

Addis Ababa University
Graduate School
Faculty of Law

The Role of the ILO Supervisory Body
in Ensuring Ethiopia's Compliance to
International Labour Standards: *A Legal
Perspective*

By: Fekadu Molla

June, 2006

Addis Ababa University
Graduate School
Faculty of Law

The Role of the ILO Supervisory Body in
Ensuring Ethiopia's Compliance to
International Labour Standards: *A Legal
Perspective*

Research Paper submitted in Partial Fulfillment of
Degree of Master of Laws

By: Fekadu Molla

June, 2006

Addis Ababa University
Graduate School
Faculty of Law

The Role of the ILO Supervisory Body in
Ensuring Ethiopia's Compliance to
International Labour Standards: *A Legal
Perspective*

Research Paper submitted in Partial Fulfillment of
Degree of Master of Laws

By: Fekadu Molla

Advisor: Mohammed Habib (LL.B, LL.M)

June, 2006

Addis Ababa University
Graduate School
Faculty of Law

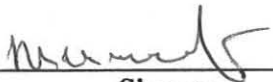
The Role of the ILO Supervisory Body in Ensuring
Ethiopia's Compliance to International Labour
Standards: *A Legal Perspective*

Research Paper submitted in Partial Fulfillment of Degree
of Master of Laws

By: Fekadu Molla

Approved By:
Board of Examiners

Mohammed Habib
Advisor


Signature

Examiner

Signature

Examiner

Signature

Acknowledgment

I would like to present my heart felt gratitude for my Advisor Ato Mohammed Habib for his critical analysis and friendly advises.

Word of appreciation also for my family and old friends, not to mention the new ones that I got along the way, for being there when I needed them the most.

Fekadu Molla

June, 2006

Abstract of the Research

There has been a more than 75 year's old tight relationship between ILO, which is the oldest sectorial international organization and it's first African member: Ethiopia. This means, it has been three quarters of a century since Ethiopia has agreed to undertake her responsibility of membership up on admission to the organization.

Ethiopia, as any other member state to the ILO is expected to assist and take part in the organization's endeavor to set international minimum labour standards, promote ratification of international labour conventions and evaluate the application of the same by member states.

Among the numerous numbers of ILO Conventions eight has been selected as fundamental and their application in the member state is given a priority attention. Ethiopia has ratified all of these fundamental conventions.

Since the adoption of the labour proclamation 64/75 Ethiopia has adopted two other proclamations and through out this period ILO supervisions especially concerning the application of fundamental conventions has been continuously going on with fruitful outcome revealed in the new labour proclamations that repealed the precedent ones.

The effective influence of the ILO supervision on Ethiopian labour law especially concerning the fundamental rights can be inferred from examining the contents of the three labour proclamations of Ethiopia and the reports of ILO supervisory bodies made between them.

Acronyms

CEACR	Committee of Experts on Application of Conventions and Recommendations
CETU	Confederation of Ethiopian Trade Unions
CFA	Committee on Freedom of Association
EI	Education International
EPRDF	Ethiopian People's Revolutionary Democratic Front
ETA	Ethiopian Teachers' Association
FDRE	Federal Democratic Republic of Ethiopia
FCTP	Federation of Commerce, Technical and Printing Industry Trade Unions
FIET	International Federation of Commercial, Clerical, Professional and Technical Employees
GB:	Governing Body of the ILO
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice

ILCCR	International Labour Conference Committee on Conventions and Recommendations
ILO	International Labour Organization
ILS	International Labour Standards
NCEW	National Confederation of Eritrean Workers
OATTU	Organization of African Trade Union Unity
PCIJ	Permanent Court of International Justice
PDRE	People's Democratic Republic of Ethiopia
UDHR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America
WWI	First World War
WW II	Second World War

Table of Contents

Contents	pages
Introduction	1
I. Back Ground of the Study	1
a. International Organizations	1
b. The International Labour Organization: Historical Development	3
c. International Legal Personality	12
d. Membership in the ILO	14
e. Structural Set Up Of the ILO	17
II. Statement of Problem of the Research	18
III. Objective of the Research	20
IV. Scope of the Research	21
V. Research methodology	22
VI. Research Significance and Applicability	23
Chapter one	
International Labour Organization: Mandate	24
1.1 Adoption of International Labour Standards	27
a. Kinds of international Labour Instrument	28
i. Conventions	29
ii. Recommendations	29
b. General Character of International Labour Standards	30
1.2. Principles contained in the Fundamental Conventions of ILO	33
a. Freedom of Association	35
b. Collective Bargaining	37
c. Equality and Non -Discrimination	38

d.. The Abolition of Forced or Compulsory Labour	42
e. Abolition of Child Labour	44
1.3. Obligation of Member States under the ILO Fundamental Conventions	46
Chapter Two	
ILO Supervision of Application of International Labour Standards	50
2.1 Scheme of Supervision in ILO	50
a. Representation	50
b. Complaint	52
c. Committee of Experts on Application of Conventions and Recommendations	54
d. Conference Committee on the Application of Standards	68
e. Fact Finding and Conciliation Commission	60
f. Committee on Freedom of Association	61
g. Other Bodies Essential for the Supervision	63
2.2. Significance of ILO Supervision in the Standard Setting and Application of the Fundamental Conventions	64
2.3. Summaries of the committee of experts on ILO fundamental Conventions	67
2.3. a. On Freedom of Association and the Right to Organize Convention (No.87)	67
i. Trade Union Rights and Civil Liberties	67
ii The Right of Workers and Employers, with out Distinction Whatsoever, to Establish and Join Organizations of Their Own Choosing	67
iii. The Right to Establish Organization with out Previous Authorization	69
iv. Right of Workers and Employers to Establish and Join Organization of Their Own Choosing	70
v. Free Functioning of the Organization: Right to Draw Up Constitution and Rules	70

vi. The Right to Elect Representative in Full Freedom	71
vii. The Right to Trade Union to Organize Their Administration	71
viii. The Right of Organizations to Organize Their activities in Full Freedom and To Formulate Their Programs	72
ix. The Right of Workers and Employers Organizations to Establish Federations and, Confederation and Affiliate with International Organizations of Workers and Employers	73
x. Suspension and Dissolution of Organizations	74
xi. Protection against Acts of Anti-Union Discrimination	74
xii. Adequate Protection against Acts of Interference	75
2.3.b. The Right to Organize and Collective Bargaining Convention (No.98)	75
c. Discrimination (Employment And Occupation) Convention (No. 111)	78
d. Equal Remuneration Convention (No. 100)	80
e. Forced Labour Convention (No.29)	82
f. Abolition of Forced Labour Convention (No.105)	83
g. On Child Labour Conventions	85
2.4. Significance of ILO Supervision on Practical Application of Fundamental ILO Conventions	84

Chapter Three

The Role of ILO Supervisory Body in Ensuring Ethiopia's Compliance to ILO Fundamental Conventions	89
--	----

3.1. Ethiopian Labour Law Development: Pre 1974 Era	89
3.2. Ratified Fundamental Labour Conventions and Their Application in Ethiopia (1975-1993)	93
a. Freedom of Association and the Right to Organize in Labour Proclamation 64/75	93
b. The Right to Organization and Collective Bargaining under Proclamation 64/75	96
c. Standards of Equality and Non- Discrimination under Proclamation 64/75	97
3.3. ILO Supervision of Application of Ratified Fundamental Conventions (1975-1993)	98
3.4. ILO Supervision on Application of Ratified Fundamental Conventions (1993-2004)	103
3.4. a. ILO Supervision on Application of Freedom of Association and Protection of the Right to Organize Convention (No87)	106
b. ILO Supervision on Right to Organize and Collective Bargaining Convention	110
c. ILO Supervision on Application of Convention No. 111	112
3.5. Post 2004 ILO Evaluations: prospects	114
Conclusion and Recommendations	117
Reference	123

INTRODUCTION

I. Back Ground of the Study

a. International Organizations

The development of the law of international organizations, going hand in hand with the enormous increase in their number, power and function, is a relatively new scenario in the development of international law. Studies on the law of international organization, thus, are not made in number and manner it should have been.

Starting from their distinct character that add up to the domain of 'subjects' under international law to the legally binding instruments they adopt, international organizations have been creating an additional domain to the international law that had been developed for the purpose of regulating inter state cooperation.

International organizations emanate from the effort of organizing activities be it political, economic, and social or any other human interaction. The philosophic debate on 'why humans cooperate?' which has older age than international originations has developed basically two extreme theories.

The first theory is '*realism*' theory which based it self on supposed cruel nature of human beings and concludes in order to survive man has to create

cooperation with another. Accordingly, with the international organizations to secure their interests and the organization exist if it continues to take care of these interests¹.

The 'idealist' theory, on the other hand, starts with the opposite ground. They argue that humans are good by nature and they cooperate only to combat problems jointly. And through this ground, they claim that international organizations are pure products of humans endeavor for 'democratic peace'².

Efforts have been made to give solution to the short comings of the above two theories. If we take realism theory, for example, it shows that states cooperate with one other to secure their interest; so the cooperation is doomed to be either temporary or to be result of coercion or submission. This does not go with the existing reality. And the idealist theory dooms much cooperation between states than their actually is. So harmonizing the two theories with the reality, is the task to be made in accordance with the distinct character of the state.

What ever the reasons for cooperation, when ever human activity is organized there will be rules of law, as expressed in the ancient adage '*ubi societas, ibi ius*'. Consequently activities of international organizations are also subject to law, and give rise to law.

¹ See generally, Jan Klabbers, Introduction to International Institutional Law, 29 (2002)

² Id., at 30

³ Id., at 1

International Organizations are one of the 'subjects' of international law. Thus, according to standard definition of 'subjects', they are deemed capable of independently bearing rights and obligations under international law. As stated in the Reparation of Injuries case, the two indicators of 'bearing rights' are treaty making right and the right to bring claims⁴.

The scope of the power of the organization is to be determined from the intention of the establishing parties which is revealed through the constitutive document of the organization. The extent of their legal powers could be interpreted from the constitutive document of the organization. This argument is supported by advisory opinion of the Permanent Court of International Justice to the ILO in 1922⁵.

b. The International Labour Organization: Historical Development

The historical development of international organizations reveals the role of international organizations was limited to promotion of small degree of cooperation between states which created them. At the present time, however, these bodies are required to undertake similar actions by organs of national governments namely: legislator, judiciary and executive⁶. One of the oldest

⁴ Id., at 42

⁵ PCIJ, *Competence of the ILO to regulate the conditions of labour of persons employed in agriculture*, Advisory opinion, Series B, nos. 2 and 3

⁶ See, Ebere Osieke, *Constitutional Law And Practice In The ILO*, 1(1985)

international organizations, which through its activities demonstrate the similar exercise of these tasks, is the International Labour Organization.⁷

It was the significant contribution of working people in the course of WWI both in the battle fields and in productions that convinced the then political leaders the importance of respecting labour rights to create permanent peace in the world. Grace to their contribution, it has become 87 years since the original document that inaugurates the most important international organization which specifically deals with matters of labour had been signed.⁸

Seeing its retrospective, it started with the peace conference, which has established at the end of the war, setting up Commission on International Labour Legislation composed of representatives of nine states namely Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland and USA.⁹

The idea of having an international labour standard setting organization had been advocated before by two industrialist Robert Owen(1771-1853) of Wales and Daniel Legnard(1783-1859) of France and was put to test with in International Association for Labour Legislation founded in Basel in 1901.¹⁰ This idea is taken by the labour commission of the conference in drafting of the constitution of ILO.¹¹

⁷ Ibid

⁸ Ibid See also www.ilo.org, *ILO History*

⁹ Ibid

¹⁰ Ibid

¹¹ See, supra 6

From February 1 to March 24, 1919 the commission held 35 meetings to consider various proposals submitted by states with respect to constitutional powers and structure of the proposed permanent organization and at the end of its sessions it adopted a draft constitution for creation of ILO. The draft constitutive document was brought before state delegates for the Treaty of Versailles and adopted as part XIII of the treaty of Versailles¹².

The 1919 ILO constitution, along with its numerous amendments which add up some characters, demonstrates the pillar objectives which the organization is set up.

The first and second phrases of the preamble of the constitution affirm the importance of social justice for universal and lasting peace revealing the political reason for which member states committed themselves in the endeavors of the organization. The important phrase in the paragraph, social justice, is a matter that to be achieved in the effective participation of all social entities. In order to achieve this, qualifying itself from other international organizations, ILO is structured in tripartite manner with representation and participation of all entities in labour relations: the governments, workers and employers. Stressing the effect of this structure Jean-Claude Javillier stated:

¹² Ibid

Standards adopted through tripartism result in a certain degree of dynamism and universality due to the fact that they are adopted by means of process of process of consultation and result in a consensus of the diverse opinions of the various parties. As a result, the standards adopted are more adaptable to differing economic and social situations, while retaining all their universality.¹³

The idea of having humane conditions of labour is another aspect for the establishment of the organization mentioned in the third paragraph of the constitution. This paragraph has at least two elements in it. In the first aspect the paragraph has idea of humanity in it. It has in its heart the intention of regulating labour conditions of working hours, right of equality, association and expression.

The establishment of ILO is catalyzed by effects of the industrial revolution in 19th century and related movements of ideas of that period. As human cost of industrialization is apparent, as J.C. Javillier stated, there was increased awareness of the importance of protecting workers¹⁴.

This, in turn, resulted in the economic reason for the establishment of the ILO. Industrialists, at that time, feared that there would lose out to competition if they unilaterally improved working conditions. Industry or country adopting unilateral social reform would find its self in disadvantage. This leads to the need

¹³ See, for example., Jean Claude Javillier, Introduction to ILO's, Fundamental Rights at Work and International Labour Standards, .8 (2003)

¹⁴ Ibid

for international social regulation in order to achieve a level playing-field for all parties¹⁵.

There was also the situation with foreign workers which has direct international character and needed international regulation¹⁶.

For accomplishment of these humane, political and economic objectives the organization has pursued the adoption of international labour standards. The organization has been adopting universal minimum condition of labour endowing rights for individual workers and associations, been obliging the ratifying states to apply and been supervising application of ratified conventions by states.

Despite the prevalent difficulties the first annual international conference of the organization met in Washington beginning october29, 1919 and adopted six international labour conventions which deal with hours of work in industries, unemployment maternity protection, and night work for women, minimum age and night work for young persons in industry.¹⁷ The conference also elects the Governing Body of the organization who in turn elects the French man Albert Thomas the first Director of International Labour Office who gave the organization the important momentum it needed that in two years the organization adopted 16 Conventions and 18 Recommendations.¹⁸

¹⁵ Ibid

¹⁶ See also, International Labour Review, *Introduction: 75 years of the International Labour Review, A Retrospective*, volume135, No.3-4, at 1(1996).

¹⁷ See, supra note 7

¹⁸ Ibid

In 1920 the ILO was set up in Geneva and on the same year the International Court of Justice with the influence of government of France declared on ILO's domain of work broadening it to include agricultural employment¹⁹.

With the growing number of adoption and ratification of the ILO conventions, the question of actual performance of ratified convention becomes an important matter to be dealt with. For this purpose, the General Conference of the organization established a committee that presently known as 'the Committee of Experts' in 1926. The Committee of Experts was and still is composed of independent jurists responsible for examining governments' reports and presents their own report to the Governing Body.

In 1934 USA joined the ILO and in 1946 the ILO has become one of the specialized agencies of the United Nation and in the following years, in the midst of WW II the ILO adopted the Declaration of Philadelphia in view of shaping and reaffirming the general principles for which the organization is set up.

The ILO continued its success of setting international labour standards after the WWII and through out the cold war period adopting numerous fundamental standards in the fields concerning equal remuneration, forced labour, discrimination in occupation and employment and child labour .

¹⁹ Ibid

Giving its share to the international Human Rights movement the ILO has adopted vital constitutional and other conventional standards. The constitution affirms on the rights of equality, freedom of association and expression which after 37 years became important aspects of the Universal Declaration of Human Rights. And through specific conventions, in 14th session of the General Conference the Forced Labour Convention (convention, no.28) had been adopted. After the ILO has become an organ of the UN and just few months before the UN General Assembly adopted the UDHR the ILO had adopted the Freedom of Association and the Right to Organize Convention (Convention no.87). The evident influence of these conventions on the drafting and final document of the UDHR is undeniable.

Following the adoption of the UN resolution 271A (III), formally known as Universal Declaration of Human Rights, the ILO has continued the adoption of legally binding conventions which deals on matters considered as human rights in the UDHR. The adoption of ILO Right to Organize and Collective Bargaining Convention in 1949, Equal Remuneration Convention in 1951, Forced Labour Convention in 1957, Discrimination (Employment and Occupation) Convention in 1959 and Minimum Age Convention in 1971 would be enough evidence to back the proposition.

The adoption of these conventions which have legally binding obligation on states up on ratification no doubt has inspired the UN in transferring the UDHR in to the legally binding two covenants in 1976. The adoption of the ICCPR and ICSECR containing many labour rights as Human Rights has

significant effect on universalization of these rights and forced the ILO to give additional attention to the supervision of application of ratified conventions by ratifying states.

At the end of the cold war period in the late 1980's and early 1990's the ILO has started to reassess its place in the changing global relations and decided to give prior attention to promoting and assisting fundamental principles and rights²⁰ and launched an effort for ratification of the fundamental conventions, and adopted the 'Declaration on Fundamental Principles and Rights at Work and Its Follow-Up'. It also established a working party on party regarding the revision of standards which at the end of its task in 2002 classified 71 of 185 Conventions, 5 Protocols, and 73 out of 194 Recommendations as up to date²¹. The organization, in parallel with the revision, started an effort to promote states ratification of the up to date convention in place of out dated conventions.

To strengthen its standard setting system, the organization made systematic efforts launching a campaign for the world wide ratification of the 8 fundamental conventions²² and adopted the 1998 ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up²³.

Besides the institutional development of the organization as an international tripartite organization, the methods of implementing its objectives adjust through time in order to match the existing conditions of the time.

²⁰ Supra note 9, at 8

²¹ Id., at 20

²² ILO, Guide to International Labour Standards ,5(2003)

²³ See, generally, supra note 8

In accordance with the above reasons, the efforts of ILO in the beginning was primarily adopting the international labour standards through the institutional frame work by the vote of two third of the conference. These Conventions generate international standards creating obligation on the part of states up on ratification. With the terms of the constitution, which makes the principles of equality and non discrimination, freedom of association and expression a constitutional principles, and through the terms of the preceding conventions the organization has continued to undertake considerable accomplishments of international standard setting.

Due to the 1998 Declaration, the ILO in addition to the motto '*Right's Way to Decent Work*' incorporates the principle of promotion of fundamental rights at work through technical cooperation with concerned bodies.²⁴

With the adoption of the 1998 Declaration Fundamental Principles and Rights at Work and Its Follow-Up, the adjustments of ILO's work with the era of globalization, the general perspective of the organization is shifted from the what is informally known as '*Rights Way to Decent Work*' to ascertaining rights through promotion of fundamental principles and rights through technical cooperation and created mechanism of follow up by the virtue of the Declaration.²⁵ The ILO, in addition to ascertaining compliance of ratified conventions through legal ways, has started with providing technical cooperation

²⁴ Amartya Sen, Work and Rights, International Labour Review, Vol.139,No.2,at 120(2000)

²⁵ Ibid

to member states in view of ascertaining compliance to Fundamental Principles and Rights at Work.

c. International Legal Personality

From the moment of its establishment, the ILO has been a sign of international commitment for social justice and demonstration of international effort towards having humane conditions of labour. The controversy over the status of the organization had also arisen with its emergence. There was a concern that the organization would have 'supera state' character limiting the traditional rights of a sovereign state.

In support of this argument international organization theorists compare the character of the League of Nations with the ILO. Accordingly, it was argued that the League of Nations operated under the '*unanimity*' voting system and states were, as a rule, not bound by decisions of the international body without their expressed consent. The International Labour Organization, however, was authorized under its constitution to adopt decisions which could create binding obligation on members without its consent by majority vote. And the right of the General Conference to exclude items from agenda by majority vote is given as example and stated that this will constitute limitation of sovereignty of states²⁶.

Contrary arguing, persons who oppose the above argument proposed that the argument even if it shows limitations on power of member states it does not signify that the organization is '*supera state*'. They further argue that it only means

²⁶Supra note 6, at 6

that the organization possesses autonomous functions and powers to enable it effectively attain the objects and purposes for which it had been created²⁷. Further explaining the matter, E. Osieke argued:

*The fact that the organization was assigned power to deal with questions which were previously under the exclusive jurisdiction of the member states obviously constituted a limitation to their sovereignty, but it was a voluntary and deliberate limitation based up on the conscious realization that the improvement of the conditions of labour all over the world would be better and more effectively attained by international collective action through an autonomous, independent body with limited, but autonomous, legal status, and functions and powers.*²⁸

This argument has been further ascertained by of International Court of Justice in 1949 through the decision on *The Reparation of Injuries Case*. In this decision the Court, stating the importance of the charter and the need for flexibility and freedom for the international organizations to take actions in conditions to for see, ruled as: “Under international law the organization must be deemed to have those powers which, though not expressly provided in the charter, are conferred up on it as being essential to the performance of its duties.”²⁹

²⁷ Id., at 7

²⁸ Ibid

²⁹ ICJ, *Reparation of Injuries case*, ICJ Reports 179(1949)

As the attainment of the objectives of the ILO, as any other international organization, in addition to functional power and privileges, is closely tied with the rights and procedures for membership and representation in the organization, and structure of the organization, these features will be the next part of the chapter.

d. Membership in the ILO

The means by which a state acquires the rights to participate on an equal footing with other states in the proceedings and activities of an international organization differs with the particular organization.

By virtue of the Treaty of Versailles member states to the League of Nations had the right to automatically claim membership in the ILO³⁰. Because of the extinction of the League of Nations the International Labour Conference amended the constitution in order to maintain the original members of the organization³¹. Besides the situation of the original members, for admission of new members, the ILO has two ways of procedure developed in law and practice.

The first means of acquiring membership regulates the admission of members of the United Nations. Article 1 (3) of the constitution of ILO entitles member states of the UN with automatic membership by communicating formal acceptance of obligations of membership to the Director-General of the International Labour Office. The principal ground to this right is the

³⁰ Treaty of Versailles, Article 387

³¹ See, e.g., Supra 1, at 18

presumption that most of members of ILO are member of the UN. Discarding this presumption and arguing contrary to automatic qualification for membership, E. Osieke lays arguments supported by two reasons: one reason is that, examination of the applying state's capacity to fulfill the criteria of the ILO should have been done. And the other is the fact that the actual existence of ILO member states that are not members of UN and because of this procedure, countries like Switzerland do not have any say if a state which is member of UN apply to be member of the ILO.³²

The second scenario concerns the admission of new member states which are not members of the UN. In accordance with Article 1(4) of the ILO Constitution admission of non-members of the UN is to be decided by two third vote of delegates attending the session with the additional requirement of attaining 2/3 vote of government delegates. The application of membership is to be submitted to the selection committee which in turn creates a tripartite subcommittee to examine the matter.³³ The subcommittee is expected to examine if the applying state could and would fulfill special requirements of the organization such as tripartism and respect the right of association. Since it is difficult to ascertain the capacity to fulfill these demands before the tripartite body and membership to the UN has relatively easier preconditions, new states often follow the first way to apply for membership to the ILO after they become members of the UN³⁴.

³² Ibid

³³ ILO, Standing Orders of the International Labour Conference, Article 28

³⁴ See, generally, Supra 6, 19

Formal acceptance of obligations of the constitution is a requirement to attain membership status in the ILO. The meaning of the phrase '*formal acceptance of obligations of the constitution*' in Article 1(3) of the constitution is elaborated with experience encountered in 1953 when applying for admission the Soviet Union make a reservation on Article 37 of the constitution and the Director-General explained formal acceptance denotes unconditional acceptance and restriction of reservation and in 1954 the Soviet accepted its obligation of the constitution with out reservation³⁵.

The other important practice which is worth mentioning is the succession of obligation that was previously applied in the land by new states. This accepted practice of the ILO, which is contrary to the doctrine '[a] successor state commence its life uncommitted by he treaty of its predecessors', is accepted to Protect the then prevalent fact of multiple independence of many new states' inverse effect on established grounds of the organization³⁶. This is to be done, however, in consideration to the capacity of the new successor state.³⁷

The last but not certainly the list relevant matter with the issue of membership of ILO is the definition of a 'state'. There is no clear cut definition of what it takes to be considered as a state under the constitution of ILO. The definition given in the international law, for the purpose of membership to the

³⁵ Supra note 6, at 20

³⁶ Ibid

³⁷ Ibid

organization, 'state' means an entity which possesses the international status necessary to enable it to discharge the obligations involved in membership³⁸.

e. Structural set up of the ILO

With the view of accomplishing its objective to ascertain universal social justice that falls under functional power, the organization is structured in tripartite manner ascertaining representation of every social entity in the labour relations: governments, workers, and employers.

The 1919 ILO Constitution lays that the organization is consist of three bodies: a General Conference of Representative of Members, the Governing Body and the International Labour Office³⁹.

The General Conference Representatives of the Members is a tripartite structured organ which has relatively similar function with state parliaments. Each member state has four representatives to the conference of whom two are government delegates, one employers' representative and the remaining one workers' representatives⁴⁰.

From the first session of the conference, it has adopted numerous Conventions, Recommendations, Resolutions, Declarations and other soft laws in the endeavor of ascertaining international minimum labour conditions. The

³⁸ See, PCIJ, Advisory Opinion, *Free city of Danzig and ILO*, Series B ,No.18, 65-263(1930),

³⁹ ILO Constitution, Article 2

⁴⁰ Id., Article3

specific values of these different international labour instruments and specific procedures of adopting a Conventions will be assessed in the next chapter.

The Conference meets once a year and when there is a special maritime session twice a year. The Conference, according to Article 17 (1) of the constitution, elects a president and three vice presidents. The vice presidents of the conference should be from the three different delegations but the president can be elected from any of the groups in the Conference. In practice, however, the post of presidency has been constantly given to government delegates⁴¹.

The second constitutional organ of the organization is the Governing body. The Governing Body is also a tripartite body consisting of 56 persons having 28 governments representatives, 14 workers' and 14 employers' representatives⁴².

From the 28 state representatives ten of them are to be from states of chief industrial importance.⁴³

Under the direction of the Governing Body, the third constitutional body of the organization, the International Labour Office performs collection and distribution of information on industrial relations or labour, prepare the documents on the agenda for the meeting of the conference, accord assistance to member states, deals on matters of effective observance of ratified conventions,

⁴¹ Supra note6, at 84

⁴² ILO Constitution,Article7

⁴³ Ibid

edit and issue publication, and perform such duties assigned to it by General Conference or Governing Body".

The Director-General of the office, who assigns and hires the employees of the office is elected by the Governing Body which it self is an organ elected by the General Conference.

II. Statement of Problem of the Research

In the previous section of the paper, it had been explained that the ILO has mainly two means of action. The first one is standard setting activities which constitute adoption of International Labour Standards and respective evaluation of application by members. The other one is promotion of International Labour Standards though technical cooperation evolving from the 1998 Declaration.

The first means of action, which is the concern of this study, is deeply related with the assertion of a standard through adopting conventions that lay international standards. Following this, comes the requirement of ratification by member states. This has to be followed, to provide the convention legally binding nature on member states, the political action of ratification. Ratification imposes an obligation on the ratifying state to apply the terms and conditions of the convention and expose itself for international evaluation.

Even if all members of the organization vowed to comply with the standards they ratify complete application is far from reality in relation with many

⁴⁴ILO Constitution, Article 10

standards even in the developed nations. Important of the matter is understanding the rule of the game which includes: affirming the commitment to the organization by providing relevant information to the organization, accepting comments and recommendations of the supervisory organs of the organization and taking appropriate and timely measures in accordance.

The extent of a State's application of a given ILO standard, which it ratified, differs with the other member state with understanding and application of its duties in relation with the above features. Attention given to its commitment to the organization, to the comments and recommendations of the organization and failure to act in accordance constitute incompliance to the standards that states agreed to apply.

III. Objective of the Research

The general objective of the research is to examine the function of the supervisory mechanisms of ILO and it's over all influence on the adoption of universal standards of labour. Special attention would be given for the assessment of the role of ILO supervisory bodies in the standard elaboration and compliance ascertaining endeavors of the organization.

Accordingly, the relevant supervisory schemes and bodies of ILO, their mandate, the procedure they use, and their influence on standard setting activities of ILO will be the matter to be examined in the paper.

The specific objective of the research to evaluate the role of these ILO supervisory bodies in Ethiopia's labour law development starting from the

adoption of proclamation 64/75. Assessment will be made on the supervisions of the ILO concerning application of standards by Ethiopia and the role it has been playing in ascertaining Ethiopia's compliance for ILO Conventions that it has ratified.

IV. Scope of the Research

As the title of the research demonstrates, the paper is concerned mainly on legal analysis of the effect of ILO supervision on Ethiopian labour law development. The major attention of the paper is on the influence of the outcome of these supervisions on the development of Ethiopian domestic labour statutes in the full application of ratified ILO standards.

As conventions are the one which impose legal obligation of compliance on ratifying state and since this paper is a legal research it won't be any surprise to know that the research deals mainly on supervision of observance of ratified conventions.

The third restriction on the domain of the research is on the substantive content of the rights to be examined. The ILO conventions deal in the area of labour extending from those considered to be Human Rights to the 'ordinary' international minimum labour conditions. This paper is restricted to the supervision of application of fundamental or core conventions which are considered to have a strong tie with Human Rights.

There are two ways of supervising the application of standards of fundamental Conventions by the ILO. The first is the right based evaluation

where measures of states are examined from the point of obligation they consented to under take when they ratified a convention. The other approach is supervision or following up , by virtue of the 1998 ILO Declaration, of measures of states for promotion of these standards so as the ILO and will accord technical assistance for state which is in need of it. Since the second approach incorporates matters that are out side of law, the paper will only deal on the first scheme.

The fourth limitation on the scope of the research is on examination of Ethiopia's observance to ratified Convention. Ethiopian domestic labour law is divided in to two main sectors: the public and the private sectors. While the rights endowed in most if not all ILO conventions include workers and employers of both sectors(besides the police and military); specific legal protection endowed to these rights in these sectors, having two different proclamations governing the two sectors respectively, is different in Ethiopia .In order to create researchable domain to the paper as to provide the essential conclusion and recommendations with in the available time and other resources, the research is restricted to the private employment lawof Ethiopia which is governed by the Constitution and the present labour proclamation (proclamation 377/2003).

V. Research methodology

Like any other legal research this paper bases up on the analysis of available literature on supervisory mechanisms of ILO, on reports, direct requests and publications made in accordance.

VI. Research Significance and Applicability

Despite early membership to ILO, up to 2005, Ethiopia has ratified only 20 effective conventions out of the total 185. On the topic of effective observance of these ratified conventions there has been evident non-observance due to different legal and other conditions.

The paper will pull out the dominant cases of non-observance of the fundamental ILO convention that had and has been raised by the supervisory bodies through out the development of Ethiopian labour law.

The paper will hopefully be of help Ethiopia's effort to effectively apply the ratified ILO fundamental conventions through adoption of new national labour law.

Chapter One

International Labour Organization: Mandate

With out neglecting the other important international laws adopted through schemes that are out side from that of the ILO, it easy to give a sound argument that the instruments of the ILO are considered the primary source of international labour law.

Even before the ILO had become one of the specialized agencies of the UN in 1946, it had adopted numerous Conventions and Recommendation in wide variety of subjects through out the labour relations. This reveals the reality that even if there are UN and other institutional and other human rights instruments in the field of international labour law, the overall frame work of international labour law can not be dealt up on with out reference to the ILO made instruments.

The influence of these ILO instruments has initiated, among scholars of international organizational law, an academic debate on the legislative powers of the ILO. There are international legal scholars that argue that the ILO has a legislative power of adopting international law. They further argue that ILO conventions are not contractual type (like treaties) but amount in a way to 'international laws', and the international labour conference which adopts them, can be taken as an International legislative body.¹

Contrasting this proposition, other scholars argue refreshing the raised and dropped proposition while drafting the constitution of ILO in 1919. While drafting the

¹ See, generally, N. varticos, sources of International labour law, Manual for Domestic application international Labour Law, ILO, International Training Center, Addis Ababa, Para. 80,(2005)

constitution, there was brief debate over the possibility of granting the organization the power to pass Resolutions, which could give rise to binding legal obligations for states whether or not they are member of ILO.² They also raise the conclusion of Permanent Court of International Justice in the advisory opinion on the *Competence of ILO to Regulate Incidentally the Personal Work of the Employer* (1926). The court argued that although the ILO had very broad powers with respect to the investigation and discussion of labour questions and formulation of proposals for national legislation or international agreements it has no legislative powers because each member was free to adopt or reject any proposals of the organization either for national laws or for international convention.³

In bridging the gap between the above two arguments, N. valticos argues since Conventions are legislative instruments requiring only conditional act which could be analyzed as being simply an accession to pre-existing act to require the force of an international law, it can be considered that Conventions represent a compromise between notions of contract-making treaties and law making treaties.⁴ And also the fact that ILO adopts numerous Conventions and Recommendation of this kind substantiates the arguments that it exercises a legislative or at least quasi-legislative function.⁵

It is only true that ILO has been engaged, starting from its very existence, in elaboration and adoption of International labour standards, in view of creating universal minimum rights for labour matters existing in each member states and also

² See, generally, Ebere Osieke, *Constitutional Law And Practice In The International Labour Organization*, 143(1985)

³ PCIJ, *Advisory Opinion on the Competence of ILO to Regulate Incidentally The Personal Work of The Employer*, series B, No,13(1926)

⁴ Supra note 1, No 2, at 51

⁵ Supra note 2, at 144

for the labour matters that falls in the international law domain directly.⁶ International labour standards are adopted in the form of International Labour Conventions and Recommendations.

Conventions have the legal status of international treaties and are designed to create international obligation on the state which ratify them.⁷ Recommendations, however, are not designed to create obligations but only to provide guide lines for governmental acting in performing legal obligation of the ratified Convention.⁸

There are also other ILO instruments, besides the International labour Conventions and Recommendations. From the many ILO Declarations in different matters of labour, the Declaration of Philadelphia (1944), and the Declaration on Fundamental Principles and Right at work and Its Follow- Up (1998) deemed to be the most important in the function of the organization. The Declaration of Philadelphia, which is formally known as '*Declaration Concerning the Aims and Purposes of ILO*', reaffirmed the fundamental principles on which the organization is based. The later has taken the organization a further one step by identifying fundamental principles and rights at work from the numerous standards of the organization and add up a concept of technical cooperation to be grated from organization to member states .

Resolutions are the other important instruments that are passed by the International Labour Conference which is used by various ILO supervisory bodies as

⁶ For example, the case of migrant workers who work in foreign country falls directly in the domain of international law, and is one of the primary immediate reasons for establishment of ILO.

⁷ See, generally supra note 1, at 50

⁸ Ibid.

guide line and terms of reference for appraisal of national situation and to the Recommendation addressed to governments.⁹

1.1. Adoption of International Labour Standards

Initiation of the adoption of International Labour Standards mainly rests, with the Governing body. As a general principle the Governing Body uses the proposal of the Director-General of the International labour office ,which is based on the survey made by the office on law and practice of the matter in hand in the member states¹⁰

The prevalent practice of adopting International Labour Standards in the form of Conventions and Recommendations is the one that is formally called as procedure of '*Double Discussion*'. This procedure starts by the Director-General of the International Labour Office distributing questionnaires to member states so as to know the law and practice of the matter in hand in the members states. The office will survey the reports of member states and prepares a proposal. The Director- General submits this proposal to the Governing Body and the Governing Body in turn proposes the matter to be an item of agenda for the next session of the General Conference.¹¹

The General conference examines the proposal of the Governing Body, usually using specialized tripartite technical committee. The committee would examine the proposed agenda and decide on whether or not it should be an agenda for next session and if the response is affirmative form a draft instrument. ¹² In the mean time, all these matters are to be communicated to all member states to allow them to use their right to present objection on the inclusion of the matter as an agenda for the next session

⁹ See supra note 1, at 66

¹⁰ See, generally, supra note 1, at 52, See, also, ILO Hard Book of Procedures, Para. 3(c)

¹¹ See, generally, supra note 2, at 148

¹² Ibid

If there is an objection presented accordingly, the conference will vote on it. And if there is 2/3 majority vote for inclusion of the item agenda, the matter will be returned to the committee. As a result, the technical committee with due consideration to features involved and provide suggestion that the draft would be adopted as Convention or Recommendation¹³ and with the same passage it took, the agenda will be returned to the International Labour Office.

Pursuant to the decisions made in the technical committee and in the International Labour Conference the office, based on the first discussion, prepares a proposal draft Convention or Recommendation and forwards it to members to their observation and comments. Based on the response of the members, the office will prepare final draft the instrument, and with the similar channel deliver it to the International Labour Conference for second discussion.¹⁴ Accordingly, the delegates to International Labour Conference vote on the adoption of the instrument in the form of convention or Recommendation on 2/3 majority vote of delegates present.¹⁵

Other procedure of adopting International Labour Standards, which requires the matter to be discussed by the General Conference only once, is also available but it is reserved for cases of urgency or special circumstances. The Governing Body can under this procedure, by a majority of 3/5, decide to refer a matter to the General Conference for single discussion, but this has been rarely used.¹⁶

¹³ See, generally, supra 1, at 52 ;See also ILO Hand Book of procedures,Para.4

¹⁴ See, generally, supra 2, at 149(Discussions and referred or the principal elements which the committee might consider as a reason for adopting a Convention or Recommendation)

¹⁵ ILO constitution, Art 19(2)

¹⁶ See, supra note 1, at 54.

1.1.a. Kinds of international Labour Instrument

ILO Conventions and Recommendations differ with one another from the point views of their legal character.¹⁷

a. i. Conventions

Conventions are legally binding international treaties which lay down the basic principles to be implemented by ratifying countries on a given subject matter¹⁸. They differ from international treatise by the fact that they pass through international institutional frame work and their adoption is not select to unanimity.¹⁹ And also, they are adopted by International labour conference which is constituted in tripartite manner constituting government, workers, and employers representations of each member state enjoying equal vote.

Further than the legal obligation of Conventions, which comes to be legally binding up on ratification, adopted Conventions create some constitutional obligations on the members states.

The first obligation is to present the adopted convention to the competent authority of the member state that has the power of law making.²⁰ And secondly member state has constitutional obligation of communicating this situation to Director-General.²¹

¹⁷ See, supra 1, at 3

¹⁸ See, ILO Rules of the Game, A brief introduction to ILO, 14(2005)

¹⁹ See, supra note 1, at 50

²⁰ See, ILO Constitution Art 19 (5)(a)

²¹ See, Id., Art 19(5)(c)

Thirdly, even if the member does not ratify a convention ,it still holds the duty to report on the law and practice on the subject matter of the un- ratified convention, when the Governing Body so requires.²²

ii. Recommendations

In as much as the fact that there are Recommendations which are autonomous, the existing practice in the ILO system shows Recommendations are non binding guide lines used to supplement a Convention by providing mode of detailed guide lines on how it could be applied.²³

Since Recommendations are adopted as non-legally binding instruments, they do not have the requirement of ratification. The one obligation on member states with regard to Recommendation is the duty to present them before the competent authority for enactment of legislation or for taking of other actions²⁴. The other requirement is, like non-ratified convention states have duty to report on law and practice is the subject matter of the recommendation when the Governing Body so requires.²⁵

b. General Character of International Labour Standards

International Labour standards, be it in the form of Conventions or Recommendations, are adopted to further establish the principal objectives that the organization is set up for. These principles are laid down in the preamble of the ILO Constitution adopted in 1919 and further affirmed by the Declaration of Philadelphia in 1944. These principles are to be ascertained in each labour relation for which a

²² Id, Art 19(5)(e)

²³ See, generally, supra 11 see also for example Income security recommendation (1949)

²⁴ ILO constitution Art,19(6)(b)

²⁵ Id, Art 19(6) (d)

universal standard is set in the organization through principles of tripartite representation.

The tripartite representation of the organization constituting representatives of employers, workers and governments gives an additional ground for the validity of International Labour Standards and additional flavor which distinct ILO standards from other international standards. Further more, this makes ILO standards adaptable to different economic and social conditions while retaining all their universality.²⁶

It is a constitutional principle; while adopting conventions, the General conference should take in to account, the different climatic conditional, imperfect development of industrial organization, or other special circumstance that make the industrial conditions substantially different.²⁷

This condition laid by the constitution reveals the primary feature of adopting International Labour Standards: universality. To make this task easy, the adopted standard should not be impracticable or distant or ultimate objective.²⁸

In support of this notion the Director- General of International Labour Office in 1963 acknowledged: "...the terms of conventions should unless they deal exclusively with a simple issue of fundamental principle and contain no detail, be sufficiently in character to be susceptible of application under widely varying national conditions".²⁹

²⁵ See, generally, Jean Claude Javillier, *An Introduction to ILO's Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, 1(2003)

²⁷ ILO Constitution, Article 19 (3)

²⁸ See, supra 1, at 56

²⁹ See, supra 1, no.2, at 56

To maintain the universal applicability of standards through different, social and economic conditions of different states, the organization uses different techniques in stage of drafting.

One of the techniques is performed while choosing the form of the draft instrument. If the Universal law and practice on the matter under consideration do not call for the issue to be adopted as a Convention, the organization may adopt it as a Recommendation so as it provides guidelines without legally binding obligation.

The other method is ascertaining flexibility of the convention while drafting so as it would be applicable in different social and economic conditions. In some instances, flexibility clauses confer states the possibility of choosing at the time of ratification the extent of obligation which they decide to undertake.³⁰ Accordingly, if the convention have several parts, states might be allowed under the convention to choose the part they want to be abide with.³¹ Conventions might, otherwise, give a right to states to exclude provisions, parts or annexes while ratification.³² Other Conventions might contain two kinds of obligations: strict and less strict; and provide a right to choose between the two obligations.³³ Still more, a Convention might allow states to declare the exact level of obligation while ratification as does the Minimum Age Convention.³⁴

By limiting the scope of the Convention or sometimes by allowing the states to give appropriate definition to 'persons' and geographical situation on which the Convention is to applied, flexibility can be maintained. Sometimes sector of economic activity or which the convention is to be applied might be limited so as to maintain the

³⁰ See, supra note 1, at 57

³¹ Ibid, [Reference is made to convention 102: Social Security (Minimum Standards) Convention that has 9 parts of which only 3 are obligatory to acceptance if states ratify]

³² Ibid; see also, Convention no. 138 of 1978

³³ See, supra note 2, at 147

³⁴ Ibid

applicability of the convention in all socio-economic systems.³⁵ By framing the basic substantive rule itself as a convention that entails promotional obligation, universal acceptance might be achieved.³⁶

In other instances general and wide terms like: '*appropriate measures*', '*adequate protection*' and '*necessary measures*' are inserted to generalize the obligation of ratifying states so as the application of the Convention will be achieved through different economic and social situations.³⁷

Flexibility of convention could also be achieved through providing choices in methods of application.

Maintaining flexibility of Conventions is essential to further promote the adoption, ratification and application of Conventions by members. While the obligation of a state to apply a Convention, which it ratified, is a constitutional obligation of the organization,³⁸ the specific obligations and methods of applications of the obligations is the matter to be specified in each convention. In some Conventions, application of standards is to be undertaken by adopting national legislations but in others the obligation can be performed by administrative measures or through collective agreements. It seems the more choice on the manner of application, it is easier for a Convention to be accepted and ratified by states.³⁹

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ ILO Constitution, Article 19(5) (d)

³⁹ Supra note 1, at 58

1.2. Principles contained in the Fundamental Conventions of ILO

The 86th session of the International Labour Conference, which had been adjourned in Geneva in 1998, had established some special status for certain chosen Conventions as '*fundamental*' and declared their application through out member state of ILO irrespective of their respective status of Ratification. The Declaration adopted in this session, which is formally known as ILO Declaration on Fundamental Principles and Right at Work and It's Follow-Up declares all members have the duty arising from the very fact of their membership to respect, to promote and to realize principles concerning the fundamental standards which are subject of those Conventions dealing on matters of freedom of association and effective recognition of the right to collective bargaining, elimination of all form of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.⁴⁰

The Governing body identified eight conventions that are in the domain of the above four rights as fundamental and it had launched successful campagne so to achieve universal ratification of these conventions in 1995.⁴¹ The eight fundamental conventions that constitute the principles concerning fundamental right are: ⁴²

- Freedom of Association and Protection of The Right to Organize Convention, (No. 87),1948
- Right to organize and Collective Bargaining Convention, (No.98) ,1949
- Forced Labour Convention, (No 29), 1930
- Abolition of Forced Labour Convention, (No 105) ,1957

⁴⁰ ILO Declaration Fundamental Principles and Rights at work and It's Follow - up, Art 2 (1998)

⁴¹ See, generally, ILO, Rules of the Game, A Brief International labour Standards, 14 (2005)

⁴² Id., at 15

- Minimum Age Convention, (No. 138), 1973
- Worst Form of Child Labour Convention, (No. 100) ,1981
- Equal Remuneration Convention, (No.100) ,1958
- Discrimination (Employment and Occupation) Convention, (No. 111),1958

A member that has ratified these conventions has the duty to respect, realize and to promote the principles in the Conventions. Supervision of the application these Conventions in the member countries will be a matter to be under took using the pre-existing supervisory machinery of ILO which we will deal up on in the next chapter.

Member states that do not ratify the Conventions also, under Article 2 of the Declaration, carry the duty to respect, to promote and realize, in good faith, the principle laid in the Conventions is accordance with the Constitution, and the Declaration established a unique procedure for the follow- up.

Since the intention of adopting the Declaration is identifying fundamental rights in employment and the performance of promotional action through the technical help of the ILO, it is very important to remember that the contents of obligations on member states and its respective way of supervision of the Declaration is different from the formal ILO way of right/obligation based supervision of application of standards by members.⁴³

a. Freedom of Association

Freedom of Association is one of the constitutional principles of ILO that is stated in preamble of the 1919 constitution. It has also been affirmed in the 1944 Declaration of Philadelphia, which formed part of the constitution of ILO that

⁴³ See, generally, Jean Claude Javillier, Introduction to ILO's Fundamental Right at work and International Labour Standards, 3(2003)

emphasized freedom of expression and association as essential to sustained progress and emphasized that they are among the 'fundamental principles on which the organization is based.'⁴⁴

Freedom of Association and Protection of the Right to Organize Convention (No.87) of 1948 defines, for the purpose of the convention, the term 'organization' as any organization of workers or employers established for furthering and defending the interest of workers or of employers.⁴⁵

In the exercise the right of association, workers, employers or their association should take in to mind that they are duty bound to respect the law of the land. The law of the land, however, should not be such as to impair or applied to impair the guarantees of the Convention.⁴⁶ Under Convention No.87, workers and employers have freedom, with out distinction what so ever, to establish and to join organization of their own choosing with out previous authorization.⁴⁷ They have the right to draw up their Constitution and organizational rules, to elect their representation in full freedom, to organize their administration and activities and formulate their programs.⁴⁸ This right to association is also extended with organization of federation and confederation.⁴⁹

The right to organize under the Convention is to be ascertained with out any undue interference from government officials to restrict this right or impede the lawful exercise there off. Accordingly, national procedure for acquisition of legal personality

⁴⁴ Bernared Genigon, et al., *Freedom of Association*, Fundamental Right at work International Labour standards 5(2003)]

⁴⁵ ILO convention No.87, Article 10

⁴⁶ Id, Art. 8

⁴⁷ Id, Art, 2

⁴⁸ Id, Art 3,(1)

⁴⁹ See, Id., Art6

by workers and employers organizations, federations and confederations should not create conditions of such character as to restrict this right.⁵⁰ With the same intention the Convention disapproves the act dissolution of organizations by the administration authorities.⁵¹

The principle of freedom of association is very essential for the overall achievement of the endeavors of ILO as they have direct relation with the basic principle that is tied with the mode of structures and function of the organization: tripartism. Tripartism, which is mainstays of the organization, could not be achieved if there is no independence to workers' and employs' organization. According to Article 2 of the Convention, organizations have the right to dawn up their Constitution, freely elect their representative to administer and organize their activities and formulate their programs. The right to join the organization of their free choice, to workers and employer, is only bound by the freely self made rules of the organization.⁵²

The only sectors of occupation or employment that are not essentially under the scope of the Convention are the police and the armed forces.⁵³ A member state, which ratified convention 87, is to apply the convention in al. employment sectors, except the above two, on which the applicability of the convention is to be freely determined by the state up on ratification.

b. Collective Bargaining

Promotion of collective bargaining is another principal mission of the ILO as it has been recognized in 1944 Declaration of Philadelphia which forms part of the ILO

⁵⁰ Id, Art 7

⁵¹ Id, Art 4

⁵² Id, Art.2

⁵³ Id, Art 9

constitution.⁵⁴ The Right to Organize and Collective Bargaining Convention (No.98), which is adopted 1949, is identified as one of the fundamental conventions of the organization.

The Convention does not give a definition to what 'collective agreement' is nevertheless it provides a functional outline of its constituents. Article 4 of the convention states about '*voluntary negotiation between employers or employers' organizations and workers' organizations with a view to the regulation of terms and conditions of employment*'. Inference can be made that the resultant of this negotiation is what we call collective agreement.

Matters of anti-union discrimination, which is the essential matters of consideration when one talks about freedom of association, is adopted in this Convention. Convention No.98 obliges ratifying states to forward adequate protection against anti-union discrimination in respect of employment, and to provide adequate protection against interference.

Anti-union discrimination in respect employment includes making the employment of a worker subject to the conditions that she /he shall not join a union or shall relinquish trade union membership, and prejudicing or dismissing a worker by reason of union membership or participation in union activities outside working hours or with the consent of the employer with working hours.⁵⁵

Workers' and employers' organizations have the right to enjoy adequate protection against any act of interference by each other or each other's agents or

⁵⁴ B. Gernigon, *Collective Agreement*, International Labour Standards, A global Approach, 30(2002)

⁵⁵ ILO, Convention No 98, Art 1(2)

members in their establishment, functioning or administration.⁵⁶ The Convention gives particular emphasis to illegality of acts that are designed to promote the establishment of workers organization under the domination of employers' organization, financial support given to workers organization so as to bring them under control of employers or employers' organizations.⁵⁷

The scope of the Convention, similarly as Convention No. 87, is to all workers conditioning the application of the Convention on police and armed forces leaving it on the hand of states, to be determined at the time of ratification.

c. Equality and Non -Discrimination

Ever since its establishment in 1919, the ILO has been working effectively on the fight on unjustified discrimination, thus it won't be surprising to know that the rights of equality and non-discrimination are constitutional principles of the organization.⁵⁸

The Declaration of Philadelphia affirms that all human beings irrespective of race, creed or sex have the right to pursue both their material well-being and spiritual development in conditions of freedom and dignity, of economic security and equal opportunity. It further proclaims that the attainment of the conditions making it possible to achieve equality of opportunity and treatment shall be the central aim of national and international policy that "all national and international policies and measures in particular those of an economic and financial character should be judged in this light and accepted only in so far as they may be held to promote and not to the achievement of this judgmental objective."⁵⁹

⁵⁶ Id., Art. 2(1)

⁵⁷ Id, Art 2(2)

⁵⁸ See generally, preamble of the constitution of ILO

⁵⁹ See generally, Declaration of Philadelphia, Part II, (which, according to Article 1 of the ILO constitution, is a constitutional principle of the organization.)

The 1998 Declaration identifies the principle of equality and non discrimination as fundamental one and the Governing Body enumerates two fundamental Conventions which specifically deal with equality and non-discrimination in employment (Convention No.100 and Convention No. 111).

The ILO Equal Remuneration Convention of 1951 is adopted to ascertain the principle of equal remuneration for men and women for work of equal value⁶⁰. Consequently, article 1(b) of the convention states: “[T]he term *equal remuneration for men and women workers for work of equal value* refers to rates of remuneration established with out discrimination based on sex.”

The Convention basically deals with matters of remuneration and set to regulate matters of discrimination based only on sex. Stating the constituents of ‘remuneration’ article 1 of the Convention enumerates ordinary, basic or minimum wage or salary and any additional emoluments what so ever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers employment.

This article is made to provide protection to what ever benefit a worker would get from his/her employment. The phrase ‘*any additional emoluments what so ever*’ represent any increment, supplement, margin bonus, allowance, benefit or advantage⁶¹. Thus, remuneration under the Convention includes, inter alia, wage differentials or increment based on seniority or marital status, cost of living allowances, housing or residential allowances and family allowances⁶².

⁶⁰. See, the second paragraph of the preamble ILO Convention 100

⁶¹. ILO, General Survey Of Reports On The Equal Remuneration Convention And Recommendation, Paragraph 15,7(1986)

⁶². Ibid

The scope of Equal Remuneration Convention is limited to promotion of equality between sexes with the issue of pay. Ever since the adoption of the Convention recognition has been made on the matter that equal pay could not be achieved without over all fight on discrimination in all of its grounds. As a result of this concession further Convention namely Discrimination (Employment and Occupation) Convention (No. 111) was adopted in 1958.

Article 1, paragraph 1 (a) of convention 111 defines discrimination as:

Any distinction, exclusion or preference on the basis of race, colour, sex religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment.

Besides the existence of such act or omission, it is essential that the act or omission to have nullifying or impairing effect on the right so as it could fall in scope of the definition.

The Convention consists of restrictive list of seven grounds of illegitimate discrimination: race, colour, sex, religion, political opinion, national extractions and social origins⁶³. To add up on the seven grounds, which represent the minimum standard on which agreement has reached, the convention provides:

⁶³. Constance Thomas and Yuki Horii, „Fundamental Rights at Work and Fundamental Labour Standards, *Equality Of Opportunity And Treatment In Employment And Occupation*, 67 (2003),

...[S]uch other distinction, exclusion or preference which has the effect of nullifying or impairing equality or treatment in employment or occupation may be determined by the member concerned after consultation with representative employers' and workers organizations, where such exist and with other appropriate bodies."

The emergence of new grounds of discrimination that are explicitly set forth in Article 1; paragraph 1(a) of the Convention shows that when there is a need for regulation it can be met at the international level by adoption of more specific standards

Convention No.111, on matters of its substantive field of application provides that terms '*employment*' and '*occupation*' include access to vocational training, access to employment and to particular occupations and terms and conditions of employment.⁶² This demonstrates the fact that the convention is set to regulate matters of equality and discrimination in employment both in the pre and post employment stage.

The measures which are not considered to be discrimination under the convention are:

- a. those that are based on inherent requirement of a particular job
- b. those warranted by the protection of the security of the state; and
- c. measures of protection and assistance

⁶²Supra note 18, at 18

⁶³supra note 25, at 69

d. The Abolition of Forced or Compulsory Labour

Forced or compulsory labour, as a case of extreme violation of 'humane condition of labour' has been a matter of issue in the preamble of the ILO Constitution, representing one of the main objectives the organization is established for. The 1998 ILO Declaration on Fundamental Principles and Right at Work and It's Follow Up lays the elimination of all forms of forced or compulsory labour as fundamental matter of objective to the organization.⁶⁶ The Governing Body enumerates two up to date Conventions on the abolishment of forced or compulsory labour as fundamental Conventions. These conventions are the 1930 Forced Labour Convention (No.29) and the 1957 Abolition of Forced Labour Convention (No. 105).

The 1930 Forced Labour Convention defines forced or compulsory labour as all work or service which is exacted from any person under the menace of any penalty and which the said person has not offered himself voluntarily.⁶⁷ The Convention has stated certain exclusions from the definition. The exception include any work exacted in venture of military service law for work of purely military character, work that is part of formal civic obligation, any work exacted as a consequence of a conviction in court of law providing the said work or service is carried out under the supervision and control of a public authority and the person is not to be hired or put in disposal of private individuals, companies or associations; and minor communal activities.⁶⁸

The Abolition of forced labour convention 1957 is adopted in view of supplementing the 1930 Forced Labour Convention.⁶⁹ Consequently, in the absence of

⁶⁶ See, ILO Declaration on Fundamental Principles and Right at Work and It's Follow Up, Article 2(b)

⁶⁷ ILO convention No 29, Art 2(1)

⁶⁸ Id., Art 2(2)

⁶⁹ See, ILO, Abolition Of Forced Labour, General Surveys by Committee Of Experts, Para 9 and 104(1979)

definition of forced or compulsory labour in the Convention no 105, the definition provided under the prior Convention is considered generally valid.⁷⁰ However, while Convention No 29 calls for the general abolition of forced or compulsory labour in all its forms, subject to the exceptions, Convention No. 105 requires the abolition of forced or compulsory labour only in five cases listed under Art 1 of the Convention.⁷¹

Convention No 105 rules for abolishment of any compulsory or forced labour as a means political coercion or education or as punishment for holding or expressing political or views ideological opposed the established political, social or economic system of economic development and using labour discipline, as a punishment for having participated in strikes and as a means of racial, social, natural or religions discrimination.⁷²

e. Abolition of Child Labour

At the international level action to combat the economic exploitation of children began in early 1919 with the creation of ILO.⁷³ After responding to the call for such protection, in the preamble to its constitution, the ILO adopted the Minimum Age (Industry) Convention on its first session in 1919 and since then up to 1997 the organization has further adopted ten Conventions and five Recommendations, setting standards on the minimum age of admission to employment or work in different employment sectors.⁷⁴ More over, the ILO actions also covered the conditions of work

⁷⁰ Max kernad and Carman Sottes, *The Abolition Of Forced Or Compulsory Labour*, Fundamental Right at work and International Labour Standards, No 77,45(2003)

⁷¹ See, Id , 46

⁷² ILO, Convention No 105, Art 1

⁷³ Ricardo Hernandez-Pulido and Tania Carou , *Protection of Children and Young Persons*, Fundamental Right at work and International labour standards, 89(2003)

⁷⁴ Mark Lansky, Perspectives, Child Labour How The Challenge Is Being Met, International Labour Review, vol. 136, NO 2, 235 (1997)

for children and young persons whose employment was not prohibited by international standards.⁷⁵

Until 1973 all international instrument of ILO on minimum age of employment were indeed of restricted applicability, concerned only with limited economic sectors or specific occupation.⁷⁶

The adoption of Minimum Age Convention (No.138) in 1973, however, changed the prior situation and adopt universal minimum age standard combining broader coverage of sector of employment work with greater adaptability to national situation. This Convention is identified as a fundamental convention on matter of child labour along with the 1999 the Worst form Of Child Labour Convention (No.182).

Convention No 138 set a general minimum age standard which has not to be less than the age of completion of compulsory schooling and in any case not less than 15 years.⁷⁷ The convention also specifies a minimum age standard (general provision) for employment or working in Hazardous work, 18 years.⁷⁸ This minimum age for hazardous work can be lowered to 16 years by national laws using tripartite consultation or condition that the health safety and moral of the young persons are fully protected and the young persons have received adequate specific instruction or vocational training in the relevant branch of activity.⁷⁹ National laws may permit persons at the age of 13 years to engage on a light work which not likely to be harmful to their health and development and not such to prejudice their attendance at school, their participation is vocational training programs approved by competent authority or their capacity to benefit from the instruction received.⁸⁰ States with insufficient economic and

⁷⁵ See, supra note 27

⁷⁶ Ibid

⁷⁷ ILO, convention No 138, Art2(3)

⁷⁸ See, Id, Art 3(1), [Defining 'Hazardous work as any work or employment which by its nature or the circumstance in which it is carried out is likely to jeopardize the health, safety or morals of young persons.]

⁷⁹ See, generally, Id, Art 3(3)

⁸⁰ Id., Art. 7

educational facility are granted a right to reduce the minimum age (the general) to 14 years and the minimum age for a light work to 12 years.⁸¹

The convention, as it is the first action of ILO in adopting minimum age for all sectors of employment and kinds of work, is very much flexible as to the extent of allowing the state to determine their extent of their national minimum standard which can be higher than the ILO standard at the time of ratification. It also tolerates states to determine the scope of applicability of the Convention, to determine what work or sector of employment is considered to be hazardous or light. In considering the scope of domain, the Convention excludes works done in schools for general vocational a technical education or is other training institution from its domain of application.⁸²

The ILO Minimum Age Convention of 1973 has provided an important base for the adoption of the 1999 Worst Form of Child Labour Convention (Convention No.182). This convention is adopted for abolition of worst form of labour for persons under the age of 18 years. The worst form of labour under the Convention constitute all forms slavery or practice similar to slavery, the use procuring or offering of child for prostitution for the production of pornography or for pornographic performances, the procuring or offering of a child for illicit activities and hazardous work.⁸³

Although the Convention enumerates some conditions that falls under the domain of worst form of child labour states are at liberty to determine the specific conditions to be applied in their jurisdiction.

⁸¹ Id., Art 2(4) and Art 7(4)

⁸² Id., Art 6

⁸³ ILO, Convention No. 182, Art 3

1.3. Obligation of Member States under the ILO Fundamental Conventions

Besides the constitutional obligations that any adopted ILO Convention levies on member states, the fundamental conventions impose their own respective obligation on ratifying member states.

As the nature and character of the standards adopted in these Conventions are very much tied with human rights, the need for universal application of these standards is some what stronger than the other ILO conventions. And this fact constitutes for a reason for the Convention to attain high flexibility and impose mostly general obligations. Even though, the specific obligations imposed on states differ through the eight fundamental conventions, the generality of terms used to impose obligations rests to be the same.

Under the Freedom of Association and Protection of the Right to Organize Convention (No. 87), for instance, states' obligations are phrased to be 'taking all necessary and appropriate measures to ensure the rights under the Convention'.⁸¹ The obligation of ratifying states is 'to provide adequate protection' in the terms of the Right to Organize and Collective Bargaining Convention (No. 98).⁸²

With regards to fundamental convention on forced or compulsory labour, Convention No. 29 obliges the states to suppress the use of forced or compulsory labour in all its forms with in the shortest possible period.⁸³

⁸¹ ILO, Convention No. 87, Art. 10

⁸² ILO, Convention No.98, Art. 1

⁸³ ILO, Convention No.29, Art. 1.

The Abolition of Forced Labour Convention (No. 105), in addition to the duty to suppress the use of forced or compulsory labour, incorporate the duty not to use any form of forced or compulsory labour on the part of the member states. More over, under this Convention, member states has to issue complete and precise regulation governing the use of forced or compulsory labour and supervise the effective implementation of the regulation.⁸⁷ Convention No. 105, on the other head, lays the obligation to take effective measures to secure the immediate and complete abolition of forced or compulsory labour.⁸⁸

In respect of the principle of equality, the Equal Remuneration Convention (No. 100) of 1951, levy obligation on states to promote and insure the standards set in the Convention and provides alternative means of application.⁸⁹ In the same manner, Discrimination (Employment and Occupation) Convention (Convention No. 111) imposes obligation to declare and pursue national policy designed to promote the standards set in the convention⁹⁰ and provides alternative means of application so as states choose the means that goes with its national conditions.⁹¹

This distinctive feature is not different with the ILO fundamental conventions on child labour. The Minimum Age Convention (Convention No. 138) obliges the states to declare the minimum age for admission for employment and undertakes to pursue a national policy and progressively rise the minimum age.⁹² Like wise, the other fundamental convention on child labour, Worst Form of Child Labour Convention (No. 182), imposes obligation on the part of states to take immediate and effective

⁸⁷ Ibid, Art. 23

⁸⁸ ILO, Convention No. 105, Art. 2

⁸⁹ ILO, Convention No.100, Art. 2

⁹⁰ ILO, Convention No. 111, Art.

⁹¹ Id., Article 3

⁹² ILO, Convention No. 138, Art 1 and 2

measure to secure the prohibition and elimination of worst form of child labour.⁹³ It has also lays obligation to establish or designate appropriate mechanism to monitor the implementation of the same.⁹⁴

The nature and character of the standard in the fundamental conventions and the more than average need of maintaining application of these conventions in member states having different socio-economic conditions compels the character of the obligation imposed on the states to be phrased in general terms to allow members to choose effective way of implementation that goes with their respective national conditions.

This generality character would have made ascertaining specific obligation under a fundamental convention an impossible task if it in not for elaboration, inference and conclusion of the different supervisory bodies of the organization. In the effort of supervising member states' effort to comply with their international obligation to the institution, the supervisory bodies of the organization provides binding and authoritative explanation of the Conventions.

The relevant bodies and procedure of supervision in the ILO and the respected explanations on fundamental conventions which makes part of the fundamental standards along with relevant situations that comes with the topic of institutional supervision will be discussed in the subsequent chapter.

⁹³ILO, Convention No. 138, Art. 1

⁹⁴Id., Art. 5

Chapter Two

ILO Supervision on Application of International Labour Standards

One of the prominent objectives to establish ILO, as we have seen in the prior chapters, is the need to have a universal minimum condition of labour. Member states that ratify a Convention expect the other ratifying states to perform their international obligation and take all the necessary measures to apply the convention.¹

With the view not to over ride the then popular but extreme conception of 'sovereignty of states', the ILO constitution lay down only two schemes to evaluate members states compliance with the convention it ratified.

2.1. Scheme of Supervision in ILO

2.1. a. Representation

The first scheme of constitutional procedure of evaluating compliance of member's states to a convention they ratify is called Representation. Representation, under Art 24 of the constitution grants industrial associations of employers or of workers the right to file, to the ILO governing body, a Representation on any member state which, in its view, has failed to secure in any respect the effective observances within its jurisdiction of any Convention to which it is a party.

When a Representation is filed to the International Labor Office, the Director-General will acknowledge its reception and at the same time he shall immediately inform the concerned government, and bring the Representation before the officers of the Governing Body that examines the Representation form, the status of the presenters

¹ See, generally, Preamble of ILO Constitution, Para. 3 (stating non performance of obligation by one state would create an obstacle for the performance of other states.)

and the state, and the alleged breach of international obligation; and report to the governing body on the reliability of the repression.²

If the governing body decides, on the basis of the report of its officers, that a Representation is receivable it will establish an independent ad hoc tripartite committee that examines the Representation. The committee, after satisfying the substantiation of the claim with the organization that presented the Representation, communicates the matter to the government concerned and requests it to deliver response in the period of time set by the committee. Accordingly, the government that is allowed to present its side will present in writing and request the committee to hear the government's explanation and invite the same to visit the country to obtain direct contact.³

The three member tripartite committee of the Governing Body examines the Representation and the government response, and up on completion of the examination submit a report to the Governing Body that includes the legal and practical aspect of the case, examination of the information submitted and conclusion and recommendation.⁴

If the governing body finds the response (if there is one) of the government insufficient, it has the right to publish the report containing the conclusions of the committee that had the Representation and the statement (if any) of the government.⁵

The only matter that a Representation is not to be dealt with this scheme is when the Representation is about infringement of trade union right; in which case the matter will be referred to Committee on Freedom of Association.⁶

² See, Standing Order of the General Conference, Art 1 and 2 [concerning the procedure for the examination of Representations under Art 24 and 25 of the constitution; establishing some criteria to receive Representations such as, necessity of being in written form, specific reference to Article 24 of the constitution, should be made against member state that ratified that particular convention and indicate what aspect of the convention is said to be violated]

³ Id., Art 5

⁴ Id., Art 6

⁵ See, ILO constitution, Art 25

⁶ See, supra note 2, Art 3(2)

Representation is one of the ways to ascertain compliance and it often is successful in influencing in polishing national laws and practices in the terms of ratified Conventions.⁷

b. Complaint

The other constitutional way of ascertaining compliance is Complaint on non-observance of a ratified Convention, which, may be, filed by a member state that has ratified the same for non-complying with the common Convention.⁸ Delegates to the International Labor Conference and the Governing Body in its own capacity, has been included as capable persons who can file a Complaint.

When the governing body receives a Complaint, with the consent of the entity that filed the complaint, communicate the complaint to the government in questions.⁹ If the response of the government is inefficient or unavailable upon receipt, of a complaint, the governing body may form a Commission of Inquiry that is responsible for full investigation of the complaint.¹⁰

There is no preset rules of procedures for the function of the Commissions of Inquiry for, besides the general directives to the Governing Body on typical procedural guarantees, has is practice, left the Commission Of Inquiry to determine its procedures.¹¹

When the Commission of Inquiry has finished examining the complaint, it shall prepare a report embodying its findings on all questions of facts of the matters and recommend as to the steps that should be taken and the time they should be

⁷ See, generally, ILO Rules of the Game, A Brief Introduction to International Labor Standards, ILO, Geneva, 81(2005)[sampling the 1998 Greece's amendment on her national law because of a Representations presented before the governing Body in area of labour inspection for substantiating the influence of the procedure.]

⁸ ILO, Constitution, Article 26

⁹ See, Supra note 7, at 82

¹⁰ see Albert Otero and Horacio Guidolo, ILO Law on Freedom of Association: Standards and Procedures, ILO, Geneva, 147 (1995)

¹¹ See, Supra note 8, Art 28.

undertook.¹² The Governing Body will communicate this report to the parties, and may publish it.¹³

Within the constitutionally prescribed three month, parties to a Complaint, have duty to inform the Director-General of the International Labour office whether or not they accept the report and recommendation of the commission and if they propose to take the matter to International Court of Justice.

If the parties so agree to the recommendation of the Commission of Inquiry, that would conclude the task of the commission. But one of them or both of them do not agree with the recommendation, the matter, in accordance with Art 31 and 32 of the constitution of the organization, will be referred to ICJ and the decision of ICJ could be final.

If the state, on which the commission proposed a recommendation (which it accepts or final decision, ICJ is delivered upon) didn't take any measures in accordance with the recommendation or with the decisions of ICJ or the conclusion of the commission, the Governing Body may refer the matter to the General conference and recommend to the conference to take such action as it may deem wise and expedient to secure compliance there with.¹⁴

The very low number of Commissions of Inquiry established through out the history the organization might show the very high status of commission. A Commission of Inquiry is the ILO's highest-level investigative procedure generally set up when a member state is accused of committing persistent and serious violations and has repeatedly refused to address them.¹⁵ And the first time, Article 33 of the constitution was referred, after 81 years from the adoption of the constitution, is against state of Myanmar after the Commission of Inquiry found '*wide spread use of forced labor*'.

¹² Id., Art 29(1)

¹³ Id., Art 29 (2)

¹⁴ Id., Art 33

¹⁵ See, generally, supra note 7, at 82

c. Committee of Experts on Application of Conventions and Recommendations

The constitution of the ILO includes only these two schemes of supervision of compliance of member states to the Convention they ratified, up on causation of grievances. These procedures represent the case where an examination of alleged non-observance of ratified convention by member state(s) to the organization when the aggrieved party or his representatives refer the matter to Governing Body. Representation, Complaint and the procedures involving Committee on Freedom of Association are termed as special procedure of supervision of compliance of member states to the standards they ratified. The term, 'Special procedure', refers the fact that the procedure is to be initiated only when there is '*charge*' of non- observance filed before the organization.

However, after the adoption of the constitution of the organization that only grant procedure of Representations and Complaints, delegates to the General Conference had started to debate on the need for a regular supervision.

In the 1925 session of the General Conference, the Irish government delegate, Professor O'Rahilly in support to formation of a committee that analyses regular reports of governments, stated:

..... [A] country is not justified in not ratifying simply because it suspects that its neighbor will not carry out its obligation.... I venture to hope, we shall have in future conferences a committee to examine such reports and see that they are properly presented in sufficient

*details, as to give a universal guarantee the obligation under taken by the different countries are carried out.*¹⁶

This official support of the Irish government leads to the adoption of a British sponsored Resolution by the Governing Body calling for consideration by the next session of the General conference of specific proposals prepared by the International Labor Office. Consequently, the proposal was presented before the General Conference and the Conference adopted, accordingly, the creation of a 'technical committee for evaluation of states' reports'.¹⁷

Even though the principal reason for establishments of a technical committee to examine governments' reports is the lack of constitutionally established body to perform the task, the inauguration of the committee didn't convince all members. And this fact, at least for a while, hinders the committee to mark its effective contribution in the effort of ascertaining compliance.¹⁸ It was in 1949 that the committee had made to broaden its function accordingly and reamed as 'Committee of Experts on the Application of Conventions and Recommendation' and empowered, in addition to evaluating regular reports of members on application of conventions that they ratified, to examine reports of member states on non-ratified conventions.¹⁹ This committee, which once had been established as a technical body, has made its one of the integral part of the organization.

Committee of Experts on the Application of Conventions and Recommendations, which is created on Resolution of the General Conference on its 8th session in 1926, is of the ILO organization entrusted with examination of government reports.

¹⁶ See, E.A. Landy, The Effectiveness of International Supervision: Thirty years of ILO Experience, no.8, 17 (1966)

¹⁷ See, generally, Id, at 18

¹⁸ See, generally, Supra note 16, at 17 and 18

¹⁹ see, supra note 16, no.5, at 19

The committee set out the fundamental principles governing its activities, its mandate and its methods of work in 1977.²⁰

Committee of Experts on Application of Conventions and Recommendation (from now on referred as Committee of Experts) is composed of independent, impartial and competent individuals who have first hand experience of different legal, economic and social systems²¹. They are appointed in their personal capacity by the Governing Body, by the proposal of the Director-General, for period of three years with the possible renewable period of the term.²²

The Committee of Experts meets in private with time scheduled by the governing body and its deliberations and documents are confidential.²³ When confronted with general or especially complex questions the Committee of Expert is empowered to appointing a ' working party' whose preliminary report is to be submitted to the committee of Exports as a whole.²⁴

The documents to be examined by the Committee of Experts includes information supplied by governments in their reports, or summaries made in the previous sessions of the Conference Committee on Application on Standards; relevant legislations , collective agreements, court decisions; information supplied by states on the result of inspection by other ILO supervisory bodies and comments of workers' and employers' organizations.²⁵

The International Labour Office performs the duty to prepare a comparative analysis on national law and practice of a ratifying state with the ratified Convention; and makes important notes on the legal question necessary for the examination of

²⁰ See, *Supra* note 10 , at 149

²¹ ILO, Hand Book of Procedures, Paragraph 53

²² Ibid.

²³ Id., Paragraph 54 (a) and (c)

²⁴ Id., paragraph 54 (f)

²⁵ Id., Paragraph 54(g)

information provided.²⁶ The twenty jurists that constituted the committee, for evaluation of reports of the members, can also demand clarification or additional information for full assessment of the matter is hand, by the way of 'Direct Request'.²⁷ There is also a chance to directly examine the matter by the Committee with going in to the place (state).

After examining the Committee of Experts will deliver its conclusion on the matter. The report (the conclusion) will have three parts: part I contains the overview of the committee's work and draws attention to the matter in hand, the part II contains individual observation on application of ratified Convention in member states, is metropolitan territories, and the submission of Convention and Recommendation before national competent authorities. Series of direct requests, and acknowledgements to the observations of the committee by concerned member would also be part of part II. Part III is a General Survey on application of Conventions by members that did not ratify the Convention is hand.²⁸

This final report of the committee, which many contained particularly comments on fundamental questions raised through application of a particular Convention by of members, will be published is the committee's annual report and immediately sent to governments so as they could have enough time to prepare a response to Conference Committee on Application of Standards.²⁹

²⁶ *id.*, Paragraph 54 (h)

²⁷ *See, generally*, *supra* note 16

²⁸ *Supra* note 21, Paragraph 54 (k)

²⁹ *see*, *Supra* note 10, at 152

d. Conference Committee on the Application of Standards

The Conference Committee on the Application of Standards, along with the Committee of Experts, is one of the principal supervisory bodies of ILO that is entrusted with the regular supervision of application of Convention and Recommendation by member states. These two bodies were created on the basis of Resolution adopted by the general Conference in 1926.³⁰

The independent technical examination carried out by the Committee of Experts is, by virtue of the hand book of Procedures for international labor standards paragraph 54(k) will be referred to the Governing Body. The Governing Body, which holds the power of initiating the agenda of the next session of the General Conference, will in turn, submit this report of Committee of Experts to the General Conference of the Organization, The General Conference establishes a tripartite Committee that considers the measures taken by member states to the provision of Conventions they ratified, reports of the Committee of Experts, information and reports concerning Conventions and Recommendations communicated by members, and on the measure taken in accordance with Article 35 of the constitution.³¹

Though the Conference Committee has a right to assess reports of states concerning Conventions they has ratified, it has become the practice, considered by some 'a practice not to be tampered with', for the Conference Committee to deal only with cases already examined by the Committee of Experts.³²

Conference Committee on Application of Standards, a tripartite committee, grants an opportunity for the state in question to explain its side for the second time and

³⁰ See, generally, supra note 10, at 149

³¹ Supra note 2, Art. 7

³² See, generally, supra note 10, at 165-166

also for other states, representatives of workers and employers to examine and review the fact of the matter and actions taken by the state in accordance.

After hearing the deliberation of the government and examining the documentations presented to it, the Conference Committee draws a conclusion and presents recommendations. This conclusion including tripartite discussions on the matters in the report along with the relevant documents examined will be referred, Pursuant to Article 7(2) of the Standing Orders of General Conference, to the General Conference.³¹

The fact that the report of the Conference Committee is subject of discussion in the plenary session of the General Conference adds up to the salient features of the committees work. The report will be published separately and also as an appendix in the Records of Proceedings of the Conference; and circulated separately to governments. Special points raised by the conference Committee and Committee's discussion of individual cases will be high lighted in the reports so that concerned states take account in the subsequent reports.³¹

In general, through continuous and progressive effort of ascertaining compliance, the two regular supervisory bodies of the Organization, the Committee of Experts and Conference Committee on Application of Standards, have ascertained some major impacts by progressively shaping and polishing national laws and practice.

It is important to remember that though neither of these bodies can impose sanctions of any kind their conclusions are sometimes considered as political or moral sanctions.³² Note should also be taken on the supplementary nature of these bodies. The Committee of Experts is responsible for technical supervision where as the Conference

³¹ Id., at 166

³⁴ Ibid

³⁵ Ibid

Committee provides direct dialogue between all stake holders and contribute to mobilize political weight and influence on an intentional forum.³⁶

e. Fact Finding and Conciliation Commission

Bearing in mind the fact that freedom of association is one of the significant constitutional principle that has direct implication to the over all tripartite structure of the organization, the ILO had started a dialogue with the Economic and Social Council of the United Nations to establish a special Procedure for Protection of the right. The negotiation was successful and in 1951 the two bodies have established a special procedure on which governments or organizations of workers' and employers' could present complaints on alleged infringements of trade union rights. Irrespective of whether they are members of the ILO, members of the UN with out being members of ILO, can submit complaints concerning violation of trade union rights by states.³⁶ Further more, what makes the procedure so special, is that it can be applied on member states whether or not they ratify Conventions on freedom of association and collective bargaining.³⁷

Pursuant to the agreement between the two organizations, the ILO has established the Fact Finding and Conciliation Commission on Freedom of Association in 1959 so as it provide service for both. The Commission is composed of three independent experts appointed by the Governing Body.³⁸

The commission is empowered to examine Complaints filed by Organizations of workers or employers, or governments concerning non-observance of standards in relation to trade union rights. If the state on which the complaint is presented is not a member of ILO but is member of the UN, the complaint would be filed before

³⁶ See, ILO, An Introduction to Committee on Freedom of Association's: Freedom of Association: Digest of Decisions and Principles of Freedom of Association, ILO, Geneva, 4th ed., 2(1996)

³⁷ Ibid

³⁸ See, Eric Gravel, et. Al, the Committee on Freedom Association: Its Impact over 50 years, 8(2002)

ECOSOC and it in turn, might refer the complaint to the Governing body.³⁹ If the state has not ratified the conventions in hand, the commission requires the consent of the state to entertain the matter.⁴⁰

The Fact Finding and Conciliation Commission on Freedom of Association is a Permanent body of highest instance of the special machinery for the protection of trade union rights. Although, principally the commission has investigatory purpose, it also has the power to examine, together with the government concerned, the possibility of settling difficulties involved by agreement.⁴¹

The complaints filed against ILO member for non-observance of trade union rights had primarily designed to be submitted to the Governing Body for preliminary examination. Following the discussions at its 116th and 117th session, the Governing Body decided to set up a Committee on freedom of Association to carry out this preliminary examination⁴²

f. Committee on Freedom of Association

The committee on freedom of Association is a tripartite body set up in 1851 by the Governing Body for carrying out a preliminary examination of the complaints for infringement of trade union right submitted under the special Procedure, and for recommending the Governing Body on the matter.⁴³

The tripartite committee is composed of persons representing governments, workers' organizations, and employers Organization.

³⁹ *see, supra* note 10, at 121

⁴⁰ *see, supra* note 36, at 2 [The procedures of the commission is similar to that of commission of inquiry]

⁴¹ *Ibid*

⁴² *See, supra* note 10, at 121

⁴³ *See, supra* note 7, at 84

In addition to preliminary examining the complaint and recommending the Governing Body, the committee, when the case before it requires no further examination, it has the right and obligation to draw the attention of the government concerned to the problems that have been found and invite it to take appropriate measures to resolve them.⁴⁴ Outside these two functions the committee would not be called up on to express any view on the question whether prima-facie case had been made out.⁴⁵

The procedure of these preliminary examinations on the alleged infringement of union rights has been laid down by the Governing Body in view of rendering the procedure both more elastic and more effective.⁴⁶

The committee has examined cases in its year of existence which enables it to build up on very full, balanced and coherent body of principles on freedom of association and collective bargaining based on the constitution of the ILO and the relevant Conventions, Recommendation and Resolutions.⁴⁷ The committee has further emphasized:

This body of principles has been created by specialized and impartial international body with a high reputation, which adopts a tripartite perspective and whose work is based real situations, namely concrete, varied and frequency very serious and complex allegations of violation of trade union rights through out the world; it has therefore acquired a broadly recognized

⁴⁴ See, supra note 36

⁴⁵ See, supra note 10, at 124

⁴⁶ See, ILO, Procedure for the preliminary Examination of Complaints Alleging Breaches of Freedom of Association, Governing Body 117th session

⁴⁷ See, supra note 36, at 2

authority at both international and national level, where it is increasingly being used for the development, national legislations.⁴⁸

g. Other Bodies Essential for the Supervision

Beside the above discussed ILO supervisory bodies, there are some other bodies that have great function in influencing the process of supervision.

The first from the list is workers and employers' organizations. In the regular supervision scheme of the ILO, government reports are delivered to the workers'; and also employers' associations and their comment on the report is one of the documents that are to be analyzed by the Committee of Experts.

In order to maintain the tripartite structure of the organization and to grant high level of acceptability to observations of the supervisory bodies, the participation and contribution of these associations can be considered as intrinsic element of the over at procedure of supervision.

The other one is the International Labour Office. Its task of performing comparative analysis for the committee of Experts, and identifying points to be analyzed by the Committee of Experts, among its other prominent tasks, makes the office important body in the whole accomplishments of the procedure.

The final body, which the writer of this paper wouldn't like to pass unmentioned, is the Governing Body. Besides the relevant activities of supervision which its Commissions and committees perform; starting from preparing formats for regular reports of member states on their application of conventions they have ratified, the

48. Ibid

Governing Body performs numerous tasks intended for the smooth undertaking of supervisory activities of the organization.

2.2 Significance of ILO Supervision in the Standard Setting and Application of the Fundamental Conventions

The ways of supervising member state's compliance to a Convention it ratified, which is briefly discussed in the previous sub chapter, can be classified in to two broad classes: regular supervision and special supervision.

The bodies of the ILO that entrusted with special supervision are required to examine (be it preliminary or substantive) a Representation or Complaint filed for alleged violation of ratified convention and report their finding and respective recommendation on the measure to be taken to the Governing Body.

The bodies that undertakes special supervision of the organization, on a commission, level like the commission of inquiry or fact finding and conciliation commission, or on a committee level Ad hoc tripartite committee to examine Representation or Committee on Freedom of Association, are considered to have quasi-judicial power to recommend on cases of Representation or Complaint filed against member state(s) that ratified the convention in consideration.

Their explanations on the meaning of standards contained in Conventions, made while recommending on conclusion of Representation or Complaint procedures, have contributed significantly on the build up of international labour standards and add up for the domain of 'case law' on the explanation of the convention.

The recommendations of special supervisory bodies are taken to final, but if it is not agreed up on by the involved states, it might be presented before the International Court of Justice for final decision. The conclusion of ILO special supervisory bodies will

hold if the contesting state did not refer the conclusion for judicial review by ICJ pursuant to Article 33 of the constitution of the organization.

Regular supervision, however, does not have the immediate feature of enforcement as that of the special procedure. The Conference Committee on Application of Standards and Committee of Experts, depend for their individual observations, rather than on Complaints or Representations, depends mainly on regular reports made in accordance with Article 19 of the constitution of the organization on application of convention they have ratified.

The reports of these regular supervision bodies of ILO constitutes explanation of as to the scope and meaning of the Convention on hand, the general universal application of these standards and individual observation of application thereof by a given state; and recommendation on the appropriate measures to be taken.⁴⁹ And the committee of experts delegates the following-up on the matter to the Office and examines the development of the situation so as the state concerned will comply with its terms progressively.⁵⁰

These regular supervisory bodies, after conclusion of the process of supervision, publish their report so as to reveal the status of the state concerned in applying a standard which it ratified. It is true that publicity plays a fundamental role in the effort of ascertaining compliance and avoiding negative publicity, has been the major sources of reason for member states' progressive compliance with recommendations (observations) of these bodies, and a major power machine for these bodies and ILO as a whole.

⁴⁹ See, generally, supra note 21, Paragraphs 63 and 65 [explaining the ultimate power of interpreting the constitution of ILO and the convention rest in the lands of the ICJ. But further lays the powers of supervisory bodies of the organization to explain scope and meaning of convention. Reading the two paragraphs together provides that the supervisory bodies have some interpreting power on conventions of the organization and any disagreement raised up on the 'interpretation' of these bodies will be settled before the ICJ]

⁵⁰ See, generally, supra note 7, at 78

The Committee of Experts, it has been observed in pervious sub chapter, undertook two major tasks. The first one is examining reports of states on their law and practice conventions they did not ratify. The committee examines the law and practice in the states that did not ratify the convention in hand and publish a general survey to foster further understanding of the standards contained to measure the extent of application of the standards even with out international obligation which is found to be helpful in promoting of further ratifications member state that didn't ratify the convention. The other major task is examining and reporting individual observation on application of members' standards contained in the conventions they have ratified. The committee to under take this task and evaluate individual performance, as the matter of general principle, needs states to ratify the convention. The obligation, on the part of member states, to regularly report on the measures taken in the application of a convention and power of the supervisory bodies to evaluate performance of application of the same relies mainly on political act of ratification.

The 1998 ILO declaration on fundamental principles and right a work, with supplementary decision of the Governing Body taking eight conventions as 'fundamental', declares their application in all member states of ILO, irrespective of the fact that it does or does not ratify the convention, by virtue of mere membership to the organization.

The Declaration set up a follow up mechanism which is established for assisting states to achieve the standards of these conventions. The character of these follow up is entirely different from the previously discussed, ratification oriented, supervision. The ony thing that the Declaration has changed for the later is on obligation to report,

decreasing the gap between two reports from five years to two years in relation to the eight fundamental conventions.⁵¹

2.3. Summaries of the committee of experts on ILO fundamental Conventions

The highly respected analysis and decision of these supervision bodies, along with the ILO Conventions and Recommendations, function as a kind of international common law. Moreover, for many, the analysis and summary on fundamental Conventions by these bodies are taken to be indicative of customary international law. Their analysis and decision on matters of fundamental Conventions will be briefly analysis as follows.

a. On Freedom of Association and the Right to Organize Convention (No.87)

The analysis of the supervisor bodies of the organization, especially the Committee of Experts', has classified the convention in to twelve important elements.⁵⁰

a. i. Trade Union Rights and Civil Liberties

⁵¹ See, generally, Jean- Claude Javillier, An Introduction to ILO's Fundamental Right at work and International Labour Standards, 3(2003); [The conclusion of findings through the follow-ups of the Declaration will be published as 'Global Report' rather than as 'individual observation' through the pre- existing regular supervision system of the organization.]

⁵² See, Bernard Gernigon et. Al, *Freedom of Association*, Fundamental Rights at Work and International Labour Standards, 13(2003)

The Committee of Experts expressed that the condition of implementation of civil and political rights enshrined in the UDHR and other international instrument for effective application of ILO standards of freedom of association.⁵³

Similar analysis has been taken by the Committee on Freedom of Association relating human rights, democracy and civil and political rights for effective application of freedom of association.⁵⁴

ii. The Right of Workers and Employers, with out Distinction Whatsoever, to Establish and Join Organizations of Their Own Choosing

The Committee of Experts, on summarizing that free exercise of trade union rights involves: the absence of any distinction in law and practice among those entitled the right, the absence of the need for previous authorization to establish organizations, and freedom of choice for workers and employers with regard to membership of such organization.⁵⁵ With the exceptions to the police and armed forces, the standards of the convention should apply to all works and employments with out any distinction, what so ever.⁵⁶

The right to establish and join organization of one's choice, as the explanation of the committee or Freedom of Association, is endowed by the virtue of the convention irrespective of the occupational category. With the exception of the police and the armed forces, public servants, agricultural workers, plantation workers, employees of airlines, hospital personnel, managerial and supervisory staff, self employed workers, workers under going a period of work of probation, concessions (sales agents), and

⁵³ Ibid

⁵⁴ *see, generally*, ILO, Freedom of Association: Digest of Decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, ILO General, 4thed.,Parageraph 32-204, 13-43 (1996)

⁵⁵ *See*, B. Gernigon et. Al, *Freedom of Association*, International Labour standards, A Global Approach, ILO general, 24(2002)

⁵⁶ Ibid

workers in export processing zones; among other workers in all sectors have the right to establish and join organization of their choice.⁵⁷ The committee on freedom of Association do even includes, through explanation of the convention, civilian staffs is the armed forces in the domain of the convention and affirms the extension of the rights in the convention to them.⁵⁸

iii. The Right to Establish Organization with out Previous Authorization

The Committee on Freedom of Association has commented on these raising the importance of avoiding the requirement of previous authorization from governments to establish organizations because the requirement of prior authorization will remain the principles freedom association a dead letter.⁵⁹

And formalities required, such as those intended to insure publicity, must not be so complex or length so as to give the authorities, in practice, discretionary power to refuse the establishment of organizations.⁶⁰

In the intention of interference fro the authorities, states should adopt provisions making judicial appeal against any administrative decision of this kind before an independent and impartial body possible⁶¹.

These formalities should not be of such nature to impair the free establishment of the organization and should not be applied in such way to delay or prevent the setting up of the organization.⁶²

⁵⁷ See supra note 54, Para. 212-241, at 46-52

⁵⁸ Id., Para. 223, 49

⁵⁹ Id., Para. 244, 53

⁶⁰ See, Supra note 52, at 13

⁶¹ Ibid

⁶² See, Supra note 54, Para. 248-249, at 54

iv. Right of Workers and Employers to Establish and Join Organization of Their Own Choosing

This right under the Convention implies, as the explanation of the Committee of Experts, in particular the right to take free decision on the choice of the structure and composition of organizations, the establishment of one or more organizations in any one enterprise, occupation or branch of activity, and the establishment of federations and confederations.⁶³

It is derived from this principle that although the convention does not aim to make trade union pluralism compulsory, pluralism must be possible in every case, even if trade union unity is once adopted by the trade union movement.⁶⁴ In short, system of trade union unity or monopoly must not therefore be imposed directly by the law.⁶⁵

v. Free Functioning of the Organization: Right to Draw Up Constitution and Rules

According to the Committee of Experts, in order to fully guarantee trade union rights, national legislations should only lay down formal requirement as regards to union constitution and the constitution and the rules should not be subject to prior approval of authorities.⁶⁶

Consequently, it is affirmed that for protection of this principle of the convention the right to appeal to the court that is empowered to re-examine the substance of the administration decision should be stated in the national law.⁶⁷

⁶³ *see, Supra* 55, 25

⁶⁴ *see, supra* 52, 14

⁶⁵ *Ibid*

⁶⁶ *Ibid*

⁶⁷ *Ibid*

vi. The Right to Elect Representative in Full Freedom

The freedom to freely elect representative of the organization by the members is very essential aspect to effectively guarantee the autonomy of organization, thus the rules and procedures of the election should be decided by the regulation of the particular organization which is pre decided by the members themselves.⁶⁸ The intervention of the authorities in the exercise of this right should not go beyond promoting democratic principles with in trade unions or to ensure the proper conduct of the election process with respect for members' right so as to avoid any dispute on the out come of the election.⁶⁹

This explanation of the Committee of Experts is supported by the conclusions of committee on freedom of Association while examining complaints and representations on matters of freedom of association and collective bargaining.⁷⁰

vii. The Right to Trade Union to Organize Their Administration

This right includes in particular autonomy and financial independence and protection of the assets and property of organizations.⁷¹ The freedom of workers and employers to organize the administration of their organization(s) is not limited strictly to financial operation but also implies the right to dispose of all their fixed and moveable assets unhindered, and they enjoy inviolability of their premises, correspondence, and communications.⁷²

⁶⁸ *see, supra* note 55, at 25

⁶⁹ *Ibid*

⁷⁰ *See, Supra* note 54, Para. 350-367, at 76-77

⁷¹ *See, Supra* note 52, at 15

⁷² *Ibid*

The Committee on Freedom of Association on this matter, summarizes the principle as; 'freedom of association implied not only the right of workers but also the right of the organization it self.'⁷³

viii. The Right of Organizations to Organize Their Activities in Full Freedom and To Formulate Their Programs

This right comprises predominantly the right to hold trade union meetings, the right of trade union officers to have access to place of work and to communicate with management certain political activities of organizations such as the right to strike and in general any activity involved in the defense of members' rights.⁷⁴

The Committee of Experts has inferred the right to strike, which is not explicitly mentioned Convention 87, from through elaboration of Article 3 of the convention which sets the right of organization to organize their activities and to formulate their programs.⁷⁵

The Committee of Experts concludes, consequently, that the right to strike should be recognized in general for trade unions, federations and confederations in public and private sectors subject to restriction on members of armed forces and the police, public servant exercise authority in name of the state, workers in essential service in the strict sense of the term (the interpretation of which would endanger the life, personal safety or health of the whole or part of the population), and event of acute national crisis.⁷⁶

⁷³ See, Supra note 54, Para. 416, at 89

⁷⁴ Ibid

⁷⁵ See, Supra note 52, 204, at 15

⁷⁶ See, Supra note 52, at 15-16

The condition of national laws to render strike lawful should be reasonable and should not make substantial limitation on the means of action and it should grant appropriate protection for union leaders and for workers against which measures may be taken for participating in lawful and peaceful strikes.⁷⁷

Similarly, the Committee on Freedom of Association has considered the right to strike a fundamental right and provide detailed summaries on its scope of application.⁷⁸

ix. The Right of Workers and Employers Organizations to Establish Federations and, Confederation and Affiliate with International Organizations of Workers and Employers

For the purpose of international solidarity, national organizations are endowed with the right to create federations and confederations and even affiliate with similar international organizations.⁷⁹ Similar analysis of the right is reflected and ascertained on the conclusions of the Committee on Freedom of Associations.⁸⁰

x. Dissolution and Suspension of Organizations

The dissolution and suspension of trade union associations by administrative authority constitute extreme form of interference and therefore the act should be

⁷⁷ *Id.*, at 16

⁷⁸ For over all detailed analysis of the right to strike and the conclusions of the Committee Freedom on Association, see, supra 54, chapter 9, from paragraphs 473 to 605 in pages 101 to 123

⁷⁹ *See*, Supra note 52, at 16

⁸⁰ *See*, Supra note 54, para 606-659, at 125-134

⁸² *See*, Supra note 55, at 27

accompanied by all the necessary guarantees to be ensured through a normal judicial process with the effect of a stay of execution.⁸²

In similar manner, the Committee on Freedom of Association considers administrative dissolution of trade union organizations as serious infringement of principles of freedom of Association. The committee has provided similar conclusion on the matter affirming that dissolution of trade union organizations should only occur in extremely serious cases following judicial decision in which the right of defense is fully guaranteed.⁸³

xi. Protection against Acts of Anti-Union Discrimination

Denial of this right afforded to workers and trade union officers by the convention may result in practice the denial of all the rights laid in the convention. The Committee of Experts concludes on the insufficiency of mere existence of legal provisions prohibiting acts of anti-union discrimination.

The committee recommends that the provision should be combined with effective, expeditious, inexpensive and in partial procedures coupled with sufficiently dissuasive sanctions.⁸⁴

The important components of this rights explained by Committee of Experts is also affirmed by the conclusions of Committee on Freedom of Associations. The Committee on Freedom of Association, while examining alleged infringements of the rights by states, has provided their elaboration on general principles of the right as laid

⁸³ See, Supra note 54, para. 665, at 136

⁸⁴ See, Supra Note 54, Para. 690-758

by Committee of Experts and recommends on what is considered to be anti-union discrimination.⁸⁵

xii. Adequate Protection against Acts of Interference

Autonomy and independence of trade unions calls for protection of workers associations from the employers and their organizations. Thus, concludes the Committee of Experts, national legislation should make expressed provision for rapid appeal procedures coupled with effective and dissuasive sanctions against acts of interference by the employers and their organizations against workers organizations, and vice versa.⁸⁶

2.3. b. The Right to Organize and Collective Bargaining Convention

(Convention No. 98)

Fundamental right of association(s)' of workers on one side and employer(s) or their associations on the other to collectively bargain has been summarized by the Committee of Experts using relevant ILO Conventions, Recommendations and Resolutions is presented subsequently.⁸⁷

Collective bargaining is a right of employers and their organizations on the one hand, and organizations of workers the other had (first level trade unions, federations and confederations); only in the absence of these latter organizations may representatives of the workers concerned may be allowed in collective bargaining.

⁸⁵ Ibid

⁸⁶ See, Supra note 52, at 28

⁸⁷ The explanation of the rights incorporated in convention 98 by Committee of Experts has been presented through the following paragraphs explaining what has been discussed in supra 52, Para. 28-30 and supra note 55, at 36-37

Collective bargaining is a right for all private and public sectors, and it is only the armed forces, the police and public servants engaged in the administration of the states who may be excluded from the exercise of this fundamental right.

The purpose of collective bargaining is the regulation of terms and conditions of employment, in a broad sense, the regulation of relations between the parties.

The final positive outcome of collective bargaining, collective agreements, are binding on the parties and are intended to determine terms and conditions of employment which are more favorable than those established by law. Likewise, preference must not be given to individual contracts over collective agreements, except where more favorable provisions are contained in individual contracts.

It is essential to take into account the fact that the exercise of the right requires independence of workers organizations. And to achieve conditions of work and other relevant standards regulating the relation between them, the parties to the negotiation are required to confer intensive and persistent efforts accommodating the principle of good faith in the negotiation.

A trade union, which represents the majority on a high percentage of the workers in a bargaining unit, may enjoy preferential or exclusive bargaining right. However, in cases where no trade union fulfills these conditions or such exclusive rights are not recognized, workers' organizations should nevertheless be able to conclude a collective agreement on behalf of their own members.

Since the principles of collective bargaining represent the voluntary nature of bargaining, procedures regulating bargaining should take this in to account and let it possible for bargaining to take place at any level.

Conciliation and mediation can be imposed by law with in the frame work of the process of collective bargaining provided that reasonable time limits are established. Imposition of compulsory arbitration in cases where parties do not reach agreement, however, is generally contrary to the principle of voluntary collective bargaining except in cases of essential service, with regard to public servants engaged in the administration of states; after fruitless prolonged negotiation if the deed lock will not be over come with out the intervention of authorities; and in the event of acute national crisis.

Interference of the legislative and administrative authorities which have the effect of annulling or modifying the contents of the freely concluded collective agreements; including on matters of wage clauses, are contrary to the principle of voluntary collective bargaining.

Restrictions on the contains of future collective agreements particularly in relation to wages, imposed as part of economic stabilization or structural adjustment policies for imperative reasons of economic interest can be admissible if they are applied as exceptional measure; only to extent necessary; do not exceed reasonable period, and they are accompanied by adequate guarantees designed to protect effectively the standards of living of the workers concerned, and particularly those who are likely to be most affected.

Detailed conclusion of Committee on Freedom of Association on the right to organize and collective bargaining, in the numerous cases it examines has added for creation of consistent conception of the standards envisaged in the convention.

c. Discrimination (Employment and Occupation) Convention (No. 111)

The Committee of Experts, through their comments on the standards of the convention, has contributed for the development of principles relating the application of the convention. The comments of Committee of Experts considering this convention deal up on mainly on mainly five features.

To start with, the committee has laid down elaborations on the seven grounds, which have been considered as unlawful grounds of discrimination by the convention.⁸⁸ Arguing the fact that there are also other unacceptable grounds of discrimination at work and employment, stating the fact that the ILO, accepting this proposition, has adopted other conventions to abolish discrimination using other grounds (such as Workers with Family Responsibilities Convention), the Committee of Experts recommends states for additional grounds in accordance with Article 1(6) of the convention. This proposed grounds include age, disability, family responsibilities, language, matrimonial status, nationality, property, sexual orientation, state of health particularly seropositivity and HIV status, and trade union affiliation.⁸⁹

Secondly, the Committee of Experts has made influential conclusion (comment) on the practical ground of application of the convention. The committee has

⁸⁸ See, generally Constance Thomas and Yuki Horii, *Equality of Opportunity and Treatment in Employment and Occupation*, Fundamental Rights at Work and International Labour Standards, 57(2003)

⁸⁹ Ibid

⁹⁰ See, ILO, Equality in Employment and Occupation, Special Survey By Committee Of Experts on Convention No. 111, part III (part 4B), ILC, 83rd session, Para 48-64

commented on the possibility the applying the convention on national level through national constitution, legislations, case law and collective labour agreements.⁹¹ According to the comment of the committee, nevertheless, this is not sufficient by itself for the full application of the convention and hence the committee has called for producing and applying national policy to promote equality at work and employment under the direct control of national authority.⁹¹ Promotion of equality by establishing and promotion of a national policy, which is the third matter of analyses by the committee, is deemed to be significant in the effort of applying the convention. States should, according to the committee, take legislative measures and simultaneously prepare and implement programs to promote equality and correct de facto inequalities which may exist in training, employment and conditions of work.⁹²

Fourthly, cooperation with workers and employers organization is considered essential to have effective national policy to promote equality.⁹³

The final matter that has been commented on by the committee is on the special measures of protection or assistance taken pursuant to Article 5 of the convention. The committee highlights the importance of acknowledging the fact that the ratification and application of convention 111 should not come into conflict with the ratification and application of other instruments for special measures of protection or assistance. The committee substantiated this proposition, backed by Article 5 of the convention, raising the instance of maternity protection measures adopted by other instrument. Accordingly, the committee concludes that maternity protection measures are not in

⁹¹ Ibid

⁹² Ibid

⁹³ Id., Para. 131-132

violation of the convention, and maternity protection and the other "protective" measures should be reviewed in accordance with the ILO Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment adopted by the General Conference in 1985, which affirms all protective legislations applying to women should be reviewed in the light of up-to date scientific knowledge and technical changes and that it should be revised, supplemented extended, retained or repealed, according to national circumstances.

Required measures designed to meet the particular requirements of certain persons, which is mentioned under Article 5(2) of the convention is also summarized by Committee of Experts. The committee has expressed its view on the need to maintain the proportionality of the protection and assistance by ratifying states with nature and scope of the protection needed or of the existing discrimination.

To guarantee that these protectional measures do not create discrimination under Article 1 of the convention, the committee recommends that states should undertake consultation with employers' and workers' organization before bestowing these protectional measures.⁹⁴

d. Equal Remuneration Convention (No. 100)

The prominent progress is the application of this convention, as noted by Committee of Experts, is the recognition by countries of the very broad definition of remuneration that is not limited to the basic or ordinary wage. As a result, countries are extending protection of equality in law and practice to ensure that additional payments and fringe benefits as are not differentiated on the basis of sex.⁹⁵

⁹⁴ *Id.*, Para. 135, at 43

⁹⁵ *Id.*, supra note 89, at 78

⁹⁶ *See*, ILO Equal Remuneration, General survey by committee of experts on application of conventions and recommendations, report III (4B), ILC 72nd session, Para. 18 and 19

The scope of the convention is up on all workers with out exception and the committee has pointed out that the of reference for comparing one or more works, as explicitly mentioned in the convention, is the 'value' of the works.⁹⁷

The Committee of Experts has also commented on the obligation of ratifying states under the convention. The committee divided the obligation as obligation to ensure, and obligation to promote.⁹⁸ The committee, further, elaborates ratifying states' obligation in determining rates of remuneration for effective application of the notion of 'equal remuneration to work of equal value', in the from three perspectives: where the state is the employer or other wise control the business, where the state is in a position to intervenes in the wage fixing process; and where there is legislation on equal treatment in the field of equal remuneration.⁹⁹

The first instance generally deals on the responsibility of ratifying states to the convention ensure the principle of 'equal remuneration for work of equal value' for its workers.¹⁰⁰ The second deals with where the state has the power under the national law to intervene in the wage fixing process.¹⁰¹ The last perspective deals with the obligation of ratifying states to enact legislations. The convention does not impose obligation on ratifying states to enact a legislations, but it still it can be inferred from the second paragraph of Article 2 of the convention that puts down the obligation of ratifying states

⁹⁷ Id., Para.24, at 12

⁹⁸ Id., Para.25, at 13

⁹⁹ Id., Para.26, at 13

¹⁰⁰ Id., Para.27, at 14

¹⁰¹ Id., Para.28, at 14

to amend any existing law that violates the convention, that states can as one measure of application, enact a legislations¹⁰²

The committee also reminds the fact that the promotion of the equality of remuneration that imposed by the convention allows multiple choice of means of application which a state should pursue in good faith.

e. Forced Labour Convention (No.29)

The Committee of Experts' contribution on laying the standards of this convention starts with elaborating the definition of forced labour envisaged in the convention. The summary of the committee on this endeavor takes each aspect of definition of forced labour under Article 2 of the convention and provides further explanation on the meaning of each constitutive feature of the definition.

Article 2(1) of the convention defines forced or compulsory labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. Accordingly, the committee has took each constituting part of the definition like, 'work' or 'service', menace of penalty and the situation with the 'consent' and provide a further explanation of the definition.¹⁰³ Detailed analysis of exception of the convention, stated under Article 2(2) of the convention is also been included in the summaries of the Committee of Experts.

f. Abolition of Forced Labour Convention (No.105)

¹⁰² For detailed reference to the definition refer, M.Kern and C.sottas, *Freedom of Workers :The Abolition of Forced or Compulsory Labour*, International Labour Standards, A Global Approach, 41-47 (2001)

¹⁰³ Id., at 47-53

The Committee of Experts' primary contribution on the standard setting relating this convention is the explanation on the scope of this convention in relation with convention 29. The committee, reaffirming the complementary nature of these conventions, has stated convention No. 105 does not constitute a revision of convention No. 29 but was designed to supplement the earlier instrument.¹⁰⁴

In the absence of definition for forced or compulsory labour under convention 105, the committee has concluded that the definition contained in convention No. 29 considered generally valid.¹⁰⁵ The committee, stressed on the fact that convention No 29 out calls for general abolition of forced on compulsory labour in all its forms, subjects to exceptions specified under Article 2(2), Convention No 105, however, requires the abolition of forced on compulsory labour only in the five cases listed under Article 1 of the convention. And the exception of prison labour incorporated in the Convention No 29 does not automatically apply for Convention No. 105.¹⁰⁶

Besides the comparative analysis on supplementary nature of the two fundamental conventions on forced labour, the committee has elaborated the five prohibited grounds on extracting forced or compulsory labour under Convention No 105.¹⁰⁷

g. On Child Labour Conventions

¹⁰⁴ See, ILO, Abolition of Forced Labour, General Survey, Para 9 and 104

¹⁰⁵ *ibid*

¹⁰⁶ See, *supra* note 102

¹⁰⁷ *ibid*

¹⁰⁶ See, *supra* note 102

¹⁰⁷ *ibid*

The two fundamental ILO conventions on child labour mainly ascertain universal minimum age for admission for employment. The 1973 convention provide ratifying states to declare their own minimum age for employment that is above the universally accepted standard, allows ratifying states to ascertain the scope of application of the convention by letting them determine what the national conception 'light work', 'hazardous work', and sectors of employment on which the convention is to be applied. The Committee of Experts provide explanations that helps as a guide line for ratifying states to determine national conceptions of light and hazardous.

2.4. Significance of ILO Supervision on Practical Application of Fundamental ILO Conventions

As briefly discussed in the first section of this chapter, Procedures that have been used by the special and regular supervision and their respective effects are of different character.

The special procedure, which has to be initiated by a Representation or a Complaint that may be filed by aggrieved workers' or employers' association, or/and by member states, has to pass through procedures that are very similar to the procedure of the judiciary. This special procedure incorporates, if the representation or the Complaint is accepted as receivable by the relevant body, the procedure of pleading a possible violation, substantiation of the claim and the opportunity to the state concerned to defend it self. And the conclusion of these quasi-judiciary organs of the organization is to be applied, relatively, immediately after the deliberation unless it is not contested before ICJ. In most instances the decisions of the body entitled to concede conclusions in the special supervision or the final decision of ICJ has the chance of effective and immediate implementation.

The case of the 1981 Poland's suspension of the *solidarnosc* trade union and detaining and dismissing many of its leaders and members, for example, had been examined by the Committee on Freedom of Association. With its recommendation the ILC filed a complaint against state of Poland. The Commission of Inquiry that examined the complaint found grave violations of Convention No. 87 and Convention No 98. Based on the commission's conclusion, the ILO, numerous countries, and organizations put pressure on Poland to redress the situation, and in 1989 Polish government gave *solidarnosc* legal status¹⁰⁸. Appreciating the accomplishment of the system Lech Walesa, *solidarnosc*' leader and later president of Poland stated: "...the commission of inquiry created by ILO, after the imposition of martial law in my country made significant contributions to the change which brought democracy to Poland".¹⁰⁹

The regular supervision, on the other hand, constitutes different procedure and its effect has different feature. Since the regular supervision mainly depend on the regular reports of states delivered to the organization pursuant to Article 22 of the constitution of the organization, since the parties involved in the regular supervision are the organization and the states under evaluation and there is no aggrieved person (besides the organization) who demands immediate relief from the process, the summary and conclusion of regular supervisory bodies are generally taken to be applied progressively with the full cooperation of the state concerned.

In addition to identifying important principles of a convention and highlighting important notes that a state should take to polish the domestic law and practices that stands in contradiction with the convention, the reports of regular supervisory bodies show the extent of application of the convention in question in the member states.

¹⁰⁸ See, Supra note 7, at 83

¹⁰⁹ Id., no. 45, at 83

The content of the Committee of Experts' observation for 2000 and 2001 concerning the range of application of Convention No 87, for instance, shows that comments were made for 88 of the 134 countries that have ratified the convention.¹¹⁰ For most of these countries, however, the problems observed did not of the extent to impair the application of the principle of freedom of association. The problem identified through out these eighty eight states constitute violations of the convention in relation with restricting the scope of the convention, restriction (legal) on categories of persons who may hold union office , restriction on free election of union leaders, requirement of excessive number of workers to establish organization, refusal to register organization or the requirement of prior authorization , legal imposition of trade union monopoly, denial of the right to are federation and confederation dissolution of organizations by administrative decision, and restriction on the rights to strike.¹¹¹

In relation to application of the provisions of convention No. 98 concerning anti-union discrimination and non- interference the observation of the Committee of Experts for 2000 and 2001 includes critical comments concerning 34 of the 148 states that have ratified the convention. The non-observance identified in the report includes; in availability of provision prohibiting anti- union discrimination, or acts of interference, inadequate protection, or sufficiently dissuasive sanctions.¹¹²

The observations made by Committee of Experts concerning the application of Convention No. 98 shows that the greet majority of state which have ratified the convention apply it in a satisfactory manner.¹¹³ The Committee of Experts' report for

¹¹⁰ See, supra note 52, at 17 and 19

¹¹¹ Ibid

¹¹² Id., at 19

¹¹³ See, Bernard Gernigon and Alberto Otero, *Collective Bargaining*, Fundamental Rights at Work and International Labour Standards, ILO, Geneva, 30(2003)

2000 and 2001 made critical observation on one-third of the 148 countries that have ratified the convention. Problems that concerns most of the states that are evaluated in the observation are: denial of the right of collective bargaining for all public servants(19 countries), requirement for trade union organization to represent too high a proportion of worker to be recognized or to engage in collective bargaining(11 countries), subordination of collective bargaining to governments economic policy (8 countries), exclusion of certain subjects from collective bargaining (6 countries), submission to compulsory arbitration in certain cases (6 countries), restricting the right of the parties to determine level of bargaining(3 countries), and prohibition of collective bargaining by specific categories of workers in private sector (2 countries) or by federations and confederations.¹¹⁴

Concerning the application of Convention No.111, the Committee of Experts noticed that despite of the fact that the convention provides multiple means of interpretation, some states that chose to implement the standards through adopting national legislation leave out some grounds of discrimination stated in the convention while adopting national legislations.¹¹⁵

Although the equality of opportunity and treatment requires a general policy that incorporate evaluating scheme of permanent and progressive process of promotion of equality which will base its implementation the principle of law and practice, some states do not have national policy to promote equality.¹¹⁶

With the application of convention No 100 by states that has ratified it, the Committee of Experts has observed: exclusion of certain categories of workers, difference in the understanding the principle 'equal remuneration for of work equal

¹¹⁴ *Id.*, at 30-31

¹¹⁵ See, *supra* 95,206

¹¹⁶ See, Constance Thomas and Yuki Horii, *Equality of Opportunity and Treatment in Employment and Occupation*, Fundamental Rights at Work and International Labour Standards, ILO, Geneva, 82(2003)