



Possible influence of the international labour organization's standards on some provisions of the African charter

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Abstract

This Paper examines the possible influence of the International Labour Organization (ILO) on the African Charter. It argues that (based on some indications herein) that the ILO and some of its standards and procedures may have influenced some portions of the African Charter as a right document. And that the guarantee of some labour rights and other obligations by state members in the Charter seems to suggest a possible influence of the ILO on it. Several factors were used to support this assertion amongst which are: the African Charter has been empowered to adhere to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the United Nations (the ILO being one of its specialised agencies); earlier existence of the ILO (since 1919) and some other obligations prescribed for state members of the ILO, same obligations and procedures which are also in the African Charter.

Keywords: African charter, international labour organization, standards, labour rights, workers' rights, influence, procedure, commission

Introduction

The ILO was created in 1919, as part of the Treaty of Versailles that ended World War I, to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice. There was keen appreciation of the importance of social justice in securing peace, against a background of exploitation of workers in the industrializing nations of that time. There was also increasing understanding of the world's economic interdependence and the need for cooperation to obtain similarity of working conditions in countries competing for markets. Thus, the driving forces for ILO's creation arose from security, humanitarian, political and economic considerations. Summarizing them, the ILO Constitution's Preamble says the High Contracting Parties were 'moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world...'

Regarding the African Charter, the idea of drafting a document establishing a human rights protection mechanism in Africa was first conceived in the early 1960's. At the first Congress of African Jurists, held in Lagos, Nigeria in 1961, the Congress adopted a declaration otherwise referred to as the 'Law of Lagos' calling on African governments to adopt an African convention on human rights with a court and a commission. However, at the time African governments did not make serious efforts to promote this concept.

The Charter establishing the Organisation of Africa Unity (OAU) now African Union (AU) imposed no explicit obligation on member states for the protection of human rights. The OAU founding Charter only required states parties to have due regard for human rights as set out in the Universal Declaration of Human Rights in their international relations. In spite of the absence of a clear human rights mandate, the OAU took bold steps to address a number of human rights issues such as decolonisation, racial discrimination, environmental protection and refugee problems. The continental organisation however ignored the

massive human rights abuses wantonly perpetrated by some despotic African leaders against their own citizens. This was due largely to the OAU's preference for socio-economic development, territorial integrity and state sovereignty over human rights protection, as well as firm reliance on the principle of non-interference in the internal affairs of member states. At the first Conference of Francophone African Jurists held in Dakar, Senegal, in 1967, participants again revived the idea of the Law of Lagos on the need for a regional protection of human rights in Africa. In the Dakar Declaration, adopted after the Conference, the participants asked the International Commission of Jurists to consider in consultation with other relevant African organisations the possibility of creating a regional human rights mechanism in Africa.

The United Nations also facilitated a series of seminars and conferences in a number of African countries. The UN Human Rights Commission set up an ad hoc working group and adopted a resolution calling on the UN Secretary General to provide necessary assistance for the creation of a regional human rights system in Africa. These initiatives of the United Nations with a view to getting African states to consent to the adoption of a regional human rights convention failed. Participants at one of the conferences decided to set up a follow-up committee mandated to carry out visits to African heads of state and other relevant authorities on the need for an African regional human rights system. Subsequent to the committee's visit to Senegal, the then president of Senegal, President Léopold Sédar Senghor, promised to table the proposition before the OAU Assembly at its next session.

In 1979, the Assembly of Heads of States and Government of the OAU meeting in Monrovia, Liberia, unanimously requested the Secretary General of the OAU to convene a committee of experts to draft a regional human rights instrument for Africa, similar to the European and Inter-American human rights conventions. A conference of

twenty African experts presided over by Kéba M'baye was organised in 1979 in Dakar, Senegal. It is important to note that the work of the Expert Committee was greatly influenced by the opening address of the host president, President Senghor, who enjoined the Committee to draw inspiration from African values and tradition and also to focus on the real needs of Africans, the right to development and the duties of individuals. After deliberations for about 10 days, the Committee prepared an initial draft of the Charter.

As a result of the hostility of certain African governments to regional human rights protection in Africa, a conference of plenipotentiaries scheduled for Ethiopia to adopt the draft charter could not take place. This period was the most dramatic in the history of the Charter. The Charter project was clearly under threat. Amidst this strained atmosphere and at the invitation of the OAU Secretary-General, the President of The Gambia convened two Ministerial Conferences in Banjul, The Gambia, where the draft Charter was adopted and subsequently submitted to the OAU Assembly. It is for this historic role of The Gambia that the African Charter is also referred to as the 'Banjul Charter'. The Banjul Charter was finally adopted by the OAU Assembly on 28 June 1981, in Nairobi, Kenya. After ratifications by the absolute majority of member states of the OAU, the Charter came into force on 21 October 1986. By 1999, the African Charter had been ratified by all the member states of the OAU. The paper is divided into several sections: Section 1 is the introductory history of both the ILO and the African Charter. The indications of possible influence of the ILO on the African Charter is the focus of section 2. Section 3 examines the procedures prescribed in the ILO Constitution for non-observance of Conventions some of which are also in the African Charter. Section 4 is the conclusion.

Indications of possible influence of the ILO on the African charter

1. Preamble to the African charter

The Preamble of the of the African Charter reaffirms the obligation of the African People by the African Charter to adhere to "... the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the United Nations..." and also the African Commission is mandated to draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the present Charter are members. Mention of "instruments adopted by the specialized agencies" includes the ILO being one of the specialised agencies of the United Nations (UN). Perhaps this is what influenced the inclusion of some labour rights contained in the ILO standards and obligations in the ILO Constitution in the African Charter.

2. Early existence of the ILO

The ILO has existed since 1919 and first projected the idea of rights in its Conventions beginning with Hours of Work

(Industry) Convention (No.1) 1919. The African Charter was drawn up much later being adopted by the Organization of African Unity (OAU) now known as African Union (AU) on 28th June 1981 and came into force in October 1986 and also projecting the idea of rights. Also, the idea and right to freedom of association had been recognized in ILO jurisprudence before the African Charter (which also provides for freedom of association) was drawn up. The African Charter like the ILO also guarantees freedom of association. While the concept of freedom of association in ILO conventions 87 and 98 is more detailed, that in the African Charter is rather terse. Also, while freedom of association in ILO conventions 87 and 98 cover "workers and employers" only, that in the African Charter covers "every individual" and is thus wider in its application. Furthermore, while ILO Conventions and Recommendations are couched in the language of rights (though restricted to labour), the African Charter went beyond labour and social rights to include political, civil, economic and development rights in one document. Thus, the scope of rights provided in the African Charter is much wider than that in ILO standards.

3. Guarantee of some workers' rights in the African Charter

a. Freedom of association

A further possible influence of the ILO on the African Charter is demonstrated in the inclusion of some labour rights in it. Particularly freedom of association which is a key labour right. In international law, freedom of association is accorded a special status. Aspects of the right are protected in a range of ILO Conventions, chief amongst these are: Conventions 87 (1948) and 98 (1949), which set out in detail the international standards on freedom of association. In addition, all ILO Members are regarded simply by virtue of their membership of the ILO and acceptance of the ILO Constitution as being bound to respect, to promote and to realize, freedom of association. Freedom of association is also guaranteed in the African Charter. Others include the right to work under equitable and satisfactory conditions and equal pay for equal work. Regarding freedom of association, Article 10 (1) of the African Charter provides that "Every individual shall have the right to free association provided that he abides by the law". This provision can be understood to cover workers and trade unions because of the use of the phrase "every individual." It is important to note that the foregoing provision is terse when compared to ILO Conventions 87 and 98 which are more detailed. Nevertheless, it is usually interpreted by the National Industrial Court of Nigeria (NICN) in the light of freedom of association contained in section 40 of the Constitution and ILO Conventions 87 and 98 so that freedom of association under the African Charter has no separate interpretation from the interpretation of it under the Constitution and ILO Conventions 87 and 98. Also, the NICN will usually cite the African Charter as an additional source of law on freedom of association with no separate interpretations. Thus, the NICN interprets freedom of association in the light of all Nigerian legislations and ILO Conventions (87 and 98) which guarantee freedom of association. It is important to note that freedom of association was already

enshrined in ILO Conventions 87 (1948) and Convention 98 (1949) before the African Charter was drawn up in 1981 suggesting a possible influence of including freedom of Association in the African Charter. freedom of association in the African Charter is understood to be a labour right and civil right.

b. Right to safety in the working environment

Article 4(1) & (2) ILO Occupational Safety and Health Convention (No.155) 1981 which provides for occupational safety and health in the working environment may possibly have influenced “the right to work under equitable and satisfactory conditions” contained in Article 15 of the African Charter. The reason I say this is that the idea of occupational safety has been enshrined in the ILO Occupational Safety and Health Convention (No.155) 1981 before the African Charter.

c. Right to equal remuneration

Article 2(1) of ILO Equal Remuneration Convention (No.100) 1951 has guaranteed the right to receive equal pay for equal work since 1951. This right may possibly have also influenced the inclusion of right to receive equal pay for equal work in Article 15 of the African Charter. It is important to note that just as the ILO Constitution has prescribed steps to be taken in the situations of non-observance of ILO Conventions, the African Charter also provide some procedures for monitoring observance of the rights enshrined in the African Charter. Again, this suggests a likely influence of the ILO on the African Charter.

4. Membership

Most African Member States in the ILO are also members of the African Union that ratified the African Charter. Out of the 53 African countries that have ratified the African Charter, 49 are also members of the ILO suggesting that their link or relationship with the ILO may have led to the idea of drawing up a regional document on rights.

5. Obligations of state parties of the ILO

a. State members to take measures at the national level to ensure compliance of ILO conventions

As in the ILO, state parties of the African Charter are obliged to take measures to ensure compliance of the African Charter. By Article 19(5)(b) of the ILO Constitution, each state member of the ILO is obliged within the period of one year at most from the closing of the session of the International Labour Conference (ILC), or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the (ILC), bring a Convention before the national authority or authorities within whose competence the matter lies, for the enactment of legislation or other action. Similarly, Article 26 of the African Charter enjoins state parties to the Charter to guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter. Also, States parties to the African Charter are under duty to promote and ensure

through teaching, education publication and respect for the rights and freedoms contained in the African Charter and to ensure that the freedoms and rights as well as corresponding obligations and duties are understood. This also suggest a possible influence of the ILO on the African Charter.

b. Regular reporting on measures taken on conventions

In Article 22 of the ILO Constitution, member states are required to report annually on “the measures which it has taken to give effect to the provisions of conventions to which it is a party.” similarly African member countries which have ratified the African Charter are also required in Article 62 to submit every two years a report to the African Commission on the measures taken to give effect to the rights guaranteed in the African Charter. The difference between the ILO and the African Charter in this regard is that while reporting in the former is annual, in the latter it is biennial. This also suggests a possible influence of the ILO on the African Charter.

Procedures for non-observance of ILO conventions by state members

The ILO Constitution has prescribed some procedures to be taken in situations where a state member fails to implement a Convention which it had ratified. Similar procedures are also prescribed by the African Charter. And this also suggest a possible influence of the ILO on the African Charter. The ILO Constitution has several procedures for non-observance or non-compliance by member states of ILO Conventions same also is the African Charter. The prescription of similar procedures in the African Charter indicates a possible ILO influence. The procedures are as follows:

Firstly, representation may be made under Article 24 of the ILO Constitution to the Governing Body by workers’ or employers’ organisations complaining that a Member State has failed to implement a Convention which it has ratified. The Governing Body then invites the government to make such statement on the subject as it thinks fit. If the Governing Body received no statement within a reasonable time, or if the statement when received is not deemed to be satisfactory by the Governing Body, it publishes the representation and the statement.

Secondly, Article 26 of the ILO Constitution provides for a complaint procedure, reserved for the most serious cases of failure to observe ratified Conventions. Complaints may be initiated by a State that has ratified the Convention against another Member State that has ratified the Convention or by the Governing Body either of its own motion or on receipt of a complaint by any delegate to the International Labour Conference (ILC). This may result in the establishment of a Commission of Inquiry. The Commissions were originally intended to be tripartite, but in practice, experts of high legal standing are appointed. This procedure was to be used in the 1990s against Nigeria in respect of violations of the freedom of association but was later suspended when the ILO later decided to send a direct contact mission to Nigeria. When in any situation, a Commission of Inquiry is set up; the step in Article 33 of the ILO Constitution follows. It provides that: In the event of any Member failing to carry out within the time specified the recommendations if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the

Governing Body may recommend such action as it may deem wise and expedient to secure compliance.

Unlike the observations of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the complaint procedure under Article 26 and the report of a Commission of Inquiry is the only way in which a legally binding determination can be made that a member has breached its obligations under a Convention. Most observations of CEACR are either a general restatement of principles or requests to governments to conform to principles of freedom of association. The findings of the Commission of Inquiry becomes binding when the member state agrees explicitly to accept them or abstains from referring the matter to the International Court of Justice under article 29 of the ILO Constitution. Failure to appeal means that the findings cannot be re-opened; the only issue is how to implement them. Although Article 33 stipulates that ‘...the Governing Body may recommend such action as it may deem wise and expedient to secure compliance’, there is only one recorded case of such action taken by the ILO to ‘secure compliance’ in its almost 100 years of existence. Similarly, the African Charter has procedures for non-observance or non-compliance by member states of the African Charter. Again, this suggests a possible influence of the ILO on the African Charter. The procedure adopted includes:

1. Establishment of a Commission known as “African Commission on Human and peoples’ Rights (hereinafter known as the Commission)”

The function of the Commission includes promotion and protection of human and peoples’ rights in Africa, particularly:

- To collect documents, undertake studies and researches on African problems in the field of human and peoples’ rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights, and should the case arise, give its views or make recommendations to Governments;
- To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislations and
- To co-operate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.

2. Communication and investigation in situations where member States are believed to have violated the provisions of the Charter

If a state party to the Charter has good reasons to believe that another State party has violated the provisions of the Charter, it may draw by written communication, the attention of that State to the matter. This communication can also be addressed to the Secretary General of the African Union and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved. Also, the Commission may ask the States concerned to provide it with all relevant information. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation. The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged,

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples’ Rights, the Commission shall prepare, within a reasonable period of time, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government. While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful. It is important to note that for the purpose of achieving its mandate or function the Commission is empowered to draw applicable principles from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations (of which the ILO is one).

Conclusion

The Paper focuses on the influence of the ILO and some of its standards on the African Charter. It argues that the ILO may possibly have influenced some provisions of the African Charter as a right document. For this argument, it draws strength from the following indications: Firstly, the Preamble of the of the African Charter reaffirms the obligation to adhere to” ... the principles of human and peoples’ rights and freedoms contained in the declarations, conventions and other instrument adopted by the United Nations...” and various instruments adopted within the specialized agencies of the United Nations of which the ILO is one of them, The wording of the Preamble seems to suggests a possible influence of the ILO on the African Charter since it affirms to adhere to the instruments of the specialised agencies of the United Nations. Perhaps this is why some ILO standards (Freedom of Association Conventions 87 (1948) and 98 (1949), Equal Remuneration Convention (No.100) 1951. Occupational Safety and Health Convention (No.155) 1981 are guaranteed as rights in the African Charter. Secondly, the ILO was in existence (since 1919) before the African Charter was drawn up as a right document (1981). And also, first projected the idea of rights in its Conventions beginning with the Hours of Work

(Industry) Convention (No.1) 1919 and may thus have influenced the inclusion and guarantee of some labour rights such as freedom of association, right to equal remuneration, right to safety in the working environment in the African Charter. Thirdly, most African Member States in the ILO are also members of the African Union that ratified the African Charter. Out of the 53 African countries that have ratified the African Charter, 49 are also members of the ILO suggesting that their link or relationship with the ILO may have led to the idea of drawing up a regional document on rights. Fourthly, state members of the ILO are obliged to take measures to ensure compliance to ILO Conventions and also report regularly on measures taken. Similarly, State Members of the African Charter are under duty to ensure protection of the rights guaranteed and to report regularly on measures taken. This also suggests a possible influence of the ILO on the African Charter. Finally, the ILO Constitution has prescribed some procedures to be taken in situations where a state member fails to implement a Convention which it had ratified. Similar procedures are also prescribed by the African Charter. And this also suggest a possible influence of the ILO on the African Charter.

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4. African Commission on Human and Peoples' Rights: History of the African Charter, <http://www.achpr.org/instruments/achpr/history/> accessed 9th March, 2023.
5. African Commission on Human and Peoples' Rights: History of the African Charter.
6. Ibid
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10. Ibid
11. A body or Committee empowered to promote the rights in the Charter. See Articles 30-46 of the African Charter.
12. African Charter, Article 60, <https://au.int/sites/default/files/treaties/> accessed 9th March, 2023.
13. The African Union (AU) replaced the former Organization of African Unity (OAU) in May 2001 after the Constitutive Act (Organisation of the African Union Constitutive Act of the African Union, July 2000) came into force and was launched in July 2002 in Durban, South Africa. The main difference between the OAU and the AU is that while the OAU was seen as a union of leaders of Africa, the AU is conceived as a union of Africa's peoples. This is demonstrated in the AU's Constitutive Act (Articles 17 and 22) which includes institutions for people's participation such as the Pan African Parliament and the Economic Social and Cultural Council (ECOSOCC) See Southern African Regional Poverty Network, "From OAU to AU and NEPAD: Regional Integration Processes in Africa and African Women", www.sarpn.org/documents/d0000608/ accessed 9th March, 2023.
14. In its preamble, the ILO Constitution of 1919 set forth the principle of freedom of association, see also, the Declaration of Philadelphia in 1944, the Freedom of Association and Protection of the Right to Organize Convention (No.87) 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949.
15. African (Banjul) Charter, Article 10.
16. ILO Declaration on Fundamental Principles and Rights at Work, para, 2.
17. African (Banjul) Charter on Human and Peoples' Rights, Article 10(1).
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30. Bob Hepple, Labour laws and Global Trade supra.
31. Ibid.
32. Ibid.
33. Except in the case of Myanmar (Burma) where action was taken to eliminate forced labour.

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35. African Charter, Article 45 (1)(a).
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