two were referred by it to the Commission of Inquiry.

The first objection was based on the fact that when the Portugese Government filed the complaint, proceedings were pending against it in respect of the complaint by Ghana, which also related to forced labour. Liberia argued that the lodging of a complaint by Portugal in these circumstances was "inappropriate". The Officers of the Governing Body recommended the rejection of this objection, for the following reason:—

> "The filing of a complaint by a Member which has ratified a Convention that another Member which has ratified is not securing the effective observance of the Convention represents the exercise of a constitutional right provided for in the Constitution of the I.L.O. The Constitution does not limit this right in cases in which a complaint is pending against the Member which lodges a new complaint."

The Governing Body approved this recommendation and decided to refer the complaint to a Commission of Inquiry. Liberia's other objections were held to relate to the merits and were accordingly referred

9 Portugal-Liberia Report, par. 392.

10 Portugal-Liberia Report.

by the Governing Body to the Commission.[11] Liberia contended that Portugal had filed the complaint as "an attempted reprisal" for action by Liberia in the United Nations, namely, her request for a meeting of the Security Council in March 1961 to consider the situation in Angola as a threat to international peace and security. In June 1961 the Security Council had adopted a resolution in substantially the same terms as the Liberian proposal, in which the Council called upon Portugal to comply with a General Assembly resolution setting up a committee of inquiry into the Angolan situation and "to desist forthwith from repressive measures".[12] Closely related to this ground of objection, but treated separately by the Commission, was Liberia's assertion that the complaint was baseless and had not been made in good faith, but solely for political reasons. The Commission dealt with the general submission that the complaint was baseless as part of its determination of the merits; clearly, this could not be regarded as an objection to admissibility. The allegation of political motives was severed from this general assertion and treated as a preliminary objection.

The Commission had no difficulty in dismissing the "reprisals" argument as a misconceived and inappropriate use of the legal concept.

> "The term 'reprisal' is used in international law to describe action which would be illegal in the absence of special circumstances justifying it which becomes legal by reason of the existence of such circumstances . . . .[13] If, therefore, the complaint were to be regarded as a reprisal this would be in law a justification rather than a condemnation of it. But in fact the complaint cannot be regarded as a reprisal as neither the complaint itself nor the action against which it is alleged to have been a reprisal was in any sense an illegal act; both represented the exercise by the State concerned of a constitutional right, the constitutional right of Liberia as a Member of the United Nations to take in its discretion certain action in the Security Council and the General Assembly and the constitutional right of Portugal as a Member of the International Labour Organization to file in its discretion a complaint that it is not satisfied that another Member is securing the effective observance of a Convention which both have ratified."[14]

The Commission concluded that "in these circumstances" the complaint could not be summarily dismissed on the ground of its alleged political character. The Commission was not concerned with any political aspects which the affair might have; its task was the purely judicial one of determining whether there had been or was still a failure by Liberia to observe the Forced Labour Convention. The Commission referred to the principles followed by the International

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11 Report, pars. 7 and 8.

12 Res. S/4835. The resolution was resolution 1603 (XV). See Rosalyn Higgins, *Development of International Law Through the Political Organs of the United Nations* (1963), pp. 125-6.

13 The Commission quoted the definition of reprisals given in Oppenheim, *Interantional Law*, vol. II, 7th ed., p. 136, and by Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. p. 1662.

14 Report, par. 384.

Court in cases in which it had been submitted that the Court should decline to give an Advisory Opinion because the questions put were political rather than legal.[15]

2. *A further preliminary objection joined to the merits*

In his submissions to the First Session of the Commission in July 1962 the Agent for the Government of Liberia gave an undertaking as to his Government's intention to file reports on the application of the Forced Labour Convention,[16] and drew attention to legislation enacted since the date of the Portugese complaint. He submitted that the undertaking and the new laws fully met the allegations in the complaint and that, consequently, nothing remained for the Commission to consider.[17] Counsel for the Government of Portugal submitted that the Commission had a duty to inquire into the facts and determine the extent to which the Liberian legislation in force at the date of filing the complaint, and the later legislation, were compatible in form, substance and application with the Convention.

The Commission decided that this submission of Liberia in effect, a "no case" submission or, more precisely, a "no remaining case" submission—could not be examined without passing upon the merits.[18] In its Final Report, the Commission said that in arriving at this decision it had been guided by "the general practice of international tribunals, aptly illustrated by the decision of the International Court of Justice on the fifth and sixth preliminary objections in the *Right of Passage over Indian Territory Case* (Preliminary Objections), of declining to decide on the basis of a preliminary objection or application for summary dismissal questions involving the examination of the merits of the case".[19]

Visits to the Territories

The Ghana-Portugal Commission spent two weeks in Angola and Mozambique, after the hearings in Geneva. The Commission explained that a relatively short visit to the territories was sufficient for its purpose; it was under an obligation to present its Report to the Governing Body as soon as possible, and it was now in possession of a great deal of information in the written and oral evidence, and gathered from its own researches.[20] The aim of the visits was to

15 The Commission cited the *Conditions of Admission Case*, I.C.J. Reports, 1947-1948, at p. 61, and the *Certain Expenses of the United Nations Case*, I.C.J. Reports, 1962, at p. 155.

16 In accordance with article 22 of the Constitution of the I.L.O.

17 Observations, 2 July 1962, set out in par. 26 of the Report.

18 Preliminary decision, 3 July 1962, Report, par. 30.

19 Cf. I.C.J. Reports, 1957, at pp. 149-52.

20 Report, par. 56. The Commission said: "A detailed inquiry on the spot—which would have needed more time and would have involved the exercise of special powers of inspection and judicial investigation on the territory of the State mentioned in the complaint—would have been necessary only if it would otherwise have appeared impossible to arrive at a correct appraisal of the questions at issue."

enable the members of the Commission to gain a direct impression of the situation in the territories and to know the practical conditions in which the main economic activities mentioned in the complaint were carried on. The visits also gave the Commission an opportunity to check the exactitude of the allegations made. The Commission said that it was fully aware of the limitations of such general impressions, but that it had taken all precautions in arranging the visits to ensure their maximum effectiveness.

The instances of an international tribunal making a visit to the *locus* are few.[21] It can hardly be said that there exists any "general practice" regarding the procedure to be followed. The Statute and the Rules of the International Court of Justice are silent on the matter, as were those of the Permanent Court of International Justice. The latter Court visited the scene in the *Diversion of Water from the Meuse Case,* at the request of Belgium, the territorial State, and with the consent of the other party, the Netherlands.[22] The arbitral tribunal in the *Grisbadarna Case* between Norway and Sweden, in which part of the maritime boundary between the two States was in dispute, visited the area concerned without express authorization in the *compromis,* but with the consent of both parties.[23] In both these cases the members of the tribunal were accompanied by representatives of the parties. When the Ghana-Portugal Commission visited Angola and Mozambique, however, it was not so accompanied. The question had been discussed at a session of the Governing Body which had before it the Commission's first report covering the hearings in Geneva. The Governing Body decided that the complaint was now *sub judice* and that therefore, in accordance with the earlier decision that the Commission should determine its own procedure, it was for the Commission to decide whether or not it should be accompanied by representatives of the two governments.

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21 See Hudson, "Visits by International Tribunals to Places Concerned in Proceedings," *American Journal of International Law,* vol. 31 (1937), p. 696. *The South West Africa Cases, Second Phase,* I.C.J. Reports, 1966, 6, at p. 9, showed that the International Court of Justice has some area of discretion in deciding whether or not to accede to a request for a view of inspection *in loco.* The Court of Arbitration in the Boundary Dispute between Argentina and Chile, which rendered its award in November 1966, established a Field Mission composed of two of the Members of the Court and two additional military officers with appropriate technical qualifications. The Mission directed the aerial photographic survey and made a reconnaissance on the ground of the area in dispute. The President of the Court stated in a Note to the Parties that it was not the purpose of the Mission to take evidence in the field (Award, p. 18). Thus, the Mission fulfilled a rather different function from that of the visits by the Commission of Inquiry to Angola and Mozambique. The Field Mission's visit is described at pp. 44-8 of the Award. (The Award is published by the United Kingdom Foreign Office, H.M.S.O., 1966, S.O. Code No. 59-162.)

22 P.C.I.J., Ser. A/B, No. 70 (1937). For the Court's order deciding upon the inspection of the various canals and locks, see Ser. C, No. 81 (1937).

23 Scott, Hague Court Reports (1916), p. 121 and U.N. *Reports of International Arbitration Awards,* vol. 11, p. 147.

The Commission's decision[24] records that the Chairman, in the exercise of the authority previously granted to him by the Commission, decided that it was not necessary for the Commission to be accompanied on its visits. It also recorded that the Commission had taken into account the views of the two governments conveyed to it through the International Labour Office. From this, it may presumably be inferred that neither government objected to the Commission's proposal that the visit should be unaccompanied.

The Portuguese Government had agreed to the itinerary proposed by the Commission, except for one area in Angola where it would be necessary for the Commission to have a strong military escort. The Commission accordingly decided not to visit this area, saying that "the work of a body of its kind cannot be performed under military escort".[25] Another area was chosen instead, in respect of which similar allegations concerning recruitment in coffee plantations had been made.

The Commission sought information from representatives of the Portuguese administration, from the management of every undertaking visited, and from manpower and personnel managers. However, one of the main objects of the visit was direct contact with African workers.

> "The greater part of the Commission's activities was devoted to this end. In almost all cases the Commission itself decided where it wanted to go in the undertaking or organisation visited. On many occasions it stopped without prior warning to talk to groups of workers encountered in the undertakings or on the road during its travels. The Commission itself at the last moment chose the workers whom it wished to question. It was thus able to talk freely and spontaneously with a large number of workers."[26]

Of equal importance was the fact that the Commission never noted workers' names.[27]

Problems of language appeared to have caused little difficulty. Most of the workers spoke Portuguese, and interpretation was done by members of the Commission or its own secretariat. In this way, the Commission was able to speak to many workers in the absence of any representative of management or of the Portuguese administration. In general, the Commission felt that its work had not been hindered by language difficulties. However, on a visit to one sugar plantation the workers questioned said that they had come to work there because they wished to, but none of them indicated clearly the manner in which he had been engaged. The Commission recorded:—

> "The unskilled workers . . . were more backward than any whom the Commission saw elsewhere and gave the impression of being intimidated. They certainly did not speak freely to the Commission and,

24 Report, par. 59. The decision was issued on 4 December 1961, upon their arrival at Nova Lisboa in Angola.

25 Report, par. 58.

26 Report, par. 80.

27 Report, ibid.

> after the Commission and the representatives of the company had moved on, some of them speaking only an African language attempted to make contact with the Commission through its staff."[28]

This seems to have been an exception; in most instances the Commission said that workers spoke spontaneously and freely.

The Ghanaian Government's request that the Commission should visit some other African countries, in particular Tanganyika and the Congo (Leopoldville), where it might meet persons who had come from Angola and Mozambique, was rejected. In a ruling issued after its return to Geneva the Commission said that the procedure adopted had given the complainant government the opportunity to submit written evidence from any source relating to the subject-matter of the complaint, and of presenting witnesses from any part of Africa. The Commission's visits had taken place in circumstances which had enabled it to hear freely the points of view of the administration, the employers and the workers. Moreover

> ". . . there would be substantial practical difficulties in assessing within the framework of the judicial procedure adopted by the Commission the weight to be attached to information received from political refugees in other parts of Africa."[29]

The Portugal-Liberia Commission did not visit Liberia. Neither of the governments requested it to do so. Thus, it became a matter for the Commission to make its determination in the light of the case as it then stood, that is, taking account of the legislation enacted by Liberia since the filing of the complaint. The Commission considered that it had all the information required, not only from the evidence at the hearings, but also from past reports of the I.L.O. Committees of Experts and the Committee on the Application of Conventions. The purpose of the inquiry was neither inquisitorial nor historical, but remedial. The Commission had to ascertain whether reasonably specific allegations were supported by current or recent facts. It was a question of judgment in each case how far it was necessary or profitable to inquire into facts relating to the application of laws since repealed. There were no specific allegations relating to the current laws which could appropriately be verified by an inquiry on the spot.[30]

International Labour Conventions and Municipal Law

1. *Fundamental obligation to make Convention effective*

Article 26 of the I.L.O. Constitution speaks of the duty of a Member State to secure "the effective observance" of Conventions which they have ratified. The nature of this obligation is expressed more cogently in an earlier provision of the Constitution which binds Members to communicate the formal ratification of a Convention to the Director-General and to "take such action as may be necessary to make effective the provisions of such Convention".[31] The crucial issue to be

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28 Report, par. 490.

29 Report, par. 86.

30 Report, par. 431.

31 Article 19 (5)(d).

determined by the Ghana-Portugal Commission was the precise content of this obligation, in the circumstances obtaining in Angola and Mozambique. The Commission's approach is strongly reminiscent of that of the Permanent Court of International Justice to the interpretation of the minorities treaties.[32] After an initial caveat that only the International Court could pronounce authoritatively on the matter, the Commission said that it

> "... construes this obligation as being an obligation to make the provisions of the Convention effective in law and in fact".

The Commission continued:—

> "It is therefore necessary, but not sufficient, that the provisions of the law should comply with the requirements of the Convention. A situation in which a legal provision inconsistent with the requirements of the Convention subsists but is regarded as obsolete cannot, in the judgment of the Commission, be regarded as satisfactory."[33]

The Commission pointed out the dangers which could result from such a patent inconsistency which was none the less alleged to comprise a *de facto* conformity with the Convention. If the municipal provisions were regarded as superseded by the act of ratification, there was a serious risk that the effect of the Convention might not be fully appreciated by those responsible for application and enforcement of the law. If, on the other hand, the legal provisions were not superseded but merely became *de facto* obsolete, the dangers were greater. The "obsolete" law could still be invoked if there were a change of government policy, or even a misunderstanding of policy by local administrators. Full textual conformity of the municipal law with the provisions of the Convention was therefore essential.

But this alone was not sufficient. In labour matters it was equally important that the law should be fully and strictly applied in practice. The government of a ratifying State had to ensure that it possessed effective administrative services, particularly a labour inspection service composed of independent officers with "a grasp of the practical realities of daily life in industry and agriculture". The provisions of the law must be made known to interested parties. The workers in particular should be given a clear picture of their rights and obligations. A procedure for dealing with grievances with no fear of victimisation of complainants was also essential. Finally, adequate penalties should be laid down for breaches of the law, and it should be a matter of public knowledge that these sanctions would be strictly enforced.

Having elaborated the content of the fundamental obligation flowing from ratification of an International Labour Convention in this

32 Principally, the Advisory Opinion on *Minority Schools in Albania*, Ser. A/B, No. 64. The Court said that it was not easy to define the distinction between notions of equality in fact and equality in law, but "nevertheless, it may be said that the former notion excludes the idea of a merely formal equality .... Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations" (at p. 19).

33 Report, par. 716.

way, the Commission was able to rule upon a submission by Portugal that a government was not liable for violations of the provisions of the Convention by administrative officials or employers, provided that disciplinary proceedings ensued. Counsel for Portugal contended that "a government must be judged not by the lapses of individuals but by its policy as a government, including the degree of sternness with which it treats such lapses".[34] The Commission accepted this as a correct general statement, provided that the government had previously taken all the steps outlined above to secure the application of the Convention, both in the terms of the local law and in the necessary administrative procedures.

> "Where these conditions are fulfilled a government cannot be regarded as failing to fulfil its obligations under a Convention because of a violation of its provisions by either an administrative officer or an employer which results in appropriate disciplinary or legal proceedings against the offender; but unless these conditions are fulfilled a government cannot disclaim responsibility for the shortcomings of its officers or for the conduct of particular employers."[35]

Moreover, the policy of the government must be such as to "protect it against lapses which are liable to escape its knowledge or control".[36] In this connexion, reasonable freedom of criticism of governmental action in respect of matters relating to the application of the Convention was "an essential element in the full implementation of the obligations of the Convention itself".[37]

In conclusion, the Commission again emphasized that it was not concerned with political questions regarding civil liberties in general, and added that it had been favourably impressed by the degree of freedom exercised by a very large majority of those whom it had met in Angola and Mozambique—officials, employers and workers, and Africans no less than Europeans—in expressing their views to it without constraint or inhibition.[38]

2. *The Meaning of forced labour—recruitment practices*

The two Conventions which Portugal had ratified related to forced labour, not to recruited or contract labour.[39] However, although these might be distinct concepts in law, in popular usage and in practice it was not easy to separate them. The Ghana-Portugal Commission was confronted with many allegations relating to cases of recruited or

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34 Report, par. 718.

35 Report, par. 716.

36 Report, par. 718.

37 In relation to the Abolition of Forced Labour Convention 1957, the Commission found specifically that the obligation to make it effective "includes the obligation to recognise the measure of freedom of expression and of association necessary to afford effective redress without victimization for grievances relating to the application of its provisions"; see Report, par. 719.

38 Report, par. 718.

39 Portugal had not ratified the Recuiting of Indigenous Workers Convention 1936 or the Contracts of Employment (Indigenous Workers) Convention 1939.

contract labour, some of which might also constitute forced labour, depending on the individual circumstances. The determining factors were whether the recruitment or the conclusion of the contract had occurred with the full understanding and consent of the workers concerned, or whether they had been tainted by compulsion, fraud, mistake or ignorance. The Commission said:—

> "The existence of recruited or contract labour does not in itself involve recourse to forced labour in violation of either the Forced Labour Convention 1930, or the Abolition of Forced Labour Convention 1957. It may, however, be the occasion of abuses in connection with recruitment which in practice—at times in breach of the law—give rise to or are indistinguishable from forced labour."[40]

The possibility of abuses in connection with recruitment was a major consideration which had led to the conclusion of a number of other Conventions and Recommendations, among them the Recruiting of Indigenous Workers Convention 1936 and the Contracts of Employment (Indigenous Workers) Convention 1939. Although Portugal had not ratified these two Conventions, the Commission referred to them "because certain of their provisions bear directly on matters in respect of which it has been alleged that recourse to recruited and contract labour in fact involves forced labour".[41] The Commission here verged on a direct recommendation that Portugal should ratify these two Conventions.

The Recruiting Convention prohibits public officers from acting as recruiting agents, exercising pressure on possible recruits, or receiving from any source any special remuneration or inducement for assistance in recruiting. The part played in recruitment by public officers and chiefs in Portuguese Africa was alleged to constitute, and in view of the Commission in certain cases did constitute, forced labour. The Commission pointed out that in its formal recommendations it was limited to indicating the steps which should be taken to give effect to the obligations which had already been assumed by Portugal. But the Commission then made an "indirect" recommendation—perhaps more accurately described as a suggestion to the Portuguese Government, but nevertheless a suggestion fortified by the considerable authority of the unanimous Commission. That government was invited to consider whether it should not ratify the Recruiting and the Contracts of Employment Conventions. The Commission's suggestion was based not only upon moral grounds but also upon strictly legal considerations. The Commission said:—

> ". . . In view of the direct relationship between certain of the provisions of these Conventions and the avoidance of abuses which would involve a violation of both the Forced Labour Convention 1930, and the Abolition of Forced Labour Convention 1957, the Commission considers that the Portuguese Government would be well advised to carry a stage further the policy represented by its ratification of the Forced Labour Convention 1930, the Abolition of Forced Labour Convention 1957, and the Abolition of Penal Sanctions Convention 1955, by giving consideration as a matter of urgency to the desirability of also

40. Report, par. 717.

41 Report, par. 714.

> ratifying the Recruiting of Indigenous Workers Convention 1936, and the Contracts of Employment (Indigenous Workers) Convention 1939. This would clarify the position and make it possible to combat the vestiges of forced labour more effectively."[42]

In order that Portugal might be in a position to implement effectively the two Conventions which were binding upon her, it was all but unavoidable that she should also give effect in the law and practice of her overseas territories to the provisions of the other two Conventions, dealing with closely related practices. Having found that certain abuses in recruitment practices constituted forced labour, and thus a violation of the Conventions which Portugal had ratified, the Commission was in a strong position to urge her to ratify the related Conventions. Strictly, there was no legal obligation on Portugal to do so. But in consequence of the Commission's findings with regard to abuses, the Portuguese Government was obliged to take positive action to remedy the existing unsatisfactory practices and to prevent their recurrence.

3. *The Forced Labour Convention in Liberian Law*

As a question of fact, it could not be disputed before the Commission of Inquiry that the Liberian Code of Laws of 1956 contained many provisions which were plainly inconsistent with the provisions of the Forced Labour Convention 1930, ratified by Liberia in 1931. As a question of law, the Commission had to determine whether these inconsistent provisions possessed the force of law in Liberia, or whether they had in some way been overridden or made obsolete by the ratification of the Convention.

The Government of Liberia argued that none of this legislation contained in the Code of 1956 constituted a failure on its part to secure the effective observance of the Convention. By Liberian law, the Convention prevailed over inconsistent legislation, and operated as an implied repeal of any such provisions in force at the time of ratification. With regard to any later inconsistent laws, it was contended that the Convention itself, together with Article 8, paragraph 1 of the Liberian Constitution which guarantees life, liberty and property, had the effect of rendering such legislation unconstitutional and therefore inoperative.

The Commission considered this argument first in relation to laws enacted before the Convention was ratified. The Liberian submissions raised two points of law: whether the ratification operated as an implied repeal of existing inconsistent laws, and whether, if this were the case, the Convention was self-executing, with the consequence that Liberia had conceivably fulfilled her obligation to secure the effective observation of its provisions. The treaty-making clause of the Liberian Constitution provided:—

> "The President shall have power to make treaties provided that the Senate concur therein, by a vote of two-thirds of the Senators present."[43]

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42 Report, par. 715.

43 Article 3, par. 1.

The Foreign Relations Law provided:—

> "All treaties to which the Republic of Liberia is a party shall be law from the date of their publication and any person violating their provisions shall be guilty of a misdemeanour."

The Attorney-General of Liberia said that these provisions had the effect that duly ratified treaties operated as an implied repeal of earlier inconsistent laws. The Commission, while accepting this as a correct statement of the legal position, which it assumed to be very similar to that obtaining in the United States of America, held that such an implied repeal was not sufficient to give effect to the obligations of the Convention.

> "... As was observed by Chief Justice Marshall in *Foster v. Neilson*, not all treaty obligations are self-executing: they may either by their terms or from their nature require legislative action to give them full effect; 'when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court'."[44]

The practice of the International Labour Organization had illustrated the relevance of this principle for International Labour Conventions. In 1930 the Committee on the Application of Conventions had reported that various governments had maintained that under the constitutions of their States the mere act of ratification sufficed to give the particular Convention the force of national law. The Committee had not accepted these statements as an adequate execution of the treaty obligations of these countries, and had said:—

> "... Most of the Conventions do not consist of provisions directly prescribing to a citizen that he shall do or leave undone a particular act, but are rather addressed to a country as such and oblige it to deal with a particular question in a particular way. The Convention itself gives the authorities in a particular country no means of securing the carrying out of its provisions, quite apart from the fact that the Conventions do not provide for any penalties in the case of non-observance."[45]

The Form for the Annual Report on the Forced Labour Convention contained the following question, included by the Governing Body in 1951:—

> "If in your country ratification of the Convention gives the force of national law to its terms please indicate by virtue of what constitutional provisions ratification has had this effect. Please also specify what action has been taken to make effective those provisions of the Convention which require a national authority to take certain steps for its implementation."[46]

The Commission endorsed the principles reflected in the observations of the Committee on Application in 1930, and held that the implied repeal of inconsistent legislation did not suffice to give effect to the "positive obligations" of the Forced Labour Convention.

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44 Report, par. 401. *Foster v. Neilson* is reported in 2 Peters 253.

45 Record of Proceedings, International Labour Conference, 14th Session, Geneva 1930, vol. I, Appendix IV, pp. 637-8.

46 Quoted in par. 402 of the Commission's Report.

Regarding later inconsistent legislation, the Commission admitted that this might be rendered invalid in some countries by virtue of constitutional provisions, but neither the Constitution of Liberia nor her Foreign Relations Law contained any such provisions. The Liberian Supreme Court had never had occasion to determine the question. The Commission felt that it could not entirely disregard the position under the law of the United States, which had been a major historical influence on the law of Liberia. It was well established that, under United States law, inconsistent federal legislation did override an earlier treaty in its operation as municipal law.

In the circumstances, the Commission could not accept the submission that Liberian legislation subsequent to her ratification of the Convention was *ultra vires* and invalid by reason of its inconsistency with the Convention.[47] The key passage in the Commission's decision is a statement of the principle that a government cannot rely upon the very fact of the inconsistency of legislation with an earlier treaty as a defence to a claim that the enactment of the legislation amounts to a positive violation of the treaty, or at least, a failure to fulfil obligations under it.

> "The Commission considers that it is not open to any government to contend in international proceedings relating to an alleged failure to give effect to its obligations under an International Labour Convention that the enactment on its initiative or with its consent of legislation apparently inconsistent with the Convention did not in fact involve any such failure because the legislation in question was constitutionally invalid by reason of the inconsistency."[48]

The Commission found that the enactment in 1936, 1949 and 1956 of certain legislation specified in the Report was inconsistent with the Forced Labour Convention and constituted a failure by Liberia to discharge the obligations accepted by it upon ratification in 1931.

A further submission by Liberia that the inconsistent legislation was not applied in practice and that, accordingly, Liberia had not failed to observe the Convention was also rejected. The obligation "to make effective" the provisions of a Convention was an obligation to make them effective in law and in fact. If the law was not consistent with the Convention "a plea that it is not applied in practice may, if buttressed by convincing factual evidence, be a reply to a particular charge of violation but affords no guarantee of continued compliance with the Convention".[49] Where the law was in conformity with the Convention, the Commission adopted the principle enunciated by the Ghana-Portugal Commission that such conformity alone was not enough; the law must also be enforced in practice, with adequate administrative services and effective grievance procedures. These general considerations were reinforced in the case of the Forced Labour Convention by specific requirements contained in Articles 23 to 25. The authorities of State Parties were to issue complete and precise regulations governing the use of forced or compulsory labour;

47 Report, par. 406.

48 Report, ibid.

49 Report, par. 412.

there must be provision for an effective complaints procedure; the strict application of these regulations was to be secured through an adequate labour inspectorate or other appropriate means; the regulations must be brought to the notice of the workers, and illegal exaction of forced labour must be punished as a penal offence with adequate penalties.

The Commissions' Findings and Recommendations

1. *Ghana-Portugal Commission*

Prior to her ratification of the Forced Labour Convention in 1956, Portuguese legislation had proclaimed the obligation to work as a "moral and legal obligation", in legislation of 1899, and in the Native Labour Code of 1928 as a "moral obligation". Many of the witnesses testified that in this pre-ratification period forced labour had come to be associated with Portuguese Africa.[50] The Commission found that far-reaching changes in Portuguese policy, legislation and practice had occurred in connection with her ratification in 1956 of the Forced Labour Convention and of the Abolition of Forced Labour Convention, in 1959.[51]

> ". . . The Commission is fully satisfied of the bona fides of these changes . . . and rejects as entirely without foundation the suggestion made in support of the complaint that 'Portugal only ratified the Convention as a cover to continue her ruthless labour policies'."[52]

However, the Commission was not satisfied that all the obligations in the Abolition of Forced Labour Convention were implemented in full as from 23 November 1960, the date of its entry into force for Portugal. There were several instances in which important changes for the purpose of bringing the law and practice into full conformity with the Convention had been made since the filing of the complaint. In these cases, the Convention's provisions had not been applied immediately upon its entry into force. The Commission also noted certain respects in which further steps were needed to give full effect to the two Conventions.[53]

2. *Portugal-Liberia Commission*

In consequences of its decision upon the legal relationship between the Forced Labour Convention and Liberian law, which has been described above, the Commission found that Liberian legislation at the date of the filing of the complaint was inconsistent with her obligations under the Convention to give effect to its provisions in law and in fact. The legislation also failed to meet the specific requirements of Articles 23 to 25 of the Convention. Many of the inconsistencies had been removed by laws enacted since the filing of the com-

50 Report, par. 725 (3).

51 Report, par. 725 (4).

52 Report, par. 725 (5).

53 The recommendations related to reinforcement of the labour inspection service, the establishment of effective grievance procedures and a proper trade union organization, and to the obligation to include information on certain specified matters in Portugal's annual reports to the International Labour Office. See Report, pars. 729-70 and par. 778.

plaint. The Commission made recommendations as to the steps to be taken to eliminate the remaining discrepancies between the laws and the Convention. Liberia was in no way "in the dock" before the Commission, which expressly recorded its appreciation of the high sense of international responsibility shown by the President and Congress in taking action for the repeal of the inconsistent laws prior to and during the investigation of the complaint. The Commission entertained no doubt that the remaining anomalies would be eliminated in the same spirit.[54]

Conclusions

The decisions of the Governing Body to refer the complaints by the Governments of Ghana and Portugal to Commissions of Inquiry, and thus to invoke procedures which had never been used before in the history of the International Labour Organization, were decisions of the greatest significance for the continuing development of international law. The way in which the two Commissions executed their delicate and onerous task demonstrates convincingly that the performance by States of treaty obligations relating to the treatment of individuals within their own jurisdiction is a matter which may be properly and effectively the object of judicial investigation. Further, the Reports show the efficacy of the mere prospect of such an investigation in operating as an inducement to a State to take certain legislative and administrative action in an endeavour to mitigate the apprehended force and extent of a Commission's adverse findings and recommendations.

The wider significance of the initiation of this procedure has been aptly expressed by Judge Jessup in his concurring opinion in the *South West Africa Cases* (*Preliminary Objections*). Referring to the proceedings of the Ghana-Portugal Commission, he said:—

> "The fact which this case establishes is that a State may have a legal interest in the observance, in the territories of another State, of general welfare treaty provisions and that it may assert such interest without alleging any impact upon its own nationals or its direct so-called tangible or material interests."[55]

As a statement of principle this remains valid, notwithstanding the controversial decision of the International Court of Justice in the *South West Africa Cases, Second Phase* (1966).[56]

The Reports of the Commissions will be a valuable guide to any Conciliation Commission that may one day be set up under the provisions of the International Convention of 1965 on the Elimination of All Forms of Racial Discrimination.[57] The procedure for investigation of inter-state complaints contained in the more recent United Nations Covenant on Civil and Political Rights[58] is not really comparable to

54 Portugal-Liberia Report, par. 422.

55 I.C.J. Reports 1962, p. 426.

56 I.C.J. Reports 1966, 6.

57 The General Assembly resolution Convention is annexed to General Assembly resolution 2106 (XX) adopted on 21 December 1965.

58 Annexed to General Assembly resolution 2200 (XXI), adopted on 17 December 1966.

the I.L.O. procedure, because a complaint from a State Party may only be received by the Human Rights Committee established by the Covenant if it relates to another Party which has made a declaration recognizing the competence of the Committee.[59] Moreover, the function of the Committee in dealing with an admissible complaint is one of conciliation rather than of judicial investigation and recommendation of remedial measures. If no solution is reached by conciliation, the Committee is empowered simply to make "a brief statement of the facts" and to communicate this, together with the submissions of the States concerned, to those States.[60]

It remains only to note that the governments concerned in these two I.L.O. inquiries accepted the findings and recommendations of the respective Commissions.

In the Ghana-Portugal case, although the Government of Portugal had announced its acceptance of the Commission's findings and recommendations at the 151st Session of the Governing Body in 1962, the International Labour Conference found it necessary to adopt a resolution at its session in 1965 in which, *inter alia*, it requested that Government "to give effect without delay to the recommendations of the 1962 Commission of Inquiry . . . particularly in so far as they relate to forced labour practices and the sequels of forced labour".[61] The resolution requested the Director-General and the Governing Body to keep the matter under review and "to take any appropriate measures to ensure that these recommendations shall be implemented".

At its 163rd Session in November 1965 the Governing Body requested the Committee of Experts on the Application of Conventions and Recommendations to make a special examination of the extent to which the recommendations of the Commission of Inquiry had been implemented and to report.[62] The Committee of Experts found that the legislative changes recommended by the Commission had become effective on 1 October 1962. With regard to the application of the revised laws and administrative instructions, the Committee reported that for the most part significant progress had been made. But there was considerable scope and need for further action to secure the implementation of the recommendations for positive measures in the manpower field, including the development of public employment services.[63] The Governing Body "took note" of this special report at its 165th Session in May 1966.[64]

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59 Article 40.

60 Article 40 (1)(h).

61 Resolution VI, International Labour Conference, 49th session, Geneva 1965.

62 *I.L.O. Official Bulletin*, vol. 49 (1966), No. 1, p. 9.

63 Special Report by the Committee of Experts on the Application of Conventions and Recommendations concerning the Measures taken by the Government of Portugal to implement the Recommendations of the Commission appointed under Article 26 of the I.L.O. Constitution to Examine the Observance by Portugal of the Abolition of Forced Labour Convention 1957 (International Labour Office, Geneva 1966), p. 25.

64 *I.L.O. Official Bulletin*, vol. 49 (1966), No. 3, p. 258.

In the Portugal-Liberia case there was no special resolution adopted by the International Labour Conference, nor any special report by the Committee of Experts. That Committee has in each year since the submission of the Report of the Commission of Inquiry to the Governing Body included in its normal report a review of the measures taken by Liberia to give effect to the findings and recommendations of the Commission.[65]

65 See Conference Report III (part IV) submitted to each annual International Labour Conference.