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This note records a recent report of a fact-finding Commission of the International Labour Organisation (ILO) which examined the labour laws of the Republic of South Africa. It also reports on the response of the Government of South Africa to the report which was tabled in the Governing Body of the ILO on 29 May 1992.

The ILO in the United Nations agencies

The ILO is one of the oldest of the agencies of the United Nations, being an agency which was originally established under the League of Nations by the Treaty of Versailles in 1919. In 1950, the ILO established a Fact-Finding and Conciliation Commission on Freedom of Association.[1] The function of that Commission is to examine such cases of alleged infringement of trade union rights as are referred to it; to ascertain the facts relevant to the complaint; to discuss with the government concerned any perceived departure from ILO standards; and thereafter to report to the Governing Body of the ILO.

Over the years since 1950, a number of inquiries have been held by panels of the Commission, created for the purpose of investigating particular complaints. The procedure adopted

by these panels is now reasonably well established and described in earlier Commission reports.[2] In principle, no case may be referred to the Commission (and hence to a panel) without the consent of the government concerned. The only exception to this rule is in respect of a complaint relating to the application of an ILO convention ratified by a country. In such a case the Governing Body may designate the Commission as a Commission of Inquiry under Article 26 of the Constitution of the ILO to investigate the alleged infringement.

In 1988, the Congress of South African Trade Unions (COSATU) made a complaint to the ILO alleging infringement of trade union rights in the Republic of South Africa (RSA). This complaint was submitted to the Governing Body of the ILO in June 1988. That resulted in a reference of the complaint to the Commission. A number of machinery steps had then to be taken.

The first arose out of the fact that the Republic of South Africa had ceased to be a member of the ILO in March 1966, following widespread criticism of that country's then apartheid laws and challenges to the credentials of the representatives purporting to represent South Africa. In the face of these challenges, the Government of the Republic of South Africa withdrew from the ILO (as from other agencies of the United Nations system). However, it remained a member of the United Nations Organisation. In order to secure its consent to the investigation by the Commission of the COSATU complaint, it was necessary to refer the complaint to the Economic and Social Council of the United Nations (ECOSOC). This was done pursuant to a procedure established between the

ILO and the United Nations for the handling of complaints against states which are not members of the ILO but which are members of the United Nations. The ECOSOC, having requested the Government of the Republic of South Africa to give its consent to the matter being referred to the Commission, this consent was communicated by letter received from the Minister of Manpower of RSA at the ILO on 19 February 1991. The first procedural hurdle had thus been passed.

ILO Commission on South Africa

It was then necessary to constitute the panel to examine the case. The person designated as Chairman was the Rt Hon Sir William Douglas, a member of the Committee of Experts on the Application of Conventions and Recommendations of the ILO and former Chief Justice of Barbados. Two additional members were appointed to the Commission and immediately designated members of the panel on South Africa, viz The Hon Justice Rajsoomer Lallah, Senior Puisne Judge of the Supreme Court of Mauritius and former Chairman of the United Nations Human Rights Committee and Justice Michael Kirby President of the NSW Court of Appeal, and Chairman of the Executive Committee of the International Commission of Jurists.

The first meeting of the Commission, so constituted, took place in Geneva in October 1991. The members of the Commission, in the presence of the Director General of the ILO (Mr Michel Hansenne) made solemn declarations of impartiality and integrity in terms similar to those made by the Judges of the International Court of Justice.

The second session of the Commission took place in South

Africa itself during the greater part of the month of February 1992. During this time the Commission held formal hearings in Cape Town and Johannesburg and undertook inspections, investigations and hearings in Durban, East London and Port Elizabeth - the principal industrial cities of RSA. At the hearings in Cape Town and Johannesburg, the Government of South Africa was represented by Adv P Blieden SC and a team of State lawyers. COSATU was represented by Adv Professor Martin Brassey, now of the University of The Witwatersrand in Johannesburg, assisted by lawyers and union officials. Arrangements were also made, in accordance with the tripartite structure of the ILO (Government-employer-union) for the South African Employers' Consultative Committee on Labour Affairs (SACCOLA) to participate. With the knowledge of the parties, the members of the Commission met privately with Ministers of the Government of South Africa, members of the judiciary (including Chief Justice Michael Corbett and Justice Richard Goldstone who is conducting a Commission of Inquiry into Violence) and Mr Nelson Mandela (President of the African National Congress).

The rules of procedure followed by the Commission were adopted by it in advance and drawn to the notice of participants and witnesses.[3] Generally speaking, the Commission followed a formal procedure but questions were put to witnesses through the Commission. In addition to much oral evidence and submissions, the Commission received a great deal of material in writing.

The original case brought by COSATU complained that the Labour Relations Act 1956 (LRA) of South Africa promoted racially constituted trade unions and infringed the freedom to

strike in RSA in ways incompatible with the jurisprudence of the ILO. In 1988, major amendments to the LRA were enacted which the Government of RSA asserted removed the basis of the COSATU complaint. COSATU then made further complaints about the laws and practices of labour relations in South Africa. At first, the Government objected to the Commission's investigating those complaints. However, upon the arrival of the Commission in Cape Town, the representatives of the Government agreed with the representatives of COSATU that the Commission's terms of reference should be broadened to "deliberate on and consider the present situation in South Africa in so far as it relates to labour matters with particular emphasis on freedom of information".[4] Accordingly, the Commission's mandate could scarcely have been wider. As well, the representatives of the Government made it plain that, although the RSA was not a party to the relevant conventions of the ILO upon which the COSATU complaint ultimately rested, South Africa agreed to associate itself with the aims of the conventions on freedom of association and the jurisprudence which has developed around them.[5]

The conciliatory moves of the Government, in dropping objections to the wider mandate of the ILO Commission, in extending its mandate and in expressing acceptance of ILO principles can only be fully understood against the background of political developments in South Africa since 2 February 1990. On that date, the State President (Mr FW de Klerk) announced to Parliament in Cape Town the abandonment of the official policy of apartheid; the removal of bans formerly applying to political organisations (principally those representative of the black population); the lifting of the

state of emergency; the release of political prisoners; the repatriation of exiles; the repeal of legislation embodying segregation and discrimination on the basis of race; and the official commitment to negotiate the creation of a democratic framework for South Africa. This change of policy led to the establishment of the Convention for a Democratic South Africa (CODESA) which was in session during the visit to South Africa of the ILO Commission. Also during the Commission's visit to South Africa, and as a result of the loss by the Government of Mr de Klerk of an important by-election, a referendum of the White population was called. This was later conducted on 17 March 1992. It resulted in a vote of 68.7% of the White electorate in favour of the State President's policies.

The ILO Commission conducted its third session in Geneva in May 1992. It then adopted its report. This was transmitted to the Governing Body. In accordance with an arrangement established with the Government of South Africa, the Government was provided with an advance copy of the report after it was signed by the Commissioners. At the time the report was tabled in the Governing Body of the ILO, there was tabled the response of the Government of South Africa to the report. The balance of this note contains some of the main points of the report and of that response.

ILO Commission report

The Commission report describes the social context and the institutions and laws governing labour relations in South Africa. The operation of the system of apartheid, and its relevance to labour laws is described. There follow

conclusions on the ways in which the laws and practices of South Africa depart from the ILO jurisprudence on freedom of association. Also stated are the conclusions on the actions taken against trade unions and their members under present South African laws which diminish or impede the attainment of the legitimate functions of these bodies as industrial unions. Amongst the most restrictive laws in this regard is the elaborate complex of security legislation established in South Africa to enforce the previous apartheid regime.

The Commission recommended the need to reactivate the National Manpower Commission of South Africa with a tripartite structure acceptable to all participants and the need for a simpler and clearer law on labour relations. The present law, with numerous procedural requirements, was considered "unduly complex and formalistic". A great part of the Commission's report deals with specific changes which are recommended to the identified provisions of the LRA relating to trade union constitutions (removal of bans on political affiliation etc); the registration of trade unions (termination of single racial unions without delay); restrictions on trade union activities (fund raising and political action) and cumbersome regulation of legal or "procedural" strikes.

The report records details of violence and injustice suffered by the large population of domestic workers and farm workers who, until now, have been excluded from the protection of the LRA in South Africa. It recommends that they, and public servants, be brought under the protection of the Statute and its institutions. Activities such as spying on, and surveillance of, trade unions, demonstrated by a number of judicial inquiries conducted in South Africa, are condemned as

inconsistent with ILO principles on freedom of association. The covert funding by the Government of rival trade unions is referred to. The Government's undertaking that such activities were being brought to an end is recorded in the ILO report.

The report also deals with the patchwork of eleven differing "Homelands" established with varying degrees of independence and "self-government" under South African law. These areas have not been recognised as independent of South Africa by any member of the international community. The injustices of the labour laws of these "Homelands" are identified. The Commission made a number of recommendations designed to ensure that such laws were brought into line with ILO jurisprudence. It stated that South Africa was held accountable before the international community to ensure that that was done.

At several places in its report, the Commission is at pains to stress that the opinions expressed are not simply the personal views of the Commissioners. Instead, they represent the conclusions reached by the Commission after testing the South African laws and practices, as found, against established ILO standards. The principal relevant instruments on freedom of association to which the evidence and submissions of the parties were addressed included the Declaration of Philadelphia;[6] the Convention Concerning Freedom of Association and Protection of the Right to Organise;[7] the Convention on the Right to Organise and Collective Bargaining;[8] the Workers Representatives Convention[9] and the Labour Relations (Public Service) Convention.[10]

South African Government's response

The response of the Government of South Africa is contained in an addendum to the report which was tabled at the same time as the Commission's report was delivered to the Governing Body of the ILO.[11] It begins with an expression of appreciation for the efforts of the Commission. It urges that those considering the Commission's recommendations should keep in mind the fact that "South Africa is in essence a developing country", that between 2.5 and 3 million people who wish to work are unemployed; that there is a high influx of unskilled labour into RSA and that the economy is moving from a labour intensive to a capital intensive one.

Many of the specific proposals for reform of the LRA are accepted in principle. Interestingly, in the context of South Africa the Government accepts that discrimination, including on the basis of race, should not be tolerated and that such discrimination constitutes an unfair labour practice. Mention is made of the approach by the South African Government to the ILO for technical assistance to expand its understanding and application of ILO jurisprudence.

Some criticism is voiced by the Government of RSA of the willingness of the Commission to admit hearsay evidence and witness opinions otherwise than in accordance with the strict rules of evidence.[12] Nevertheless, the Government's response concludes positively:[13]

> "It is trusted that the report and the Government's response will provide a useful reference point to the ongoing reform process and that it will inspire all interested parties in South Africa to participate

in the debate on a new Labour Relations Act. It is needless to say that this process will have to take into account the international principles of freedom of association, as well as the special conditions that prevail in this country, described by the Commission as one of great beauty and resources - of people and material."

Follow up and significance

The ILO Commission recommended that the South African Government should be invited to submit reports to ECOSOC, for transmission to the ILO, on the implementation of the report recommendations. During the course of the inquiry, the Government repeatedly requested the Commission itself to conduct a follow up investigation at a time later in its reform process. Since the report was published other official reports have been produced describing, in similar terms, the violence against unionists and other citizens in South Africa including in the Homelands. In June 1992, Amnesty International produced a report urging prompt adherence by South Africa to international human rights treaties and stricter control of defence and security forces blamed for various acts of violence.[14] In the same month, a report by the International Commission of Jurists also dealt with the violence and made positive suggestions for international monitors for law enforcement and future elections.[15] As the level of violence, particularly in townships on the fringes of South African urban areas increased, provision has been made for United Nations and other inspection teams to monitor the

causes of violence and the workings of the Goldstone Commission. A massacre of township dwellers in Boipatong, near Johannesburg, in June 1992 led to the suspension of the ANC participation in the CODESA talks.

Having shared so many legal cultural and sporting links with South Africa in the past, it is appropriate that Australian and other Commonwealth lawyers should exhibit a particular interest in legal developments in South Africa as that country moves towards a democratic constitution. The importance of the reforms of labour law derive from the fact that, during the ascendancy of apartheid, trade unions were often the only lawful outlet for organised political and social opinion on behalf of the Black community.

There are two other points of significance for Australian lawyers which may be noticed. The first arises from the fact that Australia is itself the subject of adverse comment before the ILO arising from its own labour relations legislation. In 1989, a report was made to the ILO Committee of Experts concerning various aspects of Federal labour laws, including the scope of s 45D of the Trade Practices Act 1974 (Cth) and its compatibility with ILO Convention No 87. Still more recently, an examination has been made of the Essential Services Act 1988 (NSW) and Industrial Relations Act 1991 (NSW). The Australian Council of Trade Unions (ACTU) has suggested that this legislation does not conform to the requirements of ILO conventions.

The treatment in the report of secondary boycotts, picketing and the limits of legitimate union activity under ILO jurisprudence gains special relevance in Australia by reason of a number of recent industrial actions. These

include the National Pilots Strike and the industrial dispute at Burnie, Tasmania, affecting the papermill conducted by Associated Pulp and Papers Mills.[16]

The second point to be noted concerns the future. In the current political climate, suggestions are made, on both sides of politics, of the need to rethink radically the structure of Australia's industrial and labour relations machinery.[17] Reformers, addressing Australia's labour laws and practices will have to consider the extent to which their reforms are compatible with Australia's obligations under conventions of the ILO to which Australia is a party and also under such ILO norms as have become part of international customary law.

The significance of the discipline of international norms upon the development of Australia's municipal laws has recently been noted by the High Court of Australia.[18] The rôle of the ILO as an agency concerned in establishing basic human rights within its special field of competence has not always secured widespread acknowledgment. The report of the ILO Commission on South Africa demonstrates the way in which, by participating in international agencies such as the ILO, and especially by subscribing to the international treaties which they sponsor, a country assumes obligations before the international community which bind it and with which, generally, it will feel obliged to comply. It is in this way that the obligations of ILO conventions may become an important factor in the local political and economic equation. That is why it is timely to consider the report of the Commission on South Africa both for its significance for that country and for the lessons it holds for other countries, including Australia.

FOOTNOTES

1 See International Labour Organisation (ILO), Minutes of the Governing Body, 110th Session, 62-90. The establishment and procedures of the ILO Commission are explained in Chapter 1 of the Commission's Report, Prelude to Change: Industrial Relations Reform in South Africa, ILO, Geneva, 1992 GB.253/15/7 (253rd Session). For further information on ILO procedures see CW Jenks, The International Protection of Trade Union Freedom, 1957 Stevens & Sons Limited London, 181FF (ILO "Allegation Procedure"). Cf Lord Wedderburn "Freedom of Association and Philosophies of Labour Law" (1989) 18 Industrial Law Journal 1.

2 See ILO Commission, 1992, 1 (paras 3-4).

3 Ibid, 7, 11-12 (fn 6).

4 Ibid, 10.

5 Ibid, 13, 129.

6 Adopted by the General Conference of the ILO, 1944. See ILO Commission, 1992, 188.

7 [No 87], 1948.

8 [No 98], 1949.

9 [No 141], 1975.

10 [No 151], 1978.

11 Doc GB 253/15/7 Add. (253rd Session).

12 Ibid, 8 (para 29).

13 Ibid, 9 (para 33).

14 Amnesty International, South Africa: State of Fear, 1992, London. See also International Labour Conference, Provisional Record, 79th Session, Geneva, 1992 "Action Taken on the Declaration Concerning Action Against Apartheid in South Africa" (Document 21).

15 International Commission of Jurists, Agenda for Peace: An Independent Survey of the Violence in South Africa, ICJ, Geneva, 1992.

16 See The Queen v The Commissioner of Police for the State of Tasmania; Ex parte North Broken Hill Ltd (Trading as Associated Pulp and Paper Mills), unreported, Supreme Court of Tasmania (Wright J)

3 June 1992.

17 Cf J.T. Ludeke, "Enterprise Bargaining and its Consequences" (1992) 66 ALJ 509, 514.

18 See Mabo v Queensland (1992) 66 ALJR 408 (HC) at 422; cf Derbyshire County Council v Times Newspapers Ltd [1992] 3 WLR 28 (CA), 60.