

**FACT-FINDING MISSIONS OR OMISSIONS: A CRITICAL ANALYSIS OF THE AFRICAN
COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND LESSONS TO BE LEARNT FROM
THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

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DEDICATIONS

To my family

And to all victims of human rights violations in Africa.

DECLARATIONS

I, **TARISAI MUTANGI**, do hereby declare, certify and affirm that this research is my own work and that to the best of knowledge, has not been submitted or is currently being considered either in whole or in part, in fulfilment of the requirements of a Masters of Law Degree at any other institution of learning. The ideas used herein have been taken from different scholars, but have been presented in a manner that has not been taken from other literature hence it is deemed original. I assume personal responsibility to the correctness of facts contained herein and to the presentation thereof.

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When I advised my mother that I had been admitted to the LLM programme in South Africa, she reminded me of a wish I had made at the age of twelve, that I wanted to be a lawyer and help those who could not speak for themselves, orphans and widows. Little did I know that I had to wait for fifteen years to realise my dream. Accordingly, I extend inexplicable gratitude to the Centre for Human Rights for being a vehicle through which my dream was made flesh. Surely those who do not dream may miss the privilege of knowing their destiny beforehand.

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ABBREVIATIONS

ACHPR	African Commission on Human And Cultural Rights and Peoples' Rights.
AHSG	Assembly of Heads of State and Government.
AU	African Union.
CAT	Convention Against Torture, Inhumane and Degrading Treatment.
CCPR	Covenant on Civil and Political Rights.
CEDAW	Convention on the Elimination of Discrimination Against Women.
CERD	Convention on the Elimination of Racial Discrimination.
CESCR	Covenant on Economic, Social and Cultural Rights.
CRC	Convention on the Rights of Children.
ECOSOC	Committee on Economic, Social And Cultural Rights.
FFC	Fact-finding Commission.
FFCC	Fact-finding and Conciliation Commission on Freedom of Association.
GOZ	Government of Zimbabwe.
IACHR	Inter-American Commission on Human Rights.
ILA	International Law Association.
ILC	International Law Commission.
ILO	International Labour Organisation.
OAS	Organization of American States.
OAU	Organisation of Africa Unity.
SC	Special Commission.
UN	United Nations

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CHAPTER ONE: BACKGROUND AND INTRODUCTION

1.0 Introduction

The credibility of contentious decisions by judicial or quasi-judicial bodies entirely depends on how accurately facts have been applied to relevant legal provisions. Allegations of human rights violations preferred against state parties to international instruments are virtually factual in nature. To state that something happened is a fact, but to explain how it happened is evidence. Both elements are essential in a contentious dispute. It is for this background that treaty monitoring bodies should not only base decisions on the facts presented before it, but should attempt to ascertain the veracity of the allegations against a sovereign state before committing itself to a finding. Consequently, any decisions by judicial or quasi-judicial body not based on elaborate facts are fundamentally flawed and incurably bad. Regional and international treaty monitoring bodies ascertain allegations of facts through fact-finding missions and other processes, which differ in procedure, but are regulated by same principles. Consequently, the main focus of this study shall be the conduct of fact-finding missions by the African Commission on Human and Peoples' Rights (the ACHPR) drawing a comparison with the Inter-American Commission on Human Rights (the IAHR).

The main motivation behind this study, though, is the reaction and response of the Government of Zimbabwe (the GOZ) to the ACHPR report in its 17th Annual Activity Report¹, the publication of which was postponed by the AU Heads of State and Governments (AHSG) on the basis that the GOZ argued that it had not been offered a chance to respond to the findings contained therein.² Pursuant to that argument, the AHSG unanimously noted;

...that some ACHPR reports on the State Parties are presented without their observations; and invites ACHPR to ensure that in future its mission reports are submitted together with the comments of the State Parties concerned and to indicate the steps taken in this regard during the presentation of its annual activity report.³

In view of the fact that indeed the mission report contained in the 17th Annual Activity Report did not have comments by state parties (Zimbabwe) attached to them, the AHSG unanimously decided

¹ Adopted by the ACHPR during the 35th Ordinary Session in June 2004, Banjul, The Gambia. See Assembly/AU/Dec.49 (III), Doc.EX.CL.109/(V).

² The publication of the 17th Annual Activity Report was postponed during the Third Ordinary Session of the African Union in July 2004, Addis Ababa, Ethiopia. However, it was subsequently published following a decision by the Africa Union during its Fourth Ordinary Session in March 2005, Abuja, Nigeria.

³ N (1 above) para 4.

to suspend the publication of the report pending the annexation of comments by the state parties concerned.⁴

In its response, the GOZ raised numerous critical issues relating to how the ACHPR conducted the 2002 fact-finding mission in Zimbabwe. It should be noted that the Zimbabwe mission was not the first mission but a culmination of others, which include Nigeria⁵, Mauritania⁶, Sudan and Togo. Such reports are subject to review in the course of this analysis. Arguably, some queries were apparently sustainable thereby questioning the efficacy of the procedure adopted by the ACHPR in conducting fact-finding missions. For instance, the GOZ strongly raised the issue of the ACHPR's limited visits and consultations arguing that the few people who were contacted by the ACHPR would not, by any standards, be representative of the situation and population of Zimbabwe.⁷ Furthermore, the GOZ contended that the time spent was too short to be effective given the degree of tarnishment of Zimbabwe by the international community.⁸

The Non-Governmental Organisations that immensely contributed to the limited success of the fact-finding mission were up in arms with the ACHPR for the disclosure of their identity in the report as this led to their harassment by the GOZ for providing such information to the ACHPR. The harassment was made manifest through unwarranted requirements to disclose their donors and to show how such funds were spent. This executive conduct has no legal basis at all in the Zimbabwean legal system. The GOZ also threatens these organisations with the repressive Non-Governmental Organisations Bill, the promulgation of which has been put on hold. It is quite clear that the effect of such conduct by the ACHPR will seriously hamper future participation of civil society in bringing human rights violations before the ACHPR, as they were exposed to executive tyranny. These are but some of the issues that arose around the Zimbabwe mission and which lead themselves to a critical analysis of the manner in which such missions are conducted.

Therefore, the aims of the study are to explore the origin, nature and purpose of fact-finding missions, to explore what is currently on the ground, to expose the inherent deficiencies in the current practice, which compromise the missions' capacity to promote and protect human and peoples' rights. Having identified the shortcomings, lessons and inspiration will be drawn from the

⁴ Paragraph 5 of the Decision provides that the AHSG "SUSPENDS the publication of the 17th Annual Activity Report in accordance with paragraph 4 above pending the possible observations by the Member states concerned".

⁵ March 1997.

⁶ 19-27 June 1996 and reported and annexed in the 10th Annual Activity Report of the ACHPR.

⁷ Paragraph 2.5 of the Comments of the Government of Zimbabwe.

⁸ N (1 above) paragraph 3.2.

practice and rules of procedure of other regional and international treaty monitoring bodies, particularly the IACHR.⁹

The starting point of the analysis shall be to identify the various fact-finding related issues that arose in the response of the GOZ to the ACHPR report. A survey of the reaction and response of other countries in which similar fact-finding missions were conducted, shall be carried out to gauge the consistence or otherwise in the ACHPR's practice. It shall be strongly suggested that the ACHPR should substantially borrow from other human rights systems if necessary.¹⁰ After closely observing these issues, the study will come up with a position and firm recommendations to the ACHPR in terms of which its practice can be revamped for the achievement of an effective and progressive promotion and protection of human and peoples' rights as contemplated by the African Charter.

1.1 Research question(s)

- What are the origin, nature and forms of fact-finding missions?
- What are the strengths and shortcomings in the ACHPR's fact-finding practice?
- What can be borrowed from other regional and international treaty monitoring bodies for an overall improvement in the practice in order to achieve maximum benefit from fact-finding missions in the protection of human rights?

1.2 Research method

Recourse shall be made to non-empirical methods taking the form of literature review whereby writings by experts on the non-African human rights systems shall be resorted to so as to achieve a lucid comparison between the ACHPR and the IACHR. To that end, the work shall adopt a comparative approach.

⁹ It derives its legal basis from Chapter VI of the American Convention on Human Rights (Adopted by the Organisation of American States on 22 November 1969).

¹⁰ R Murray, "Serious or Massive Violations under the African Charter on Human and Peoples Rights: A Comparison with the Inter-American and European Mechanisms" (1999) 2 *Netherlands Quarterly of Human Rights* 126.

1.3 Literature review

Indeed much patched work has been written on how efficiently the ACHPR conducts fact-finding missions. Virtually, no literature exists acknowledging state reporting and individual complaints as forms of fact-finding. Consequently, one has to endure in order to get a thorough, continuous and comprehensive critical work on this subject by assembling paragraphs from different scholars to come up with something substantial on the subject.¹¹ Remedially, this study aims to consolidate all possible debates on the nature of fact-finding practice, fully discussed and identifying issues so that readers may join in the debate well informed.

However, Rachel Murray writing with Malcolm Evans,¹² Evelyn Ankumah¹³ and Frans Viljoen¹⁴ are some of the scholars in the African human rights system, who have been highly critical of the ACHPR practice in individual complaints procedure and state reporting. Their literature insists on the ACHPR reforming its practice for a better human rights protection regime in Africa. In the UN system, Ramcharan,¹⁵ Anne Bayefsky,¹⁶ Ermorca,¹⁷ among others, wrote widely on the universally accepted general principles on investigative fact-finding, which should be codified to enhance international harmony in human rights fact-finding. Diana Shelton¹⁸ and Edumundo Vargas¹⁹ have detailed literature germane to this study writing on the practice in the Inter-American system. The intercourse of all this literature will guarantee an incisive comparative study as reflected by the chapter overview below.

1.4 Chapter overview

This study has four chapters. Chapter one constitutes introductory remarks putting the study into context and the justification thereof. Chapter two explores the nature, origin, forms and importance of fact-finding in human rights protection. It searches for the underlying principles governing

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- ¹¹ R Murray "Evidence and fact-finding by the ACHPR", in M Evans and R Murray (eds) (2000). See generally the whole edition.
- ¹² M Evans and R Murray Eds (2000) *The African Charter on Human and Peoples' Rights: The system in Practice 1986-2000*.
- ¹³ EA Ankumah (1996) *The Commission on Human and Peoples' Rights: Practices and Procedures*.
- ¹⁴ F Viljoen "Admissibility Requirements under the African Charter" in M Evans & R Murray (eds) (2000) 78.
- ¹⁵ BG Ramcharan *International Law and Fact-finding in the Field of Human Rights*, Ramcharan Eds (1982).
- ¹⁶ A F Bayefsky (eds) (2000), *The UN Human Rights Treaty System in the 21st Century*.
- ¹⁷ Ermorca, F "International Enquiry Commissions in the Field of Human Rights" (1968) *Human Rights Law Journal*, 186.
- ¹⁸ D Shelton, "Utilisation of Fact-finding Missions to Promote and Protect Human Rights: The Chile Case", 2 *Human Rights Law Journal* (1981) 1.
- ¹⁹ Vargas EC, "The Visits on the Spot: The Experience of the Inter-American Commission on Human Rights", in Dr BG Ramcharan (eds) (1982) *International Law and Fact-finding in the Field of Human Rights*.

credible and plausible fact-finding. Chapter three analyses the ACHPR fact-finding practice to see what is there and critically compare it to the IACHR, UN and ILO practice. It aims at demonstrating the strengths and weaknesses of the African system. Chapter four revisits the weaknesses unearthed in chapter three and proposes recommendations for overall improvement. The study concludes by soliciting draft rules of procedure from the general principles explored in chapter two combined with lessons learnt from other systems in chapter three. The model fact-finding rules of procedures are marked Annexure A at the end of this work.

CHAPTER TWO: THE NATURE, ORIGIN, AND PURPOSE OF FACT-FINDING MISSIONS

2.0 Introduction

The 21st Century has been earmarked as the age of rights, that is, the era of effective implementation of human rights.²⁰ Clearly this is a departure from previous eras wherein much more emphasis was devoted towards exploring the normative content of rights. Against this background, fact-finding has become pivotal to achieving this 21st Century goal since it has turned out to be ancillary to the full settlement of human rights violations disputes. This chapter explores the evolution and the nature of fact-finding mission to consider how well equipped they are to contribute to the attainment of this goal. It ends with a thorough analysis of the purposes as well as the procedural aspects that facilitate the exercise of fact-finding.

2.1 Defining fact- finding

It is important to explore, in the first instance, the normative definition of this concept in its non-judicial context before venturing into its origin. Regrettably, fact-finding is one concept that defies a precise definition. A renowned early writer posed a question: “What does the word ‘facts’ mean?”²¹ He went on to observe that public opinion understands fact-finding as an inquiry where the elements of a disputed state of affairs are carefully discovered in an atmosphere free from bias. The objective of such an exercise is to place a competent organ in a position where it reasonably makes informed and balanced decisions, but not holding it responsible for the facts upon which the decisions are based.²²

The American Law Institute Model Code of Evidence defined “finding a fact” as a process through which one determines that the existence of a fact is more probable as opposed to its non-existence, that is, evidence of more convincing force than a mere allegation of fact.²³ The definitions propounded above suggest the involvement of someone in the verification of facts or elements or part thereof. Such individual or group of individuals, institution or organ, is called a fact-finding mission on an on-site investigation.

Critical observations could be made from the preceding definitions, namely, that the existence of a dispute is material to the establishment of a fact-finding mission. A mere allegation is insufficient to

²⁰ L Henkin, *The Age of Rights* (1990).

²¹ F Ermorca, “Partiality and Impartiality of Human Rights Enquiry Commissions of International Organisations”.
Rene Cassin *Amicorum Discipulorumque Liber 1* (1969), 74.

²² As above.

²³ American Law Institute Model Code of Evidence (1942) 71.

set a fact-finding mission in motion for the elucidation of facts²⁴ or more accurately, to ascertain facts impartially.²⁵ As alluded to earlier, such ascertainment of facts in their elaborated form enables an organ bestowed with authority to make the meritorious decisions in a credible manner to the satisfaction of the parties concerned and in the public interest.

However, the preceding definitions do not clearly address the manner in which fact-finding is conducted, that is, whether the process involves the physical presence of the members of the mission on the “site” from where allegations of human rights violations emanated. For this milieu, the American version of “on-sites investigations” also needs a critical examination for some inspiration. In a nutshell, “on-site” explains the “what” and “where” elements of the process, meaning “what is being done and where?” It is submitted that “on-site” depicts an examination *in situ* or *in loco* in terms of which an authority physically attends at the scene to get acquainted with the facts subject to a dispute.²⁶ To this end, an accurate definition would be achieved by combining the meaning of “fact-finding” as well as that of “on-site investigations”, which is more elaborate, definitive and canvasses the process and the activities carried out.

2.2 The evolution of fact-finding in the UN human rights system

Whilst the evolution of fact-finding is far from clear, scholars²⁷ are sure that it did not originate within the human rights domain, but emanated from the Hague Conventions of 1899 and 1907, wherein the concept was simply known as an “inquiry”.²⁸ The first Hague Convention in 1899 for the Pacific Settlement of International Disputes established an international commission of inquiry, whose role was to carry out fact-finding without drawing any conclusions.²⁹ This marked the origin of the Geneva based fact-finding (traditional fact-finding), as opposed to contemporary human rights fact-finding.

The mandate of the international commission of inquiry was extended in 1904 in the celebrated “Hull” or “Dogger Bank” case³⁰ to include a specific mandate to decide where the fault lay and to ascribe degree of fault to the responsible parties. In other words, the commission was transformed

²⁴ L Oppenheim, *International Law* edited by H Lauterpacht (1952) 13.

²⁵ Goodrich, Hambro and Simons *Charter of the United Nations (1969)*, 261.

²⁶ “In one place’ and ‘at the location’.

²⁷ Ramcharan (n 15 above) 3.

²⁸ UN Document A/5694, para 10.

²⁹ Ramcharan (n 15 above) 4.

³⁰ A commission of inquiry established by an agreement signed on 12 November 1904 to decide the dispute between Great Britain and Russia. The case was celebrated as a turning point in fact-finding since commissions, which previously had no mandate to allocate fault in a dispute, were, for the first time, endowed with such responsibility.

into a quasi-judicial organ. The second Hague conference saw a motion being moved for the drafting of rules of procedure for the commission so as to make its role accurate and reasonably expeditious.

Moreover, competent and more permanent commissions of inquiry were established in terms of the Bryan and other similar treaties between 1913 and 1915.³¹ A further development was that they could now decide on legal issues falling to determination in a dispute. Article 15 of the Covenant of the League of Nations was another landmark evolution of these commissions as it conferred conciliatory functions upon the Assembly and the Council. It followed that the inquiry procedure became the most suitable means by which these organs were fed with information to make final decisions in often highly charged political disputes. The same culture was inherited by the United Nations.³² The proliferation of UN treaty-based bodies has enabled the organisation to pursue fact-finding in a specialised and effective way especially by promulgating rules of procedure, which should serve as the benchmark for all UN bodies implicated in on-site investigations.

2.3 Features and forms of human rights fact-finding

2.3.1 Features

Frans Viljoen³³ and Berti Ramcharan³⁴ concurred on the different forms of human rights fact-finding depending on the purpose for which they have been carried out. The latter writer accentuated the point that human rights fact-finding should always be distinguished from any other fact-finding in international law, especially traditional fact-finding.³⁵ This assertion should obtain notwithstanding the fact that human rights fact-finding evolved from the broader concept of fact-finding in international law.

³¹ As above.

³² The first UN mission ever, the *La Mission d'observation des Nations Unies en El Salvador (ONUSAL)*, was conducted in July 1991 in El Salvador to observe the government in transition. Secondly, in February 1992, a mission called UN Transitional Administration in Cambodia established by the UN. Thirdly, in September 1992, the UN absorbed a OAS – established International Civilian Mission in Haiti called the *Mission Civil Internationale en Haiti*. Fourthly, a human rights verification mission was deployed in November 1994 in Guatemala following peace negotiations. These were the first four UN human rights fact-finding missions; I Martin, "The role of human rights field presence", in A F Bayefsky Eds (2000), *The UN Human Rights Treaty System in the 21st Century*, 97.

³³ Viljoen F "Fact-finding by UN Human Rights Complaints Bodies" (2004) 8 *Max Planck Yearbook of United Nations Law* 1.

³⁴ Ramcharan (n 15 above) 7

³⁵ Ramcharan (n 15 above) 6

2.3.1.1 Remedial

As opposed to traditional fact-finding, human rights fact-finding is not primarily intended to adjudicate or castigate violators of human rights, but to seek a speedy remedial action based on true and corroborated factual background bearing in mind the political exigencies of the situation. Demonising the perpetrating state has never been an objective of human rights advocacy. We will hasten to opine that revealing human rights violations has been used as tool to enforce recommendations against a state through international documentation and embarrassment.³⁶ In the absence of this specific objective, the purpose of human rights fact-finding should remain remedial.

2.3.1.2 Neutrality

Far from the approach of neutrality adopted by international commissions in the pacific settling of political disputes, human rights fact-finding is blatantly partisan in favour of human rights protection. The reasoning advanced in support thereof is that as soon as an international organisation is seized with the matter of the systematic or gross violations of human rights, the ascertainment of facts ceases to be a dispute between the state and its citizens, but becomes a matter of public interest in line with the purposes and principles of the organisation sanctioning that fact-finding exercise.³⁷

It may be further opined that the protection of human rights is or ought to be championed by the UN. To that end, all regional and international human rights treaty bodies protect rights as a consequence of their affiliation to the UN. Consequently, human rights violations attract the attention of the UN and therefore, it attracts the attention of the international community. The European Human Rights Commission brought the argument closer to home when it was quoted to have held that;

Thus public or collective interest was well described by the European Human Rights commission in the instance of a complaint by Austria against Italy. The commission recorded, *inter alia*, that a High Contracting Party, when it refers an alleged breach of the Convention to the commission under article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the commission an alleged violations of the public order of Europe.³⁸

³⁶ Implemented in the European system where the Council of Ministers are specifically tasked to ensure compliance by defendant states with the Court's rulings.

³⁷ Theo. Van Boven, "Fact-finding in the field of human rights", *Israeli Year Book of Human Rights* (1973), para 22.

³⁸ Ramcharan (n 15 above) 7.

2.3.1.3 Inquisitorial vs. Adversarial

It has been strongly argued that human rights fact-finding is purely inquisitorial and not adversarial in line with the notion that there are no parties to a dispute *per se*, save for fact-finding prompted by the individual complaints procedure³⁹ or inter state complaints procedure in terms of the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁰ and the International Covenant on Civil and Political Rights.⁴¹

2.3.1.4 Rules of procedure

Despite their usage over time, most rules applicable to traditional fact-finding do not apply to human rights fact-finding. For instance, no consultation or participation by the accused state is recognised in constituting the commission of inquiry, the commission is not responsible to the parties concerned but to the authoritative organ (for instance, the African Union in respect of the ACHPR) and the report prepared at the end of the mission should contain both findings and recommendations.⁴²

2.4 Forms of fact-finding

Viljoen⁴³ and Ermorca⁴⁴ have observed that fact-finding in the field of human rights falls into the following major categories;

2.4.1 Investigative fact-finding

This is where a monitoring body carries out fact-finding free from restriction on the format, membership and procedure to be adopted by the missions. It involves the physical presence of the mission in the territory of the investigated state. These investigations are common with Charter based bodies, which enjoy freedom from encumbrances, and may be sanctioned by the constituting instruments, for instance, the commissions established in terms of the Charter of the UN. UN treaty bodies embark on such missions; albeit in a limited context as their enabling instruments may provide for a limited scope or may not provide for such missions at all. Ermorca prefers to term this category “institutionalised fact-finding”, reasoning that the authenticity of the

³⁹ The ILO conducts adversarial fact-finding missions prompted by individual complaints filed against contracting states before the Committee of Experts for the Application of Conventions And Recommendations.

⁴⁰ See article 14.

⁴¹ Optional Protocol to the ICCPR, entry into force 23 March 1976, in accordance with Article 9.

⁴² N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry* (1974), 292.

⁴³ Viljoen (n 33 above) 56, where Frans Viljoen observed three distinct categories of fact-finding in the UN system.

⁴⁴ Ermorca postulated a further category, namely fact finding by intergovernmental and non-governmental organisations.

commission's authority is entrenched in the constitutive instrument. The commission adopts a quasi-judicial or judicial nature following submission by state parties to an unqualified accession to an instrument that unequivocally provides for fact-finding.⁴⁵ The procedure and format to be adopted remains a prerogative of the commission. To that end, such a procedure is free from unnecessary clogs and is deemed effectively exhaustive.

It is important to note that a state party acceding to the Convention on the Elimination of Discrimination Against Women (CEDAW) and its Optional Protocol has consented to a real possibility of a thorough investigative fact-finding on its territory should the Committee on CEDAW so decides.⁴⁶ The same is likely to obtain in respect of states that will accede to the Optional Protocol to the Convention Against Torture (CAT).⁴⁷ Arguably, the ACHPR falls into this category given the provisions of article 45 (2) as read with article 30 of the African Charter on Human and Peoples' Rights (African Charter), which, by any standard of interpretation, do not patently provide for fact-finding. However, they do confer on the ACHPR the mandate to "promote human and peoples' rights and ensure there is some protection in Africa."⁴⁸ It is submitted that fact-finding is a component of the protective mandate of the ACHPR hence impliedly provided for in the African Charter without any limitation. To that end, fact-finding by the ACHPR qualifies as institutionalised fact-finding.

The same position should obtain with the IACHR as it is established in terms of the American Convention on the Rights and Duties of Man as well as its statute.⁴⁹ The Statute of the IACHR empowers it to draft its own rules, thus being at liberty to determine how on-site investigations ought to be embarked upon without the institutional limitations that have paralysed the UN treaty bodies, namely human rights instruments that do not provide for fact-finding missions at all or those that restrict the mission from pursuing an independent agenda. For instance, freedom to constitute the commission and to draft the agenda, imposition of restrictive terms of reference and a restrictive budget.⁵⁰

⁴⁵ Ermorca (n 17 above) 186.

⁴⁶ Article 8 of the optional Protocol to CEDAW, A/RES/54/4).

⁴⁷ So far there are three ratifications by Albania, Malta and the United Kingdom. Article 28 (1) provides for twenty ratifications to edge the Optional Protocol into force. Available at <<http://www.unhchr.ch/html/menu2/6/cat/treaties/proratification.htm>> (accessed on 26 August 2005).

⁴⁸ Article 30 of the African Charter.

⁴⁹ Article 18 (g) of the Statute of the IACHR.

⁵⁰ As above

2.4.2 Fact-finding through state reporting (indirect fact-finding)

Such fact-finding arises where an organ or treaty body examines periodic state reports submitted by states in fulfilment of their international obligations as prescribed by the instrument they acceded to. State reporting is arguably the oldest UN treaty monitoring mechanism in the field of human rights. It is indirect because the commission does not go out and seeks the facts on its own. Instead, it assesses the human rights situation in given state by examining the report submitted by the state concerned. This is a critical process as the essence of a report is to demonstrate the human rights situation in a member state and to show what “legislative and other measures” states have implemented in compliance with a treaty. This explains why it has always been submitted that the success of indirect fact-finding entirely depends on the extent to which states are willing to comply with their reporting obligations.

2.4.2.1 The controversy

Scholars have registered their reservations in respect of this form of fact-finding despite its apparent competence.⁵¹ Ermorca has dubbed indirect fact-finding as one that is “without consequence” in its effect.⁵² With due respect, fact-finding through state reports cannot be deemed ineffective considering the immense contribution it has amassed in human rights protection. Human rights commissions take state reporting seriously to the extent that they have unilaterally drafted state reporting guidelines to ensure that there is effective reporting to enable exhaustive assessment of the human rights situation in a given state without being physically present in that state.⁵³ Since 1988, the ACHPR in particular has reiterated that states should be honest to demonstrate the difficulties they are facing in the realisation of rights and freedoms.⁵⁴

Furthermore, shadow reports prepared by civil society, especially NGOs, have gone a long way in ensuring that the commissions and UN Committees are apprised of the accurate human rights situation in a given state.⁵⁵ The ACHPR allows these NGOs audience; wherein they verbally motivate their shadow reports and openly disagree with government delegates to the benefit of the ACHPR. This is a safety measure to minimise bias, intentional misdirection or diffused reporting by some devious states. The report is bound to cover all spheres of human rights and freedoms in a state, namely, child rights, women rights, labour, civil and political rights, socio-economic and

⁵¹ Ramcharan (n 15 above) 8.

⁵² As above.

⁵³ The ACHPR adopted the initial draft in 1988, amended for clarity in 1988 known as the Amendment of the General Guidelines for the Preparation of Periodic Reports by States Parties, Doc/OS/27 (XXIII).

⁵⁴ “Status of submission of state reports as of May 2003”, available at
< http://www.achpr.org/english/_info/status_submission_en.html (accessed on 18 August 2005).

⁵⁵ A Motala “Non-governmental Organisations in the African System” in R Murray & m Evans Eds (2000) 249.

cultural rights.⁵⁶ Scanty reports would put the ACHPR in a difficult position to assess such reports and these bodies; the UN Human Rights Committee (UNHRC) in particular, loathes such reports, as was the case with the report submitted by Syria in 2001.⁵⁷ In that report the UN Human Rights Committee expressed its displeasure in the lack of information on “human rights situation in actual fact”.⁵⁸

All these safeguards are put in place to make sure that the ACHPR examines a particular report with a substantially true picture of the real situation in the state concerned. The main objective in drafting guidelines and allowing audience to NGOs is one; that is to ensure that they rely on elaborate facts, the essential aim of fact-finding (elucidation of facts). In a bid to ensure that the exercise is worthwhile, the commissions always insist on states, when submitting subsequent reports, to give a feed back on how they have implemented recommendations made in preceding reports. Therefore, indirect fact-finding will only be “without consequence” where there is no effective follow up mechanism.

2.4.3 Complaints based fact-finding (indirect fact-finding)

It is where a treaty body gets acquainted with the general human rights outlook in a state through the general impression created by individual communications lodged. The more the complaints against one state the clearer the human rights situation in the sued state. Most treaty bodies handle individual complaints of human rights violations by member states in terms of which they attempt to settle a dispute between a citizen and the state. To that end, four of the seven UN treaty bodies entertain such complaints, namely, the UN Human Rights Committee,⁵⁹ the Committee on CEDAW,⁶⁰ the Committee on CERD,⁶¹ and the Committee on the Convention Against Torture.⁶²

⁵⁶ A critical question regards the suitability or otherwise, of fact-finding in the field of socio-economic and cultural rights as this would, it was argued, allow commissions to plunge into the suitability of economic policies, which, by their very nature, are prerogatives of the incumbent government. This is in line with a notion in international law that a state is at liberty to choose its own economic, political and social system such that fact-finding report should not tread in this domain. Dr Ramcharan, however, observes in conclusion, and we agree, that “ a fact-finding body cannot ignore the state of enjoyment or lack thereof, of socio-economic and cultural rights in a country which is the subject of its investigation and therefore, without prejudice to the principle stated immediately above, it is proper that it should point out, if the evidence is clear, that certain policies followed by the government have resulted in the deteriorating economic and social conditions”. Ramcharan (n 15 above) 10.

⁵⁷ Doc. CCPR/CO/71/SYR (Concluding Observations) of 24 April 2001.

⁵⁸ N (57 above) para 1.

⁵⁹ The Optional Protocol to the CCPR provides for the individual complaint mechanism. Only a party to the Protocol is subject to the Committee’s jurisdiction.

⁶⁰ Article 1 of the Optional protocol to CEDAW entitles the committee to handle such complaints.

⁶¹ State parties are only bound upon lodging a declaration in terms of article 24 of CERD.

The ACHPR is axiomatically empowered to handle, in the main, inter-state communications,⁶³ as well as individual communications referred to as “other communications”.⁶⁴ With similar force, Chapter VII of the American Convention of Human Rights empowers the IACHR to deal with individual complaints.⁶⁵

2.4.3.1 The role of facts

More often than not, complaints are filed with these treaty bodies in written form.⁶⁶ The enabling instruments provide for a specific procedure to be adopted in the consideration of such communications. If not, then the rules of procedure would. In a nutshell, the general procedure is that a complaint is registered with the secretariat upon meeting certain conditions. The admissibility stage follows where certain communications may be dismissed on the basis of being “unsubstantiated”. This marks the beginning of the importance of elucidated facts in order to convince the treaty body that the communication is based on real facts even before the ACHPR deals with the merits of the matter.⁶⁷ Not much emphasis is needed to state that a quasi-judicial or judicial body requires facts to reach an informed decision. Article 56 (4) of the African Charter outlines admissibility criteria. For instance, a communication will be inadmissible where it is exclusively based on information obtained from the mass media.⁶⁸ This provision serves to show how important concrete facts are in the determination of human rights violations disputes.

Consequently, it is at this stage that the body needs concrete evidence, with the primary responsibility vesting in the parties to present facts to motivate their respective motions. It is only the CAT in article 22 (4) that admits unrecorded information supplied by anyone, on which to base its findings.⁶⁹ The Committee’s Rules of Procedure invite complainants and or their representatives to provide “further clarifications or to answer questions on the merits of the complaints”.⁷⁰ Viljoen laments that notwithstanding these robust provisions, which are permissive of fact-finding, the Committee on the CAT is still to exploit them.⁷¹ The above boils down to the conclusion that the

⁶² Article 22 of the CAT empowers the Committee to deal with individual complaints or inter-state complaints.

⁶³ Articles 47-54 of the African Charter provide for “communications from states”.

⁶⁴ Articles 55-59 of the African Charter. See also Chapter XVI of the ACHPR Rules of Procedure.

⁶⁵ Also article 45 of the American Convention on Human Rights.

⁶⁶ C Tomuschat, *Human Rights Between Idealism and Realism* (2003) 179.

⁶⁷ See article 56 of the African Charter and article 46 of the American Convention on Human Rights.

⁶⁸ For a complete interpretation of article 56 (4) of the African Charter, see *Jawara v The Gambia* Communications No.147/95 and 149/96.

⁶⁹ Article 7(1) of Optional Protocol to CEDAW reflects the same provisions. The ICCPR and CERD, for instance, insist on written information.

⁷⁰ Rule 111(4) of the CAT Committee Rules of Procedure, Doc. CAT/C/3/Rev.4 of 9 August 2002.

⁷¹ Viljoen (n 33 above) 63.

success of this form of fact-finding is in the number of the complaints against each state as well as from all parts of the continent to give the commission an intensive national and continental human rights outlook.

2.4.4 Fact-finding by *ad hoc* bodies

Ermorca identified this category, which Viljoen omitted, as his study was limited specifically to UN bodies. They are *ad hoc* because they are formed to cater for a situation that has manifest with no rules of procedure and temporary terms of reference. The main players are UN *ad hoc* bodies, NGOs and inter-governmental bodies who conduct missions for private use. Some importance is attached to this category of fact-finding since it is carried out by organisations that have consultative status with the UN.⁷² To that end, it is submitted that their activities are of public interest since the UN may rely on their findings in settling some human rights violations disputes. In the African system, the contribution of NGOs is so fundamental such that they are given eminence in the system. In fact statistics reveal by the end of the 28th Session in November 2000, the ACHPR had granted observer status to NGOs in excess of 240 who always play a pivotal role in the dialogue between the ACHPR and member states.⁷³

2.4.5 Fact-finding by Special Rapporteurs and Working Groups

The office and mandate of Special Rapporteurs is one of the recent human rights protection and promotion mechanisms both in the UN and other human rights systems, which ranks as one of its “innovative achievements”.⁷⁴ The ACHPR has so far appointed three thematic rapporteurs; on extra-judicial, summary and arbitrary executions,⁷⁵ on prisons and conditions of detention,⁷⁶ and on the rights of women in Africa,⁷⁷ and a Working Group on the Rights of Indigenous Peoples’ of Africa.⁷⁸ The Inter-American system has two rapporteurs concentrating on the rights if women and

⁷² The UN would not disregard contributions from Amnesty International given that it was the source of the most detailed proposal for the creation of the office of the UN High Commissioner for Human Rights in 1992. See Amnesty International, *Facing Up to the Failures: Proposals for Improving the Protection of Human Rights by the United Nations* (December 1992).

⁷³ Motala (n 55 above) 260.

⁷⁴ M Evans & R Murray, “The Special Rapporteurs in the African System” in M Evans and R Murray (Eds) (2000) 280.

⁷⁵ Appointed at the 15th Session of the ACHPR as a result of the genocide in Rwanda.

⁷⁶ Appointed during the 20th Session of the ACHPR in October 1996 following serious lobbying by NGOs and in particular, the *Penal Reform International* based in Paris. Part of the mandate was to conduct examinations (on-site investigation) of prisons in African countries.

⁷⁷ The Special Rapporteur on Women was appointed during the 25th Session of the ACHPR.

⁷⁸ The Working Group on Indigenous Populations/Communities in Africa recently visited Botswana prior to

on the right to freedom of expression with the UN having appointed only seven special rapporteurs by 2000.⁷⁹ They invariably adopt investigative fact-finding during visits to member states.

2.4.5.1 Rapporteurship in the African System

Malcolm Evans and Rachel Murray observed that invariably the mandate of these officeholders involve fact-finding methodology from the preparation for the mission, preparation of the activity report and the formulation of recommendations, especially the published reports.⁸⁰ For instance, in the African system, the Special Rapporteur on Prisons and conditions of detention has since visited Zimbabwe and Mozambique in 1997,⁸¹ Madagascar and Mali in 1998,⁸² The Gambia and Benin in 1999.⁸³ And lastly, it went to Central African Republic in 2000.⁸⁴ It is submitted that these statistics place the African system on the same level with the UN and Inter-American system. Other rapporteurs have engaged in various activities that are always summed up in the Annual Activity reports of the ACHPR.

2.5 Aims of human rights fact-finding missions

2.5.1 Elucidating facts

As enunciated earlier, though fact-finding comes in diverse forms, the main objective is the same, namely, the elaboration or elucidation of facts. However, human rights fact-finding goes a step further than traditional fact-finding in its form and purposes. Ramcharan observes that;

Fact-finding is at the heart of human rights activity. The prescription of human rights norms implies an understanding of the needs to be addressed, which in turn requires an appreciation of the factual conditions. The application and supervision of human rights norms do not take place *in abstracto* but in relation to specific circumstances and situations. This also requires an awareness of the factual

compilation of a detailed report called *Report of the ACHPR's Working Group on the Indigenous Populations/Communities* pursuant to the "Resolution on the Rights of Indigenous Populations/communities in Africa", adopted during the 28th Session of the ACHPR.

⁷⁹ Motala (n 55 above) 280.

⁸⁰ As above 293.

⁸¹ Prisons in Mozambique: Report of the Special Rapporteur on prisons and Conditions of Detention, Report on a visit 14- 24 December 1997, by E.V.O. Dankwa, Series IV, No.3 (*Documents of the ACHPR*) 645.

⁸² No report issued.

⁸³ Prisons in Benin: Report of the Special Rapporteur on prisons and Conditions of Detention, Report on a Visit 23-31 August 1999, Series IV, No. 6.

⁸⁴ Prisons in Central African Republic, 19-29 June 2000, Report of the Special Rapporteur on prisons and Conditions of Detention in Africa, Series IV, No.7.

conditions. Claims that human rights are, or are not, being respected, or are being violated, turn essentially on questions of fact.⁸⁵

In view of this noble opinion by the eminent scholar, one needs little persuasion, if any at all, to appreciate the central role ascribed to fact-finding in the human rights domain. Certainly, one cannot allege the violations of human rights without specific reference to concrete and credible events. The net meaning of the above passage builds on Oppenheim's insistence that in international law, the main objective of fact-finding is to elucidate facts with the ACHPR concerned tasked to investigate the circumstances and issue an authentic report at the end of the mission.⁸⁶

2.5.2 Credibility of allegations

Human rights fact-finding is aimed at the ascertainment of facts in a bid to establish the presence or otherwise of human rights violating conduct by the accused state or by other actors. Such elucidation should be carried out in such a manner as to command credibility and with reasonable urgency in order to address a prevailing unfavourable *status quo*. Fitzpatrick advanced the same argument as outlined in the preceding quotation when he observed "describing an occurrence as a human rights violations is pejorative and not a factual categorisation. As a result, human rights bodies strive to provide fair opportunities for rebuttal by the alleged perpetrator or the accused state".⁸⁷ Human rights fact-finding should bring home " a more interpretative, and less purely descriptive intelligence to the assessment of the available facts" at the same time avoiding manifest bias by adopting proper procedure.⁸⁸

2.5.3 Intervention and dissuasion

Having scrutinised the various purposes of fact-finding mentioned above, Ian Martin synchronised them and formulated a four-fold approach to the aims of human rights fact-finding, namely, dissuasion, intervention, assistance and reporting.⁸⁹ Field presence, it was argued, would prompt the curtailment of any further violations of human rights as it ensures a sudden intervention by the fact-finding body in case violations is continued. This notion is premised on the assumption that personal representation is more effective when compared to written and distant persuasions. Field presence also enhances an opportunity to the state to tap from the wisdom of the visitors in

⁸⁵ Ramcharan (n 15 above) 1.

⁸⁶ L Oppenheim, *International Law* Vol 2, Seventh edition, edited by H. Lauterpacht (1952) 13.

⁸⁷ J Fitzpatrick, "Human Rights Fact –Finding", in AF Bayefsky (eds) (2000) 65.

⁸⁸ Fitzpatrick (n 87 above) 66.

⁸⁹ I Martin, "The Role of a Human Rights Field Presence", in Bayefsky Eds (2000), 101.

addressing the problem at hand. Ultimately, the treaty body would prepare a presumably accurate report at the end of the mission, which tends to be credible after being prepared by eyewitnesses.

2.6 Procedures for investigation

Readers of this work would be anxious to be apprised of any international standard rules of procedure on fact-finding missions. In fact, such an inquiry would be germane to the current study as their existence or otherwise, would assist in the comparative analysis of different human rights systems. As alluded to earlier, a couple of such rules do exist. In 1980, the International Law Commission adopted the Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions.⁹⁰ In 1974, the UN adopted the Draft Model Rules of Procedure for United Nations bodies dealing with violations of Human Rights, which rules are admittedly non-binding on any treaty body, organisation or state. They are mere guidelines around which fact-finding bodies may craft their own rules to suit the specific needs.

It should be out rightly noted that despite the existence of such rules, “little consensus exists on the appropriate methodology for human rights fact-finding, though various proposals for standards or rules of procedure have been floated over the years”.⁹¹ The rationale behind this divergence, it has been argued, ranges from the availability of facts already gathered by other fact finders, “the potential consequence of an adverse finding”, and the extent of co-operation by the accused government and lack of funding.

2.7. The importance of rules of procedure

2.7.1 Yardstick for credibility and integrity

The harmony shared by scholars on the need for a defined set of rules suggests the indispensability of such rules. The lack of a defined methodology, argued Bassiouni, particularly in respect of empirical research and field investigation, “means that there is no basis to test the validity of the research in order to assess the plausibility of the conclusions”.⁹² Some of the earliest human rights scholars, Frank and Fairley, were quick to identify the reasons why not just rules, but

⁹⁰ Ramcharan (n 15 above) 250.

⁹¹ Fitzpatrick (n 87 above) 65.

⁹² Bassiouni, “Appraising UN Justice Related Fact-finding” available on
< http://66.102.9.104/search?q=cache:vj0M07zLFX4J:law.wustl.edu/igls/Unconfpapers/p_35_Bassiouni.pdf+justice+and+fact+finding&hl=en > (accessed on 26 August 2005).

fair rules, are critical in human rights fact-finding.⁹³ Defined procedures, they opined, are an essential ingredient for the credibility and integrity of the whole exercise. Such a conclusion was premised on the fact that “any suspicion of ‘*ad hoc*-ery’ undermines the efficacy of the fact-finding process”.⁹⁴ The procedures directing the investigations fundamentally determine the integrity of the whole mission.

2.7.2 Co-operation of investigated state

In the second place, proper and fair procedures are decisive in securing maximum co-operation, which is critical, from the accused state. Proceeding from the premise that “the difficulty about facts is that there are so many of them”, the fact-finder needs to be robustly placed to distinguish between objective facts and politically- tailored facts.⁹⁵ Such a task becomes colossal and daunting where the accused state does not disclose facts readily in its possession to rebut the allegations. Consequently, the fact finder will prepare a report based on raw facts, as the state did not refute charges. Evidently, state co-operation should be secured at all costs. The learned authors concluded that there is no more embarrassing situation to fact finders as when the state successfully rebuts the allegations after the report has been prepared and submitted.⁹⁶ Therefore, it is pertinent that the mission obtains the consent (co-operation) of the accused state before setting off. Fair procedures that “manifest persuasively the fairness to all sides as well as thoroughness of the fact-finding exercise” have always induced such consent and co-operation.⁹⁷

2.7.3 The minimum core content of the rules

In the midst of disagreement regarding the appropriate procedure in fact-finding, eminent scholars have struck a compromise on the nature of the issues to be addressed in the rules. They have borrowed heavily from the ECOSOC⁹⁸ procedure as well as the International Labour Organisation (ILO).⁹⁹ Of the five ILO instrumentalities,¹⁰⁰ the Committee of Experts on the Application of

⁹³ TM Franck & HS Fairley, “Due Process in Human Rights Fact-finding” (1980) 74 *American Journal of International Law* 312.

⁹⁴ Franck & Fairley (n 93 above) 312.

⁹⁵ D Bailey, “UN Fact-finding and Human Rights Complaints” (1972) 48 *International Affairs* 250.

⁹⁶ Franck & Fairley (n 93 above) 318.

⁹⁷ As above.

⁹⁸ Draft Model Rules of Procedure for United Nations bodies dealing with violations of Human Rights, UN Doc. E/CN.4/1021/Rev.1 (1970).

⁹⁹ The Philadelphia Declaration creating the ILO, adopted in 1944.

¹⁰⁰ Four other instrumentalities include, the *Ad hoc* tripartite Commissions, Commissions of Inquiry, and the Fact-finding and Conciliation ACHPR on Freedom of Association.

Conventions and Recommendations has been outstanding in its operations.¹⁰¹ There is ample evidence to show that various UN *ad hoc* bodies have not been astute enough to exploit the opportunities that came their way and come up with comprehensive rules of procedure. Ermorca gave an example of the *Ad hoc* Working Group on South Africa, which had in its terms of reference, a leeway to put in place such “procedural modalities” as it deemed appropriate, but did not attempt the first ever rules of procedure for *ad hoc* bodies.¹⁰²

2.7.3.1 Critical aspects of due process

The rules should address, *inter alia*, the chairpersonship of the mission, election of members, decision-making through majority vote, the drafting of agenda, place of meeting, whether sessions are open or *in camera*. Furthermore, they should spell out the person responsible for setting up the itineraries of the mission, whether members of the mission could interview witnesses they please and on oath, and whether the accused state may confront witnesses and rebut the allegations in a hearing.¹⁰³ In conclusion, in as much as the rules of procedure should affirm the two-pronged objectives mentioned here above, they are merely a modest beginning towards establishing “normative procedures”. Their importance should never be underestimated as the utilisation of the report by interested parties entirely depend on the overall credibility, manifest fairness and diligence in the fact-finding process.

2.8 The impartiality of the commissioners

The minimal content of impartiality requires special attention. Fact-finders should exercise a high threshold of impartiality as this predicates the credibility and plausibility of the exercise. Given the diverse categories of fact-finding, fact-finders ought to be impartial in examining state reports, handling of individual communications and when undertaking direct fact-finding. Impartiality must be demonstrated both in the rules and in their conduct during the exercise. This is yet another ideological rendezvous amongst fact-finding scholars, namely, neutrality, or lack of it, of fact-finders. The renowned authors, Franck and Fairley, resoundingly opined thus;

It is the opinion of the authors that fact-finding must be as impartial and as fair to the parties as procedural and evidentiary rules can render it without making the inquiry task impossible, not merely for ethical reasons but in order to maximize (*sic*) the credibility and impact of the facts found. To this end, fact-finders must develop conduct that sharply distinguish them from those bodies that assemble prosecutorial evidence...Since the efficacy of fact-finding rests so largely on credibility, and credibility

¹⁰¹ Franck & Fairley (n 93 above) 333.

¹⁰² Ermorca (n 17 above) 192.

¹⁰³ Franck & Fairley (n 93 above) 321.

emanates primarily from manifest integrity of process, sound procedures are not merely desirable but a functional pre-requisite.¹⁰⁴

2.8.1 Indicators of impartiality

It should be noted that the learned authors stressed that impartiality should be laudable both in the rules and conduct. They went on to identify the indicators of procedural probity to include, the calibre of fact-finders, terms of reference, the procedure for investigation and utilisation of the product.¹⁰⁵ In a nutshell, fact-finders conducting the mission should be, and should be seen to be free of commitment to a perceived outcome; hence “independence, integrity and impartiality are individual and not national characteristics”.¹⁰⁶ Key to this qualification is that fact-finders must act in personal capacities.¹⁰⁷

Furthermore, the terms of reference should strive to keep political consideration out of the realm of fact-finding.¹⁰⁸ As previously held, rules are important for credibility and to solicit for state co-operation. Rules must herald a fair assessment of the human rights situation so that the state does not deem the exercise as violation of its domestic jurisdiction. The utilisation of the product is the domain of the political organ, namely, the UN, AU or the OAS in this context. The report ought to be crafted in such a manner that the interests of both parties are recognised and given effect.¹⁰⁹ Taken conjunctively, fact-finders must do everything possible to preserve the probity and credibility of the exercise, balancing between the interests of the accused state and the net intention of a fact-finding mission by making fact-finding “comprehensive, objective, impartial and timely”.¹¹⁰

2.9 Conclusion

It has been noted in this chapter that fact-finding is hardly a new concept, but has evolved through history in the UN system in pursuit of the peaceful settlement of disputes. The deviation from traditional fact-finding has resulted in the formulation of human rights fact-finding soon after World War II, a process specifically designed to cater for soaring human rights needs. Its effect on the protection of human rights has seen it disintegrating into different forms, wide enough to cater for complex, systematic and grave human rights violations. However, diversity is inclined to cause

¹⁰⁴ Franck & Fairley (n 93 above) 310.

¹⁰⁵ As above.

¹⁰⁶ Bailey (n 95 above) 263.

¹⁰⁷ CW Jenks, “The International Protection of Trade Union Rights”, in Luard Eds (1967), *The International Protection of Human Rights* 210, 239.

¹⁰⁸ Boven (n 37 above) 103.

¹⁰⁹ Ramcharan (n 15 above), 322.

¹¹⁰ Declaration on Fact-finding by the UN in the Field of Maintenance of Peace and Security, A/RES/46/59, art. 3.

disorder in the absence of specific rules of investigation, an area axiomatically neglected by fact finders despite a plethora of reasons why rules of procedure are necessary. Human rights scholars and commentators have motivated drafting of basic rules, flexible enough to cater for fact-finding by any body, organ or commission. That will mark a dawn of new era in the protection and promotion of human rights. The next chapter shall explore fact-finding in the African human rights system.

CHAPTER THREE: FACT-FINDING IN THE AFRICAN SYSTEM: A COMPARISON WITH THE INTER-AMERICAN PERSPECTIVE

3.0 Introduction

The adoption of the African Charter by the Organisation of African Unity (OAU) almost twenty years after its inception was received by many as the dawn of a new era in the promotion and protection of human rights in Africa.¹¹¹ The sigh of relief was premised on the fact that the OAU, a purely political organ, maintained a reluctant inclination towards human rights protection. The reluctance emanated from some of the organisation's functional principles; namely, the upholding of sovereignty,¹¹² decolonisation¹¹³ and the principle of non-interference in the internal affairs of member states.¹¹⁴ Consequently, alleging the violations of human rights in a member state was deemed blatantly inconsistent with the founding principle of non-interference.¹¹⁵

It is against that background that the coming into force of the African Charter strongly influenced the content of the African Union (AU) Constitutive Act, which among other things, enshrined systematic violations of human rights as a compelling reason to intervene in the domestic affairs of a member state.¹¹⁶ Otherwise maintaining the erstwhile functioning principles, which gave no preference to concerted human rights protection would contradict Article 1 of the African Charter, which enjoins member states to recognise and give effect to the rights and freedoms in the Charter. The African Charter establishes the ACHPR, an organ of the AU mandated to spearhead the promotion and protection of human and peoples' rights.¹¹⁷ One of the tools in the protective mandate is fact-finding. This chapter seeks to critically explore whether the ACHPR has utilised all the variants of fact-finding in a manner consistent with the aim and purposes outlined above. The practice of the IACHR shall be considered in the same chapter with a view to drawing a systematic and meticulous comparative analysis of the two systems.

¹¹¹ N Udombana, "Toward the African Court on Human and Peoples' Rights: Better Late Than Never", (2000) 3 *Yale Human Rights & Development Law Journal* 45, 47.

¹¹² Art.4 (a) of the AU Constitutive Act.

¹¹³ Art. 4 (b) of the AU Constitutive Act.

¹¹⁴ As above.

¹¹⁵ R Murray, *The ACHPR on Human and Peoples' Rights & International Law* (2000), 1.

¹¹⁶ Art. 4 (h) of the Constitutive Act.

¹¹⁷ Art. 45 of the African Charter.

3.1 The ACHPR

Regular reference has been made to the ACHPR in the preceding chapters.¹¹⁸ The majority of the articles therein provide for the miscellaneous nitty-gritty relating to the composition of the ACHPR,¹¹⁹ election of office bearers,¹²⁰ and general administrative issues.¹²¹ In 1987, the ACHPR commenced execution of its mandate, which is provided for in Chapter II of Part II.¹²² The mandate is two-legged; promotional and protective. The former aims at cultivating a culture of human rights awareness in the general citizenry of member states, whereas the later specialises in ameliorating or providing redress to victims of human rights violations. The latter dimension is the one relevant in this work. Unlike in other systems where investigative fact-finding is categorically provided for,¹²³ the African Charter is silent. Pursuant thereto, the ACHPR has employed a benevolent interpretation of the African Charter, which permits the ACHPR to “resort to any method of investigation” in carrying out its mandate.¹²⁴ Consequently, the ACHPR has carried out direct fact-finding missions by “creatively using the Charter”, especially article 46 as shall be demonstrated hereunder.¹²⁵

3.2 The IACHR

The agenda of the Ninth International Conference of American States¹²⁶ included the establishment of the Organisation of American States (OAS) and the adoption of the American Declaration of the Rights and Duties of Man to register the OAS’s emphasis on human rights.¹²⁷ A decade later, the Declaration of Santiago established the IACHR, following which the Council of the OAS approved its Statute in May 1960.¹²⁸ The mandate of the seven-member IACHR is mainly “to promote the observance of and the defence of human rights and to serve as a consultative organ of the OAS in this matter”.¹²⁹ The Inter-American human rights perspective deems rights as those entitlements enshrined in the American Convention of Human Rights¹³⁰ and the American

¹¹⁸ Articles 30-44 of Chapter I of Part II of the Charter.
¹¹⁹ Article 31 of the African Charter.
¹²⁰ Article 33 of the African Charter.
¹²¹ Articles 34-43 of the African Charter.
¹²² As above.
¹²³ Article 18 (g) of the Statute of the IACHR.
¹²⁴ Article 46.
¹²⁵ Ankumah (n 13 above) 53.
¹²⁶ The conference held in Bogotá, Colombia in 1948.
¹²⁷ OAS Doc.OEA/Ser.L/II.23/Doc.21 rev.5 (1978).
¹²⁸ OEA/Ser.L/V/II.26 Doc.10. 2 November 1971.
¹²⁹ Art 112 of the Charter of the OAS.
¹³⁰ OAS Doc.OEA/Ser.K/XVI/1.1/doc.65/rev.1/corr.1 (1970).

Declaration on the Rights and Duties of Man. The specific duties of the IACHR are couched in its Statute, which provides for direct on-site investigations and individual complaints.¹³¹

3.2.1 IACHR on-site visits history

Since its inception in 1960, the IACHR earned a fairly good reputation through wide publication of annual activity reports as well as effective on-site visit reports.¹³² More importantly, it devised a comprehensive professional practice based on elaborate rules of procedure.¹³³ Consequently, some scholars have predicted that the IACHR would soon suffer from the law of diminishing returns because it had been “too successful”.¹³⁴ Statistics review that so far the IACHR has conducted in excess of ninety on-site investigations in the Americas.¹³⁵ Arguably, the Chilean experience has remained outstanding as it had far reaching positive consequences in terms of procedure and substantive law.¹³⁶ It is the reputation of the IACHR that has been a fundamental determinant in choosing it as a comparator throughout this study. The following is the comparative analysis of fact-finding within the two human rights systems.

3.3 Practices and Procedures

3.3.1 State reporting

In chapter two, we concluded that the examination of state reports represents indirect fact-finding. State reporting is the only compulsory requirement in many international human rights treaties including all the UN human rights treaties.¹³⁷ Labelled as “the most widespread and established method of implementation at the international level of human rights standards”,¹³⁸ and the

¹³¹ Art 18 of the Statute of the IACHR.

¹³² On-site missions are not compulsory. See IACHR, *The Inter-American Yearbook on Human Rights* (1987), 878.

¹³³ Chapter IV of the IACHR Rules of Procedure.

¹³⁴ D J Padilla, “The Future of the Inter-American Human Rights System” available at <[Http://: www.wlc.American.edu/hrbrief/The Future of the Inter-American Human Rights System.htm](http://www.wlc.American.edu/hrbrief/The_Future_of_the_Inter-American_Human_Rights_System.htm)> (accessed on 27 July 2005).

¹³⁵ See “On-site Visits” available at <[http://: www.cidh.oas.org/DefaultE.htm](http://www.cidh.oas.org/DefaultE.htm)> (accessed on 8 September 2005).

¹³⁶ Diana (n 18 above). The mission was celebrated because it influenced a sudden fall in cases of disappearances and arbitrary detention, which fell from 2 777 in 1974 to 667 in 1975 soon after the on-site mission.

¹³⁷ ICCPR (art. 40), CESCO (art. 16) and CERD (art. 9).

¹³⁸ A Bayefsky, “Making the Human Rights Treaties Work: An Agenda for the Next Century” in L Henkin & JL Hargrove (eds) (1994) 222. Also P Amoah, “Participation of Non-Governmental Organisations in the work of the ACHPR on Human and Peoples’ Rights” ICJ Workshop on NGO Participation in the ACHPR, Banjul, The Gambia, 5-7 October 1991, 6.

“backbone of the mission of the ACHPR”,¹³⁹ periodic reporting has endured derisive criticism.¹⁴⁰ Connors¹⁴¹ summed up the scathing criticism as follows;

... those who have subjected the system of state reporting established by the six international human rights treaties to any level of analysis reach conclusions, which range along a continuum. At one end of this continuum is the view that the entire system is an empty diplomatic ritual and should be disbanded, while at the other is the view that, while not flawless, the system is a valuable tool in ensuring the implementation of agreed human rights obligations and operates as best it can given its various constraints.¹⁴²

Two hypotheses ensue, namely, on the one hand, state reporting serves nothing more than satisfying diplomatic goals, whilst on the other, reporting is a fundamental vehicle towards achieving the implementation of rights, which objective we have said is the goal of the century in the field of human rights.¹⁴³ The current critique is premised on that an abysmal state reporting mechanism anywhere predicates negatively on the quality of the fact-finding exercise, and eventually the promotion and protection of human rights. The hypotheses shall be resorted to in examining the practice and procedures of state reporting under the African system in order to demonstrate the strengths and weaknesses of the system.

3.3.2 Examination procedure

The ACHPR and the IACHR are bestowed with the obligation to monitor compliance by member states with the respective regional human rights instruments.¹⁴⁴ Soon after ratifying the African Charter, an initial report should be lodged and thereafter every two years, states should submit “a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter”.¹⁴⁵ In contrast, state reporting is non-existent in the Inter-American system. Instead, the IACHR prepares country reports on member states, analysing the human rights situation therein.¹⁴⁶ In a bid to induce incisive reports from

¹³⁹ IB El-Sheikh, “The ACHPR on Human and Peoples’ Rights: Prospects and Problems”, (1989) 7 *Netherlands Quarterly in Human Rights* 272, 281.

¹⁴⁰ Periodic reporting dates back to art.22, League of Nations, 225CTS 195 (in force 10 January 1920), arts. 19 and 22 of the Constitution of the International Labour Organisation, 1 UKTS 47 (1948) (in force 10 January 1920), arts. 73(e), 87(a) and 88 of the UN Charter, 1 UNTS xvi (in force 24 October 1945), art. VIII of UNESCO, 4 UNTS 75 (in force 4 November 1946).

¹⁴¹ J Connors, “An Analysis and Evaluation of the System of State Reporting”, in Anne Bayefsky (eds) (2000) 3.

¹⁴² Connors (n 141 above) 4.

¹⁴³ Henkin (n 20 above).

¹⁴⁴ Article 62 of the African Charter and art.112 of the OAS Charter.

¹⁴⁵ As above.

¹⁴⁶ Since 1962, the IACHR has prepared country reports in excess of sixty. Available at: < <http://www.cidh.org/pais.eng.htm>>(accessed on 23 September 2005).

states, the ACHPR has prepared Guidelines for State Reporting, which, if adhered to by states, would aid both the content and form of the reports.¹⁴⁷

The underlying objective of the Guidelines is to “ create a channel for constructive dialogue between the states and the ACHPR”.¹⁴⁸ Scholars writing on the African system have, however, lamented the whole process of state reporting identifying fundamental weaknesses that prey on the quality and efficacy of this form of fact-finding.¹⁴⁹ It is reiterated that the quality of fact-finding through reports is directly proportional to the quality of the reporting exercise as a whole. The moot issues are as follows.

3.3.2.1 Non-submission or overdue reports

Article 62 of the African Charter read together with article 65, create the obligation of state reporting. Disappointingly, very few states are up to date with their reporting obligation,¹⁵⁰ some have simply fizzled out¹⁵¹ whilst others have not yet submitted any report to the ACHPR for examination.¹⁵² The same problem has apparently plagued the UN system too.¹⁵³ Non-reporting by developing states has encroached into the UN system, and is so serious that it has been submitted as one of the grounds for UN reform.¹⁵⁴ In 1996, the International Law Association (ILA) enunciated the UN situation as follows;

Forty-five to 80 percent of states parties to the six treaties have overdue reports. About half of these numbers are initial reports. Eighty-one states, or an average of 60 percent of states parties to all the treaties, have five or more overdue reports. In fact, the system relies on this degree of non-compliance. On the basis of the meeting time currently allotted to the treaty bodies, if all the overdue reports

¹⁴⁷ N (53 above).

¹⁴⁸ N (53 above) para 2.

¹⁴⁹ M Evans *et al*, “The Reporting Mechanism of the African Charter”, in M Evans & R Murray (eds) (2000) 36. Also E Udeme “The ACHPR on Human and Peoples’ Rights: Eleven Years After”, (2000) 6 *Buffalo Human Rights Law Review* 93.

¹⁵⁰ As at May 2001(the last update of the ACHPR), only sixteen states were up to date. See The Fourteenth Annual Activity of the ACHPR, 2000-2001, Annexure II, *Documents of the ACHPR* 19.

¹⁵¹ Thirteen states owe at least one report. As above.

¹⁵² Twenty-four states never reported. N (142 above) 19.

¹⁵³ E Evatt, “The Future of Human Rights Treaty System: Forging Recommendations” in A Bayefsky eds (2000) 292; J Hatchard, “Reporting under International Human Rights Instrument by African Countries” (1994) 38 *Journal of African Law* 61.

¹⁵⁴ M Scheinin & H Niemi, “Reform of the United Nations Human Rights Treaty Body System Seen from the Developing Country Perspective”, available at;<<http://scholar.google.com/scholar?hl=en&lr=&q=cache:MqDJsgSKDOYJ:www.abo.fi/instut/imr/norfa/heli-martin.pdf>> (accessed on 1 September 2005).

actually were submitted it would take the treaty bodies an average of eight years just to expunge the backlog.¹⁵⁵

Inspired by the General Comments of the Committee on the CESCR, we previously opined that state reporting ensures that the ACHPR has a detailed global view of the factual human rights situation in member states.¹⁵⁶ Pursuant to the current state practice, non-reporting defeats the purpose of periodic reporting thereby affecting the system as a whole.

3.3.2.2 Non-compliance with reporting Guidelines

Notwithstanding the adoption of the revised reporting Guidelines, states have remained defiant in respect of the quality of their reports. The Guidelines were meant to aid, among other things, the uniformity and content of such reports to enable the ACHPR to have a continental view of the human rights situation in its jurisdiction.¹⁵⁷ The dialogue, which the ACHPR seeks to forge, can only be constructive if based on true and elaborated facts. Such facts cannot be canvassed in an inaccurate, incomplete or tardy report, but in one that is honestly drafted in harmony with the Guidelines in terms of form and substance. Such are the reports that would enable the treaty body to engage in effective dialogue and investigative examination of state reports.

3.3.2.3 Limited sources of information

Practice has shown that often the ACHPR examine state reports in the absence of any other source of corroborative information that rebuts the state report.¹⁵⁸ Consequently, no effective fact-finding can be sustainable where the facts are so negligible. Notably, civil society participation is minimised by states, which conceal state reports against which shadow reports ought to be lodged since there is no formal mechanism in the procedure or practice, for access to state reports before the session. The granting of observer status to NGOs by the ACHPR should have been an unambiguous call to states to work together with such organisations even in the preparation of state reports.

¹⁵⁵ Anne F. Bayefsky, "Report on the UN human Rights Treaties: Facing the Implementation Crisis", in the First Report of the International Law Association's Committee on International Human Rights Law and Practice, submitted to the Helsinki Conference, 11-17 August 1996.

¹⁵⁶ General Comment No. 3 para 4, available at:
<[Http://: www.unhcr.ch/tbs/doc.nsf/\(.../38e23a6ddd6c0f4dc12563ed0051cde7?opendocumen](http://www.unhcr.ch/tbs/doc.nsf/(.../38e23a6ddd6c0f4dc12563ed0051cde7?opendocumen)> (accessed on 22 August 2005).

¹⁵⁷ Ankumah (n13 above) 40, in which she laments the disparity in form and substance of the reports notwithstanding elaborate reporting Guidelines. The ACHPR encouraged the withdrawal of some reports for being uselessly scanty.

¹⁵⁸ Evans (n149 above) 54.

The above problem is compounded by the practice of not informing all interested parties regarding the session in which a particular report will be considered. Furthermore, the ACHPR does not make copies of the report available to NGOs prior to the session so as to provoke active participation of NGOs resident in the state presenting a report.¹⁵⁹ False or partially true facts are sure ingredients of misdirected concluding observations as the ACHPR may eulogise or reprimand a state for non-existent human rights situations.

3.3.2.4 Attendance by state delegates

The African Charter does not sanction the presence of state delegates, but logic dictates that “constructive dialogue” might only thrive where both parties to the dialogue are in attendance. Non-attendance has prompted the ACHPR to defer the consideration of certain reports. Closely related to no-attendance is attendance by incompetent delegates, in that they may be too junior to give authoritative answers to questions of policy formulation and implementation raised by the ACHPR. Often, the ACHPR requests for clarification pending the drafting of concluding observations making the presence of state delegates highly critical. The problem of non-attendance has plagued the ACHPR to the extent that it declared that reports should be considered in absentia.¹⁶⁰ Evelyn Ankumah entirely agrees with this stance, at the same time conceding that the presence of delegates enhances the effectiveness of the process.¹⁶¹

However, the learned author maintains that due to the calibre of delegates, effectiveness does not necessarily follow as mere lawyers from the ministries of foreign affairs, magistrates and diplomats who are not currently resident in the reporting state, have previously presented reports.¹⁶² We hasten to register our dissent to this observation. Apparently the problem that needs to be addressed is the calibre of delegates. The examination of reports in absentia is not a solution as it is inconsistent with the idea of constructive dialogue. It is, therefore, opined that a different incentive to provoke attendance should be sought as the current one defeats the spirit and intention of “constructive dialogue”. The unhelpful result is that junior state delegates take questions back to their countries, the answers to which will never be part of the concluding observations, made at the end of the session.

¹⁵⁹ As above.

¹⁶⁰ Rule 83 of the ACHPR's Rules of Procedure. However, implementation is still outstanding.

¹⁶¹ Ankumah (n 13 above) 97.

¹⁶² As above.

3.3.2.5 Time constraints

The ILA statement alludes to another factor crippling the system, namely, insufficient time allocated to examination of reports. The time allocated to a particular report is usually too little (an average of three hours) to make any sense out of it given that some commissioners would have perused the report just before the beginning of the session.¹⁶³ Harmlessly phrased questions are usually raised that may have to be responded to in writing at a later date. Thereafter, the ACHPR retreats to deliberate on the concluding observations, albeit in a restricted time span notwithstanding outstanding questions that may remain. Axiomatically, such an environment is not consistent with efficient fact-finding through state reports. Observing the deficiency of time in the UN, the International Law Association lamented that “the ability to have a frank discussion, or at least one in which the treaty body members are able to expose the shortfalls in a state’s record, is severely limited by the restrictions on meeting time”.¹⁶⁴ Scholars have also registered their disapproval to the duration of the ordinary sessions of the IACHR as antagonistic to an exhaustive examination of human rights concerns falling to determination in the session.¹⁶⁵

3.3.2.6 No effective follow-up mechanism

The ACHPR generally, like any other UN treaty bodies, lacks efficient mechanisms to impress on member states in the reporting process. For instance, there is no mechanism to solicit for all outstanding reports from member states besides the adoption of declarations by the ACHPR registering its displeasure with the status quo.¹⁶⁶ Sometimes the ACHPR has written letters to concerned states reminding them of what they already know; that reports are outstanding.¹⁶⁷ As stated above, the ACHPR can neither secure the attendance of a state representative for the consideration of a report, nor ensure that a state substantially follows the reporting Guidelines. It has always been held that a shoddy report is better than non-reporting at all. However, we strongly opine that for the purposes of effective fact-finding through state reports, proper reports complying with the Guidelines should be timeously submitted before the ACHPR. Such submission should be done well before the session and considered in the presence of competent state delegates who

¹⁶³ Evans (149 above) 55.

¹⁶⁴ As above.

¹⁶⁵ AG Mower Jr, *Regional Human Rights: A Comparative Study of the Western European and Inter-American Systems* (1991) 84.

¹⁶⁶ Draft Resolution on Overdue Reports for Adoption, Fifth Annual Activity Report of the African ACHPR on Human and Peoples’ Rights 1991-1992, ACHPR/RPT/5th, Annex IX (*Documents of the ACHPR*).

¹⁶⁷ See letter by Mr Isaac Nguema, Second Annual Activity Report of the ACHPR on Human and Peoples Rights 1988-1989, ACHPR/RPT/2nd, Annex XIII (*Documents of the ACHPR*).

give prompt and authoritative responses to enquiries and take with them informed and targeted concluding observations.

3.4 Investigative fact-finding (missions)

This section seeks to evaluate the practice and procedure adopted by the ACHPR in conducting investigative missions to member states. From the outset, it is important to note that the ACHPR has neither recorded nor a defined procedure on investigative fact-finding missions. In proof thereof, the ACHPR website provides for procedure in respect of individual communications and state reporting only.¹⁶⁸ The same obtains in the UN system of *Ad hoc* bodies, and to that end; the UN serves as no useful comparator. As hinted above, the procedural deficiencies can only be deduced from the comments by concerned governments in whose territories the ACHPR has conducted fact-finding missions and compiled reports, for instance, in Mauritania, Nigeria, Senegal and Zimbabwe. However, for reasons known only to the ACHPR, no reports were issued in respect of the visits to Nigeria and the Sudan.¹⁶⁹

3.4.1 Fact-finding mission to Mauritania

Following the receipt of communications alleging systematic and serious violations of human rights,¹⁷⁰ the ACHPR decided during the 19th Session to send a fact-finding mission to Nouakchott, Mauritania, “with a view to finding an amicable resolution to put an end to the situation”.¹⁷¹ The mission conducted its work from the 19th to the 27th of June 1996. It was a cardinal term of reference that the mission was not there to decide “whether what they encountered was wrong or right, but above all to listen to all sides with the objective of bringing to the ACHPR in its contribution to the search for an equitable solution through dialogue”.¹⁷² Three commissioners and the legal advisor of the ACHPR constituted the whole mission. They interviewed vast numbers of representatives of government and civil society. Thereafter, a report was prepared and adopted. Apparently, no comments ensued from the Government of Mauritania and there is no account

¹⁶⁸ “State Reporting” available at <<http://www.achpr.org/statereporting>>.

¹⁶⁹ R Murray, “Serious or Massive Violations under the African Charter on Human and Peoples’ Rights: A Comparison with the Inter-American and European Mechanisms” (1999) 2 *Netherlands Quarterly of Human Rights* 126.

¹⁷⁰ The violations of human rights in Mauritania solicited four communications lodged on 16 July 1991 by the Malawi African Association, 21 August 1991 by Amnesty International, 12 March 1993 by Madame SARR DIOP, 30 March 1993 by the *Rencontre Africaine pour la Defense des Droits de l’Homme*, the Interafrican Union of Human Rights and the Mauritanian League for Human Rights.

¹⁷¹ 10th Annual Activity Report of the ACHPR on Human and Peoples’ Rights 1996-97, Annex IX, para 1.

¹⁷² As above.

regarding the implementation of the recommendations, as the ACHPR has no sound follow up mechanism.

3.4.2 The mission to Senegal

The four- member-mission, which lasted for six days, was the result of a communication filed by a NGO based in Senegal, which described grave and massive violations of human rights at Kaguitt, in Casamance, following a clash between the Senegalese army and the rebels of the *Mouvement des Forces Democratiques de la Casamance (MFDC)*.¹⁷³ A decision was taken in the ACHPR during the 17th, 18th and 19th sessions to send a mission of good offices to Senegal in an endeavor to come up with an amicable solution to the problem.¹⁷⁴ However, very few people were interviewed during the fact-finding exercise.¹⁷⁵

Furthermore, another issue to be further explored is that the ACHPR termed the mission one “of good offices to Senegal”, a term, which they had not used before.¹⁷⁶ Surprisingly, though, a report was subsequently prepared, adopted and attached to the 10th Annual Activity Report of the ACHPR in the same manner any fact-finding report would have been handled. We accordingly opine that notwithstanding the status ascribed to the exercise by the ACHPR, the mission was, for all intents and purposes, one of fact-finding. The report was prepared in a manner similar to how investigative reports are handled such that to ascribe status different from a fact-finding mission to such an exercise would be a misnomer.

3.4.3 The fact-finding mission to Zimbabwe

Of all the missions conducted in member states to the African Charter, the mission to Zimbabwe presents an interesting study of considerable relevance and pertinence to the current study. The premise of this conclusion is that the ACHPR has produced a report, the publication of which was postponed.¹⁷⁷ This is a development, which stood unprecedented in the history of human rights protection in Africa.¹⁷⁸ Thereafter, the GOZ responded with elaborate comments raising substantive and procedural issues bearing on the manner in which the mission was conducted. The mission to Zimbabwe was the only fact-finding exercise not stimulated by individual

¹⁷³ *Rencontre Africaine Pour la Défense des droits de l'Homme v Senegal* filed on 12 October 1992.

¹⁷⁴ N (171 above), 29.

¹⁷⁵ N (171 above), 30.

¹⁷⁶ As above.

¹⁷⁷ See note 1 above.

¹⁷⁸ A brief discussion of the legality of the decision shall follow.

communication as it was motivated by “widespread human rights violations in Zimbabwe”.¹⁷⁹ To that extent it stands out as one mission that squarely falls into the definition of direct or investigative fact-finding.¹⁸⁰ The decision to send a mission was made during the 29th Session of the ACHPR in Tripoli in May 2001. The mission took place from the 24th to the 28th of June 2002 in Harare.

3.4.3.1 The legitimacy of the suspension of publication

The AHSG made a decision to postpone *sine die* the publication of the 17th Annual Activity Report during the 3rd Ordinary Session in Addis Ababa.¹⁸¹ The decision pioneered a precedent that raises questions bearing on the manner in which fact-finding missions ought to be carried out and the relationship between the ACHPR and the AU (specifically interpretation of article 59 of the African Charter). The decision is sufficiently germane to this study as the purported explanation hinged on a fact-finding report, namely, that the government of Zimbabwe had not been afforded a chance to file comments before the preparation of the final report. In essence, it dictates how fact-finding missions should be handled in future. The precedent befuddled even the Commission causing it to request for the interpretation of the African Charter from non-state organizations. And yet, interpretation of the African Charter is part of the ACHPR’s mandate.¹⁸²

Article 59 of the African Charter provides as follows;

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairperson of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairperson after it has been considered by the Assembly of Heads of State and Government.

The main question is whether the AHSG acted *ultra-vires* its powers when it decided to defer the publication of the activity report. If so, whether such interpretation is detrimental to or aids the promotion and protection of human rights in the context of fact-finding missions. It is out rightly submitted that article 59 (1) is without any consequence as it relates to all “measures” taken in

¹⁷⁹ 17th Annual Activity of the ACHPR on Human and Peoples’ Rights, 2004-2005, Annexure II, para 1.

¹⁸⁰ Chapter 2 above, generally.

¹⁸¹ Notes 1 and 2 above.

¹⁸² The ACHPR requested the Centre for Human Rights of the University of Pretoria for an opinion on the normative meaning of article 59 of the African Charter. On the Commission’s mandate to interpret the Charter.

terms of the Charter.¹⁸³ To compound the problem, sub-article two refers to “the report” without specifying which report, and the use of the conjunctive “however” show that this “report” has been previously mentioned. We are therefore, strongly persuaded that the “report” mentioned is the “factual report”, a corollary of an in-depth study of cases of “serious or massive violation of human and peoples’ rights” mentioned in article 58 (1) and (2) of the African Charter.

Without over stretching the quoted provision, a factual report that is prepared following an in-depth study suits the definition of a fact-finding report. Our view is that the in-depth study referred to in article 58 is the fact-finding report. Accordingly, Article 59 (2) should mean that a fact-finding report standing on its own feet might not be published unless the AHSG decides given that the ordinary meaning of “decision” is “choice”. Article 59 (3) indisputably refers to activities of the ACHPR (presumably annual activity reports), which can only be published after the AHSG has given a thought to it. Makau Mutua shares the same sentiments.¹⁸⁴ Evelyn Ankumah, also reached the same conclusion, namely, that the article literally means as it provides, prompting the Commission to shun publicity.¹⁸⁵ In light of the decision of the AHSG, the generous interpretation of article 59 for which Rachel Murray applauded the Commission during the recent years was substantially overturned by this decision.¹⁸⁶

The conclusion of the discussion is that the AHSG acted *intra-vires* when it decided to stay the publication of the annual activity report. However, two antagonistic observations ensue; on one hand is the view that documentation of human rights violations should be done expeditiously so as to remedially arrests any further violations.¹⁸⁷ Prompt publication of fact-finding reports would go a long way in achieving this vital objective. On the other hand is the view that one of the tenets of natural justice, the *audi ultem par tem* rule,¹⁸⁸ is so pertinent to the preparation of fact-finding reports such that any process that excludes it, either intentionally or constructively, is fundamentally and incurably flawed.¹⁸⁹ Such are the demands of natural justice without which there can be no credible fact-finding reports. As one scholar of Administrative Law has stated;

¹⁸³ “Suitable action to achieve some end”, *The Concise Oxford Dictionary of Current English*, 845.

¹⁸⁴ M Mutua, “The Construction of the African Human Rights System: Prospects and pitfalls” in S Power & G Allison *Realizing Human Rights: Moving from Inspiration to Impact* (2000) 151.

¹⁸⁵ Ankumah (n 13 above) 180.

¹⁸⁶ Murray (n 115 above) 85.

¹⁸⁷ Chapter 2 above, generally.

¹⁸⁸ “Hear the other side”.

¹⁸⁹ Viljoen (n 33 above) 55.

It is fundamental to fair procedure that both sides should be heard...This is the more far-reaching of the principles of natural justice, since it can embrace almost every question of fair procedure or due process, and its implications can be worked out in great detail. It is also broad enough to include the rule against bias, since a fair hearing must be an unbiased hearing...¹⁹⁰

The net effect of the decision was to assert that fact-finding reports might not be published unless comments by the state concerned are attached thereto, which decision we are reluctant to concur with.¹⁹¹ One would prefer an approach, which in principle requires comments by the state concerned within a prescribed period of time. Failure to do so would prompt the AHSG to authorize the ACHPR to publish the report. Such an approach tallies well with a cardinal IACHR practice, namely, that a preliminary mission report must be sent to the accused state prior to the publication of the final fact-finding report to enable the state to make comments or observations.¹⁹² Where the state resorts to the former, the ACHPR may not alter the final report. However, in the event that the state makes specific observations, the final report has to be accordingly amended.¹⁹³ We therefore, deem it justifiable to conclude that the ACHPR is incessantly held hostage to political power unless it liberates itself from the quandary.

3.5 Procedural issues arising from fact-finding missions (strengths and weaknesses)

The examination seeks to identify the strengths and weaknesses of the system. Following is the analysis of the fact-finding reports on Senegal, Mauritania and Zimbabwe.

3.5.1 Prior to the fact-finding

3.5.1.1 Non-disclosure of the sources of the allegations

The Comments of the GOZ queried the non-disclosure of the informants who prompted the fact-finding mission.¹⁹⁴ Consequently, argued the GOZ, it was in a dilemma to decide whether to grant the ACHPR diplomatic entry into its jurisdiction. More pertinently, non-disclosure of such sources made it difficult for the GOZ to specifically refute certain allegations. Apparently, this is a sudden departure from the normal practice in that the ACHPR has, in previous missions, disclosed the

¹⁹⁰ HWR Wade, *Administrative Law* (1971) 421.

¹⁹¹ Para. 4 of the Decision, which stresses that in future the ACHPR should not publish mission reports without the comments of the state concerned. This is problematic in that if the state concerned deliberately decides not to make comments urgently, the AHSG may be inclined to defer publication, which decision the ACHPR cannot challenge.

¹⁹² Art. 58 (a) of the IACHR Rules of Procedure.

¹⁹³ Murray (n 186 above) 85.

¹⁹⁴ Para 2.3 of the Comments to the Fact-finding Report.

source of allegations made against the government under investigation.¹⁹⁵ The more important question is, however, whether such disclosure was vital in the interest of the contents of the report. Our considered view is that disclosure of informants is only desirable where the investigated government offered a guarantee against reprisals, especially through the rules of procedure. In the current matter, such guarantee was not present, as the ACHPR has no rules of procedure; therefore disclosure was highly undesirable in the interest of witnesses.

3.5.1.2 Publicity

It has been strongly argued that the ACHPR treats fact-finding missions as a private occupation. There is no sufficient publicity of the exercise by the ACHPR to enable the victims and or their families and representatives to visit the ACHPR at its residence and lodge denunciations.¹⁹⁶ The ACHPR does not hold press conferences, but only prepares a communiqué at the end of the fact-finding mission. Ahmed Motala went further to observe that the ACHPR has maintained “a low-key attitude towards the media even in instances where media attention could have enhanced its work and image, for example during missions to investigate human rights violations”.¹⁹⁷

Edumundo Vargas summarises the Inter-American practice as follows;

Next, the SC usually holds a press conference to publicise its program and to call upon the representative sectors of society to present their points of view. This communiqué also alerts persons, who feel that their human rights have been violated, to present their complaints at the local offices of the commission, which are usually set up in the hotel where the commission is staying.¹⁹⁸

It is generally agreed that the documentation of human rights violations is deprived of its effect if such records are not effectively disseminated to the international community. People should not only assume that the ACHPR is protecting their rights. It must be seen to be doing so. Disclosing its presence in a country should be one of the ACHPR's priorities because such opportunities rarely avail themselves. Without prejudice to other functions, we opine that victims should be called upon to file complaints as a wider process of fact-finding. Now if the ACHPR maintains a surreptitious attitude towards a public function, the absence of bias and efficiency will be doubtful.

¹⁹⁵ N (171 above).

¹⁹⁶ Ahmed Motala, a seasoned scholar and activist referred to the ACHPR as “camera shy” when he facilitated a discussion with the LLM Class, Centre for Human Rights, University of Pretoria, May 2005.

¹⁹⁷ A Motala, “NGOs in the African System” in Evans and Murray (eds) (2000) 256.

¹⁹⁸ E C Vargas, “The Visits on the Spot: The Experience of the Inter-American ACHPR on Human Rights”, in BG Ramcharan eds (1982) 142.

3.5.1.3 Diversion from the official programme

The GOZ alleged that upon gaining entry to its territorial jurisdiction on the ticket of the agreed programme, the ACHPR fundamentally diverted by meeting certain persons not listed on the programme.¹⁹⁹ One would be inclined to assume that the GOZ was amenable to a list of persons with whose evidence it was comfortable. Although the ACHPR's fact-finding programme may not be comparable to the IACHR, which is often comprehensive, at least it prepares one before commencing the mission. However, the Nigerian experience is disquieting in that the Nigeria government prepared the programme.²⁰⁰ As has been previously held, such programmes, among other things, serve to secure the investigated state's consent and co-operation in the exercise.

With respect, governmental participation has never been a valid consideration in the preparation of mission activities. It defeats the purpose of the exercise if the ACHPR should only have access to facts in favour of the government.²⁰¹ The recurrence of this objection can be avoided by adopting rules of procedure similar to those of the IACHR. The Special Commission (SC), as it is called, is allowed to independently formulate its own activities,²⁰² with the accused state required to allow the SC to interview "any persons, groups, entities or institutions freely and in private".²⁰³ The same position obtains in ILO practice.²⁰⁴ Consequently the ACHPR was within its rights to divert from its own programme for the purposes of the effectiveness of the exercise.

3.5.1.4 Insufficient preparation

This is an independent observation in the system that the ACHPR does not do any meaningful background preparation (study) before the date for the exercise. Presumably, this lack of preparatory study influenced the ACHPR to fundamentally misdirect itself by finding, among other things, that land was not central to the problems in Zimbabwe, yet this was a given fact.²⁰⁵ Had it not been for the invaluable participation of civil society, it could have been difficult for the ACHPR to meet the victims of human rights violations or their representatives.²⁰⁶

¹⁹⁹ Para 2.4 of the GOZ Comments.

²⁰⁰ "ACHPR on Human and Peoples' Rights visit to Nigeria" available at: [http://www.ilo.org/econACHPR Mission to Nigeria.htm](http://www.ilo.org/econACHPR/Mission%20to%20Nigeria.htm) (accessed on 26 July 2005).

²⁰¹ The non-conclusive nature of the programme is a fundamental requirement in the ILO procedure to prune the process of unnecessary limitations. N (85 above) 340.

²⁰² Art. 53 of the IACHR Rules of Procedure.

²⁰³ Art. 55 (a) of the IACHR Rules of Procedure.

²⁰⁴ Franck & Fairley (n 93 above) 343.

²⁰⁵ Para 8.0 of the GOZ Comments.

²⁰⁶ Amnesty International, "Zimbabwe Human Rights Defenders under siege" available at:

The IACHR does not commence the mission on the date stated in the programme. It begins way before with the deployment of the secretariat in the country to logistically prepare for the arrival of the SC.²⁰⁷ The logistical arrangements include, sorting out transport and lodging. Critical to this process is the preparation of the briefing book containing the general background information on the state, a summary of the cases before the IACHR against that government and selection of cities or places to be visited by the SC.²⁰⁸ The IACHR staff would travel to the country to finalise the preparations just before the SC arrives. Such comprehensive preparation would indisputably enhance the analysis of the facts and aid the accuracy of the final report. It is evident that the ACHPR is far much wanting in this respect.

3.5.2 During the mission

3.5.2.1 Lack of rules of procedures

Rachel Murray²⁰⁹ observed the extent of this problem and its couched consequences when she observed that;

As there is no clear set of guidelines by which the ACHPR conducts these visits and its independence and impartiality have been questioned, the use of missions in the collection of reliable information is questionable. This is compounded by the paucity of information about the way in which these missions have been conducted, with reports providing only minimal information on which places were visited and who was met, if a report is provided at all.²¹⁰

The above observations imply that the IACHR has earned for itself a positive reputation for making and maintaining expatiated rules of procedure governing on-site visits.²¹¹ The same obtains with the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) of the ILO, in respect of which Franck and Fairely have eulogised the body by holding that its “proceedings provide a considerable trove of procedural concepts that are of universal applicability, and most of them ought to be applied by any fact-finding mission seeking credibility for its product”.²¹²

<http://66.249.93.104/search?q=cache:4oPAqHo8W-:>

web.amnesty.org/library/index/engaf460012005+human+rights+fact-finding&hl=en (accessed on 1 September 2005).

²⁰⁷ Vargas (n 198 above) 137.

²⁰⁸ As above.

²⁰⁹ As above.

²¹⁰ Evans & Murray (n 11 above) 108.

²¹¹ Chapter IV, IACHR Rules of Procedure.

²¹² Franck & Fairley (93 above) 343. Also Rossilion, “ILO Examination of Human Rights Situations”, (1974) 12 *International Commission of Jurists, The Review* 40; CW Jenks, *Social Justice in the Law of the Nations: The*

Therefore, if a fact-finding mission is to become more than just a chimera, the ACHPR should craft universally approved minimal standards of due process to determine the manner in which facts are collected and how they should be handled thereafter.

3.5.2.2 Restrictive time frame

The ACHPR has been recurrently criticised for its restrictive time allocation to the fact-finding exercise. Human rights organisations in Nigeria raised a hue and cry when the ACHPR rushed through its government-authored-programme without giving opportunity to complainants to file denunciations. In the same vein, the GOZ appeared so concerned with the record four-day fact-finding mission, reasoning that the time frame could not allow a comprehensive fact-finding and objective analysis of facts.²¹³ The ACHPR professed lack of resources as the cause. The GOZ insists that an offer to assist in logistics was categorically made, but was not taken up. To that end, submitted the GOZ, the excuse was untruthful and therefore, an insult.²¹⁴

We hasten to note that a fact-finding process that does not permit sufficient time to collect and analyse evidence is a sure sign of need for a complete overhaul. The ACHPR correctly acknowledged that there were widespread violations of human rights in Zimbabwe.²¹⁵ Given the population figures and the extent of violations in Nigeria and Zimbabwe, one could only conclude that the ACHPR short-changed the system. Such are the demands of a process in public interest so as to exclude any real or probable bias. The celebrated IACHR mission to Chile took three times as much time despite the average being between six and sixteen days depending on the extent and nature of human rights violations.²¹⁶ The ACHPR should therefore, allocate time congruent to the severity of the violations.

ILO impact after Fifty Years (1970); Wolf, "At the Apex of Value Hierarchy-An International Organisation's Contribution" (1978) 24 *New York Legal and Society Law Review* 179.

²¹³ Para.3.0 of the GOZ Comments.

²¹⁴ Para. 3.2 of the GOZ Comments. The ACHPR's refusal to accept financial assistance from the government was, however, consistent with international practice. Vargas notes that the Special ACHPR may not accept that the government pay its expenses during its visit. However, if resources were not there then it was wise to postpone the visit until such a time, as the funds would be available, than rushing through a controversial report.

²¹⁵ N (1 above) para.1 of the Executive Summary.

²¹⁶ Vargas (n 198 above) 142.

3.5.2.3 Capital city-oriented missions

Another depiction of the ACHPR is that it virtually conducts its missions in capital cities only.²¹⁷ This is true in respect of all the missions under scrutiny in this study. The obvious outcome is that the final report is not reflective of the overall outlook of the human rights situation in the country. In its own words, the GOZ lamented thus;

The Government of Zimbabwe had anticipated a nationwide investigative mission, in which a wide cross-section of Zimbabwe's population, both rural and urban, would be met as the allegations were said to be widespread. In light of this anticipation, the Government of Zimbabwe had prepared a draft itinerary that included visits to rural areas, to farming areas as well as meeting the people of Harare.²¹⁸

In sharp contrast to this practice, the UN fact-finding mission to Zimbabwe prompted by *Operation Murambatsvina (Restore Order)* managed to visit almost all regional cities because the nature of arbitrary evictions was massive and widespread.²¹⁹ In this respect, the ACHPR requires no more embarrassing comments in order to broaden its horizons. Holding inquiries in regional capitals is a giant step towards achieving effective data collection, especially in federal states like Nigeria. Another telling example is the SC, which has been celebrated for spending "approximately one half of its time outside the capital".²²⁰ For example, the SC visited Aguilares, a rural settlement in El Salvador where disturbances led to the death of rural workers. In 1978, visits were made in every town where there had been bombings due to insurrection in Nicaragua. In 1979 in Argentina, the SC visited cemeteries across the country following allegations that certain persons were buried in unmarked graves.²²¹ Indeed human rights protection requires wriggling out of comfort programmes and attending to the very people in need of help. In this regard, the ACHPR should emulate the UN and the IACHR.

²¹⁷ Murray maintains that, the ACHPR conducts interviews in various places other than the capital cities, and refers readers to the Tenth Annual Activity Report. With respect, we beg to differ. There is nothing suggesting that the mission visits more than two cities, let alone regional cities and rural areas where serious violations normally occur out of sight of foreign embassies. If such evidence is not in the report itself, then, it is not there. See R Murray "Evidence and Fact-finding by the ACHPR", in M Evans & R Murray Eds (2000) 100.

²¹⁸ Para. 4.1 of the GOZ Comments.

²¹⁹ AK Tibajuka "The Report of the Fact-finding Mission to Zimbabwe to assess the Impact of *Operation Murambatsvina* by the UN Special Envoy on Human Settlements Issues in Zimbabwe", 18 July 2005, Section A, para 1.3. Mission carried out under the auspices of the UN-Habitat –Human Settlements.

²²⁰ Vargas (n 198 above) 142.

²²¹ As above.

3.5.2.4 Data collection techniques

A fact-finding activity is aimed at collecting elaborate facts that prove or rebut allegations of human rights violations. The ACHPR must be logistically prepared to gather facts through any opportunity that avails itself during the visit. In this domain, the IACHR set a precedent by establishing a temporary office at the hotel, whereat victims could lodge communications in the same way as one lodges a complaint through the individual complaint procedure.²²² This has made on-site visits a double-barrelled gun in the protection of rights in that, on the one hand, there is protection through individual complaints procedure and, on the other, through on-site investigation.²²³

Rachel Murray laments the lack of ingenuity in the ACHPR and categorically refers to the Inter-American system as a precedent, which ought to be emulated.²²⁴ The ACHPR has already demonstrated its indifference by rebuffing the application of facts collected during a fact-finding mission to a case before it by holding that the mission to Sudan;

Must be considered as part of its human rights promotion and does not constitute a part of the procedure of the communications, even if it did enable it to obtain information on the human rights situation in that country. Consequently, this decision is essentially based on the allegations presented in the communications and analysed by the ACHPR.²²⁵

It is so astounding to learn this from a regional human rights treaty monitoring body that facts collected through fact-finding mission are inadmissible in the determination of individual complaints. This is a retrogressive and misdirected interpretation of the purpose of fact-finding, which is to place a quasi-judicial body in a position to make informed decisions. This casts doubt on whether the ACHPR knows what it will be doing during a fact-finding mission.

3.5.2.5 Preliminary reports

It has been noted that the ACHPR does not issue any preliminary reports soliciting for comments or observations from the government concerned. In the preceding chapter, it has been concluded that one of the advantages of physical presence in the accused state is to exert constructive

²²² Vargas (n 198 above) 144.

²²³ During the SC 14 days visit to Argentina in 1979, 5 580 new complaints were received. Of these complaints, 4 153 were declared admissible and are being determined through the individual complaint Mechanism. Filing of new complaints should be separated from persons who come to give factual evidence of violations of rights, as is the procedure of the ACHPR. The ACHPR does not receive new complaints during a fact-finding mission.

²²⁴ Evans & Murray (n 11 above) 100.

²²⁵ Communications 48/90, 50/91, 52/91 and 89/93, *Amnesty International; Comite Loosli Bachelard; Lawyers' Committee for Human Rights; Association of Members of the Episcopal Conference of East Africa v Sudan*, *Thirteenth Annual Activity Report 1999-2000*, Addendum, para. 46.

pressure to end continued violations. The presence of a mission must prompt some immediate improvement.²²⁶ To that end, the fact-finding body should issue preliminary reports requesting the government to end or answer allegations of serious and immediate attention. The SC broking of a peace agreement, which coincided with its visit to Colombia in 1980, reinforces the importance thereof.²²⁷

The same sentiments were manifest by the UN General Assembly when it tentatively agreed as follows by adopting the Declaration on Fact-finding by the UN in the Field of Maintenance of Peace and Security;

The States directly concerned should be given an opportunity, at all stages of the fact-finding process, to express their views in respect of the facts the fact-finding mission has been entrusted to obtain. When the results of fact-finding are to be made public, the views expressed by the States directly concerned should, if they so wish, also be made public.²²⁸

The ACHPR, findings are made public after the preparation of the final report; if at all one is prepared. It is submitted that the non-issuance of preliminary reports may be a result of the ACHPR's negative attitude towards full exploitation of fact-finding missions, preferring the traditional conception, which is often restrictive in application. These problems encroach into the aftermath of the mission, which is plagued by several shortcomings, which we now proceed to analyse.

3.5.3 Post- mission

3.5.3.1 The dichotomy between investigative and indirect fact-finding

The ACHPR has categorically demonstrated its ignorance regarding indirect fact-finding through individual complaints by refusing to determine individual communications against Sudan in light of facts collected during a fact-finding mission.²²⁹ The same finding was retained in respect of communications against Mauritania, in which the ACHPR regarded the mission as a visit of "good offices".²³⁰ It reasoned that on-sites visits are constitutive of its promotional and not protective

²²⁶ Vargas (n 198 above) 145.

²²⁷ The SC brokered an agreement between the Colombian government and armed insurgents, the M-19, in Bogotá, Colombia. Similarly, the SC's preliminary remarks in Panama brought about immediate nullification of decrees repressive on freedom of expression and right to due process. The second visit to Nicaragua in 1980 saw the immediate release of most women prisoners. Vargas (n 198 above) 146.

²²⁸ N (110 above) art. 26.

²²⁹ N (225 above).

²³⁰ N (171 above) 36.

mandate, as is the case with individual complaints.²³¹ With due respect, it is submitted that the main issue is not the form of the mandate, but rather the refusal to utilise facts documented during a fact-finding mission. In turn it is a rejection of fact-finding through individual communications.

There is no information available suggesting that the IACHR maintains the dichotomy preferred by the ACHPR. For instance, various on-site visits carried out in South America were prompted by insurgence, rising dictatorship or an unconstitutional change of government.²³² Notwithstanding such political upheavals, the IACHR has recorded such visits as investigative visits, and not “good offices” as the ACHPR would like to describe them. We therefore, strongly criticise that finding and aver that indirect fact-finding should be appreciated and due weight be placed on evidence collected through fact-finding.

3.5.3.2 Non-reporting or tardy reports

As is the case with non-reporting by states in periodic reporting, the ACHPR sometimes does not produce any report after a fact-finding mission despite soaring criticism from scholars.²³³ Most disheartening is facts evincing that no reports have seen the light of day in respect of missions to Togo, Sudan and Nigeria.²³⁴ As a great achievement, the ACHPR may publish a report after it has been evidently overtaken by events in substance. For instance, the report on Zimbabwe only came out after a period in excess of two years,²³⁵ the reports on Mauritania and Senegal came after almost twelve months as opposed to the UN report on *Operation Restore Order*, which took only ten days.²³⁶

In sharp contrast, the IACHR has a practice of producing preliminary reports during the course of the mission, which are sent to the government for immediate action and response.²³⁷ Another final preliminary report is produced at the end of the mission against which the state concerned should file a response before the preparation of the final report.²³⁸ In the case of Chile, the IACHR produced an annual report on Chile, which were considered in the regular sessions of the OAS.²³⁹

²³¹ Addendum para. 87 to the Thirteenth Annual Activity Report, 1999-2000.

²³² Missions to Chile, Colombia, Haiti, were prompted by political instability in those states.

²³³ The report on an investigative mission carried out in Nigeria in March of 1997 is still to be published, or maybe even prepared.

²³⁴ Murray (n 115 above) 21.

²³⁵ The fact-finding mission was carried out in June of 2002 and the report only came out in November 2004.

²³⁶ The missions were conducted in June 1996 and the reports were published in the Tenth Annual Activity Report of the 21st Session in April 1997. N (171 above).

²³⁷ Vargas (n 198 above) 143.

²³⁸ As above.

²³⁹ As above.

In general, the IACHR produces an executive summary of reports on visits carried out during the time covered by every Annual Report.²⁴⁰

The importance of a fact-finding report should not be minimised. The report is the crude documentation of factual proof of human rights violations or its absence in a state. To that end, the remedial function of a fact-finding visit can only be achieved through expeditious publication of the findings to exert pressure through exposure and embarrassment. Having observed this imperative function, Franck and Fairley concluded;

The fact-finders' report, given full publicity, serves to clarify misconceptions, absolve or embarrass the investigated party, influence public opinion, and, where appropriate, facilitate further expressions of community disapprobation. Fact-finding is thus, potentially, a significant weapon in the armoury of world order.²⁴¹

Reverting to the purpose of fact-finding missions, we noted that it is to redress violations in the shortest time possible. As a result, a timely report would go a long way in achieving this goal. It should logically follow that it is in respect of serious and massive violations that the ACHPR would resolve to carry out an investigative mission. Therefore, to delay the publication of recommendations is massively retrogressive to the protective mandate of the ACHPR.

3.5.3.3 Premature publication and disclosure of informants

The African Charter provides for the bureaucratic steps a report should exhaust before it can be unleashed to the anxiously awaiting civil society.²⁴² However, there is evidence proving that the Secretariat (the ACHPR is however, still responsible) leaked the report on Zimbabwe months before its consideration by the AHSG in November 2004.²⁴³ Furthermore, the ACHPR disclosed the names of the NGOs, which prompted the fact-finding mission, exposing them to reprisals by the government.²⁴⁴ By no means is a suggestion being made implying that the conduct of the ACHPR was improper in its entirety. Instead, we are persuaded that it was unwise for the ACHPR to allow the leakage of the report as that conduct had incurable and undesirable consequences,

²⁴⁰ "IACHR Annual Reports" available at < <http://www.cidh.oas.org> > (accessed on 27 September 2005).

²⁴¹ Franck & Fairley (n 93 above) 308.

²⁴² As above.

²⁴³ Amnesty International, "Zimbabwe Human Rights Defenders under siege"
[http://66.249.93.104/search?q=cache:4oPAqHo8W-:
web.amnesty.org/library/index/engaf460012005+human+rights+fact-finding&hl=en](http://66.249.93.104/search?q=cache:4oPAqHo8W-:web.amnesty.org/library/index/engaf460012005+human+rights+fact-finding&hl=en)

²⁴⁴ As above.

namely, retraction of state co-operation in future. We have laboured to explain how fundamental state co-operation is to the credibility and probity of the fact-finding report.²⁴⁵

As regards disclosure of witnesses, this is practically unavoidable because the report can only be credible where facts are ascribed to certain existent witnesses. However, disclosure in the Zimbabwe situation was highly undesirable because the ACHPR has no rules of procedure in terms of which the investigated state would undertake not to execute any reprisals to informants and witnesses.²⁴⁶ Apparently, this has become the practice of investigative fact-finding by international organisations in the ILO and the UN in general.²⁴⁷ The practice of the IACHR is entirely based on the rules of procedure that have stood the test of time. It ought to be noted that the practice of the IACHR in publishing reports has been “*ad-hoc*”²⁴⁸ in the sense that consideration of the report by a political organ would precede its publication, but sometimes it would not.²⁴⁹ This is because there is no article 59 equivalent confidentiality provisions in the Inter-American system. The decision to publish the report entirely falls within the discretion of the IACHR. In light of this fact, the ACHPR has to come up with original ideas to circumvent the paralysis threat posed by article 59.

3.6 Complaints based fact-finding

The ACHPR has undertaken a number of fact-finding missions prompted by individual complaints.²⁵⁰ Given the little weight ascribed to such missions by the ACHPR, this dimension of the discussion does not evolve around the desirability of such missions, but the use of the final product (the fact-finding report). Consequently, it is timely to suggest that generally, the ACHPR should allocate due weight to fact-finding reports prompted by communications.

²⁴⁵ Chapter 2 above, generally.

²⁴⁶ Art. 54 of the IACHR Rules of Procedure.

²⁴⁷ Art. 15 of “The Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions” (1981) 75 *American Journal Of International Law* 163.

²⁴⁸ Vargas (n 198 above) 148.

²⁴⁹ For instance, the final report on Chile (1976) was considered by the OAS Permanent Council, which presented it to the General Assembly. The report on El Salvador (January 1978), Haiti (August 1978) and Argentina (September 1979), were presented straight to the General Assembly; the Nicaragua report (October 1978), incorporating serious and massive violations was urgently considered by the Consultation of Ministers of Foreign Relations. As above.

²⁵⁰ N (225 above).

3.6.1 IACHR practice

The success of complaints-based fact-finding is in the number of individual complaints filed. The more the complaints from one state, the clearer the general human rights outlook in that state. Scott Davidson has noted that the IACHR, having been denied consent to conduct on-site investigations, “utilised the individual communications as evidence in attempting to determine the state of human rights in the member states against which they were addressed”.²⁵¹ Comparatively, the IACHR has handled more complaints than the ACHPR. Furthermore, it has undertaken investigative on-sites missions prompted by these complaints especially in dealing with disappearance cases prevalent in Latin America. Above all, it has utilised the reports of on-sites missions in deciding individual complaints, basing its findings on the fact-finding reports. The UN system has also utilised individual complaints to obtain a general view of human rights situation in member states.²⁵²

In the African system, a good example of complaints based fact-finding is the series of complaints filed by Nigerian NGOs during military rule in Nigeria. Such complaints enabled the ACHPR to find that the ousting of the jurisdiction of the courts to determine the constitutionality of presidential decrees and executive control of military tribunals were major human rights violations across the country.²⁵³ The same was the situation in Mauritania and other states where systematic violations of human rights were reported and successive complaints filed.

3.6.2 Strengths

Inadequacies aside, the ACHPR’s progressive interpretation of article 56 of the African Charter (admissibility requirements) has provoked the massive filing of individual communications for a continental assessment of the human rights situation. Such progressive departure from other systems includes discarding the victim requirement hence anyone may lodge complaints without themselves being victims of violations (expansive *locus standi*). This allows non- Africans to file complaints on behalf of Africans,²⁵⁴ and restricting the onus to prove exhaustion of domestic remedies.²⁵⁵ The ACHPR has interpreted socio-economic rights to be intricately linked to civil and

²⁵¹ S Davidson, *Law and Political Change: Human Rights* (1993) 133.

²⁵² Cases against Turkey before the UN Human Rights Committee.

²⁵³ *Constitutional Rights Project, Civil Liberties Organisation*, Communications 87/93 and 129/94. Also *Media Reports Agenda and Constitutional Reports Project v Nigeria* Communications 105/93, 128/94, 130/94 and 152/96, Eighth Activity Report 1994-1995 Annexure VI, 391 and Ninth Activity Report 1995-1996 Annexure VIII, 452.

²⁵⁴ *Maria Baes v Zaire* Communication 31/89, Eighth Activity Report 1994-1995, Annexure VI, 383.

²⁵⁵ *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Inter africaine des Droits de l’Homme, Les Temoins de Jehovah Zaire* Communications 25/89, 47/90, 56/91 and 100/93, Ninth Activity

political rights.²⁵⁶ In cases of systematic, serious and massive violations, the author's authorisation and exhaustion of remedies is irrelevant.²⁵⁷ These achievements motivate individual complaints thereby affording the ACHPR the chance to have a continental human rights assessment- -the essence of indirect fact-finding. All in all, the ACHPR should utilise indirect fact-finding as a human rights barometer to influence incisive investigative fact-finding missions.

3.7 Conclusion

This chapter constituted the main issues falling for interrogation in this work, namely, the quality of fact-finding through the various forms of fact-finding in a comparative perspective. We have noted that comparatively, the African practice is substantially flawed, especially in direct fact-finding and state reporting. It is discouraging to note that after twenty years of entry into force of the African Charter, certain states have not bothered to report and those who have attempted did it as an errand or have fizzled out. Despite vast comparative regional practices, the ACHPR carries out missions in a manner suitably described as medieval antiquity; having no rules of procedure and does not issue reports. If regional human rights protection should not become a figment of the imagination, or an empty diplomatic gimmick, then drastic measures should be adopted in order to rejuvenate the African human rights system as a whole. We now proceed to propose recommendations for improvement in the following chapter.

Report 1995-1996, Annexure VIII, 444.

²⁵⁶ *SERAC v Nigeria* Communication 55/96, where the "right to food" was deduced from the right to life.

²⁵⁷ As above.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.0 Conclusion

In Chapter One we premised this study on the hypothesis that fact-finding in the African system needs a complete overhaul given the scathing criticism that has been levelled against the same by numerous commentators. Consequently, in Chapter Two we explored the basic universally acceptable principles of fact-finding regarding the history, forms and purposes of fact-finding. The indispensability of procedural due process was duly noted. Laying these findings as a foundation, we interrogated the African human rights fact-finding practice in Chapter Three drawing a comparison with the Inter-American system. The examination exposed abysmal practices, which, if allowed to persist in the current state, might paralyse the progressive and effective human rights protection in Africa. Following hereunder are the recommendations for improvement derived from the case study, as well as with other regional and international human rights treaty bodies that have been tried and tested.

4.1 Recommendations

4.1.1 Fact-finding through state reporting

Little could be borrowed from both the IACHR, as state reporting is non-existent under this system. The UN system is plagued by the same problem of non-reporting, which threatens the future of the system. Scholars have argued that this is because the multiplication of human rights committees established by different UN human rights instruments has tended to duplicate reporting requirements of governments.²⁵⁸ Consequently, the following recommendations are original and have been derived from scholars and commentators writing on these systems as well as independent observations.²⁵⁹

- i. The ACHPR must emulate the IACHR by carrying out investigative fact-finding missions in non-reporting or defaulting states. Where governmental consent to conduct investigative missions is withheld, the ACHPR has to use secondary sources of information to prepare country reports and make recommendations.²⁶⁰

²⁵⁸ WM Reisman, "Practical Matters for Consideration in the Establishment of a Regional Human Rights Mechanism: Lessons from the Inter-American Experience" (1995) *St. Louis-Warsaw Transatlantic Law Journal* 89, 100.

²⁵⁹ See literature review in Chapter One.

²⁶⁰ C Medina "The Role of Country Reports" in DJ Harris & S Livingstone (eds) (1998) 120.

- ii. The recommendations referred to in (i) above will have to be lodged with the AHSG in terms of article 53 of the African Charter for redress that may include exertion of political pressure and the imposition of some kind of sanctions on persistently delinquent states.²⁶¹
- iii. The ACHPR may adopt resolutions governing the certain areas. We propose that they be phrased in the following terms;
 - a) “Resolution on Compliance with Reporting Guidelines”, which empowers it to reject reports inconsistent with ACHPR Reporting Guidelines. This will motivate submission of reports that are detailed and uniform in form and substance, which easily give a continental human rights outlook.
 - b) “Resolution on Presentation of State Reports by Competent State Delegates”, which makes the attendance of delegates compulsory and authorises the ACHPR to refuse audience to junior delegates and to defer the examination of reports for a strict and restrictive period of time.²⁶² This addresses the problem of indefinite deference of examination of certain reports for non-attendance of state delegates. It also ensures the attendance of senior and competent.
 - c) “Resolution on the Amendment of Certain Provisions of the Charter in terms of Article 68 of the Charter”, which would enable the ACHPR to acquire the sponsorship of a state to move a motion for the amendment of the Charter in terms of article 68. Provisions prone to amendment would possibly include all claw-back clauses and article 59 limiting the ACHPR’s right to publish its measures and findings, given the weight ascribed to the ACHPR’s opinion to the AHSG in favour of the proposed amendments. Meanwhile, the ACHPR should boldly and broadly construe the Charter.
- iii. The ACHPR may have to amend its rules of procedure to allow access of state reports by recognised civic organisations at least three months prior to its examination, to prompt open, incisive and participatory dialogue and debate during the examination of the reports.
- iv. In order to allocate enough time for examination of state reports, the rules of procedure should be amended to provide for two ACHPR sessions in a year since the AHSG now

²⁶¹ D Bodasky, “The Role of Reporting in International Environmental Treaties: Lessons for Human Rights Supervision” in DJ Harris & S Livingstone (eds) (1998) 373.

²⁶² UN Human Rights Committee General Comment No. 2 (3) in Yearbook of the UN Human Rights Committee 1981-82, Vol 11, UN Doc.CCPR/3/Add.1.

meets twice. One session should be allocated to individual communications and the other to a thorough examination of state reports. This is in view of the mandatory provisions of article 54 of the African Charter that require the ACHPR to submit an activity report at every AHSG session.

- v. The amendment of the rules of procedure must specifically provide for the time regulating the publication of concluding observations and a defined follow-up mechanism, which, if not adhered to, would prompt an investigative mission to assess implementation of recommendations.

4.1.2 Complaints based fact-finding

- i. Rules of procedure ought to be amended to impose a time frame within which the ACHPR's decisions should be published in all official languages of the AU.
- ii. Decisions ought to be well reasoned, consistent and based on progressive principles of international human rights law.

4.1.3 Investigative fact-finding

Most of the recommendations in this category relating to shortcomings observed in Chapter Three above will be incorporated in the rules of procedure governing fact-finding missions, a draft copy of which is annexed hereto this study as Annexure "A". We urge the ACHPR to amend its rules of procedure by the insertion of these provisions since the prerogative to effect amendments falls within the sole discretion of the ACHPR.²⁶³ Annexure A contains model rules of procedure, which emanated from general principles governing investigative fact-finding explored in Chapter Two above. They were also derived from the fact-finding practice by UN *Ad hoc* bodies, ILO FCC procedure and the IACHR practice of on-site visits. The Belgrade minimal rules, the ECOSOC rules of procedure on fact-finding and the IACHR rules of procedure governing on-site visits played a major role in the content of Annexure A.

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²⁶³ Rule 121 of the ACHPR Rules of Procedure.

ANNEXURE “A”

(MODEL RULES OF PROCEDURE GOVERNING INVESTIGATIVE FACT-FINDING MISSIONS)

Article 1 (Investigative missions)

1. A simple majority vote of the members of the Commission present and voting, shall suffice as a resolution to conduct an investigative mission in a member state.
2. Such a mission may be conducted with the consent of the investigated member state, which consent member states should not unreasonably withhold. However, consent shall be is deemed granted where the Commission has been invited by a member state to carry out an investigative mission in its territory.
3. If advisable and necessary to carry out an investigative mission, the following situations shall suffice to justify the decision;
 - (a) Allegations of massive and systematic violations of human and peoples’ rights;
 - (b) Upon lodgement of a communication or communications that meets all admissibility requirements stipulated in article 56 of the Charter, alleging violations of human and peoples’ rights and capable of factual proof;
 - (c) In the case of member states that have not yet submitted the initial report in terms of article 62 of the Charter;¹
 - (d) In the case of member states that are behind with their reporting obligations sanctioned by article 62 of the Charter, by at least two reports, beginning with those owing more reports;²
 - (e) In cases of unconstitutional change of government;
 - (f) Upon invitation by a member state to carry out an investigative mission in its territory.

Article 2 (Selecting fact-finders)

1. A mission of fact-finders, called a Fact-Finding Commission (FFC), selected by the Commission for a specific mission, shall always conduct investigative missions.
2. At no time shall the selection of a FFC precede the decision to conduct an investigative mission in a member state.

¹ To remedy the problem of non-reporting.

² N (note1 above).

3. The selection of the FFC and the chairperson thereof shall be the prerogative of the Commission subject to internal administrative regulations. Consequently, the Secretariat and staff members of the Commission shall be eligible in constituting a FFC.³
4. The Commission shall be mandated to constitute the FCC with members that are not deposed to a political finding, competent and those not committed to a perceived outcome.⁴

Article 3 (Disqualification of certain members)⁵

The following members of the Commission and private individuals are disqualified from participating in a specific investigative mission;

- (a) A national of the investigated state;
- (b) A member who is a citizen of a state, which shares the same geographical region with the investigated state;
- (c) A member who is temporarily or permanently resident in the territory of the investigated state, though not necessarily a citizen thereof.

Article 4 (The itinerary)

1. The prerogative to organise mission activities shall be solely exercised by the FFC, which schedule of activities may, on without prejudice basis, be amended by the FFC as and when the FFC so decides that action to be necessary to enhance an efficient conduct of the mission, provided it is done prior to the preparation of a final report.
2. To that end, any investigative mission that shall be conducted on the basis of a schedule of activities prepared by or with substantial input of the investigated state shall be incurably bad.⁶

Article 5 (Duties of the investigated state)

It shall be obligatory upon the investigated state to provide facilities necessary for the conduct of the mission, which include, but not limited to local transport, lodging of the FFC, security, access to

³ Designed to exclude the active participation of states in the preparation of the itinerary as such conduct exposes the independence of the FFC and its final report to scathing criticism, as was the situation with the mission to Nigeria.

⁴ This is to attempt to constitute the FFC with people who appreciate the distinction between factual findings in the domain of human rights, as opposed to a political finding in the settlement of political disputes. Lack of commitment to a perceived outcome is the rule against bias and competence entails the recruitment of people who are knowledgeable to what they are required to do within the parameters of the terms of reference.

⁵ Individuals and commissioners who are prone to obvious, real or likelihood of bias ought to be eliminated from the outset.

⁶ See n 3 above.

any public documents; interview any persons, group of persons, entities, public and private institutions, unrestricted access to places of detention and any other category of persons and places not specifically mentioned.⁷

Article 6 (Guarantee against reprisals)

Prior to the commencement of the mission, the FFC shall insist on getting a written guarantee from the government of the state being investigated, asserting and affirming that no action amounting to victimisation of informants, witnesses and their property or families, shall be perpetrated by the government as a punishment for disclosing violations of human and peoples' rights.⁸

Article 7 (Communiqué and mobile office)

1. Following the issuance of a written guarantee against reprisals, the FFC shall hold a press conference at the place where it is residing declaring its presence in the territory of the member state and calling upon all persons, relatives or their representatives, who may have denunciations to make, to come and lodge complaints at the mobile office which shall be open during business hours applicable in the state.
2. Such communiqué shall indicate dates and addresses of the mobile office in the regional capitals, or any other places other than the capital where the FFC shall conduct its fact-finding exercise. At least half of the mission time shall be spent outside the capital subject to the nature and magnitude of human rights violations.⁹

Article 8 (Preliminary reports provisional measures)

1. The FFC may issue preliminary reports to which the investigated state shall respond in the shortest possible time. Such reports may include requests to the government for provisional measures in urgent cases in order to ameliorate and arrest any further violation of human and peoples' rights.¹⁰

⁷ To facilitate the FFC's access to all possible factual sources of data corroborative to the allegations of human rights violations, which are largely individuals and independent human rights organisations and institutions of government and interaction with such sources should be confidential.

⁸ An equivalent of the Witness Protection Units in domestic and international jurisdictions. Insisting on guarantee against reprisals was borrowed from ILO practice, though requesting for one is a general fact-finding practice. It provokes maximum and honesty participation of anyone knowledgeable to factual proof of human rights violation.

⁹ The mobile office is critical in that indignant victims of human rights violations have an opportunity to lodge communications at absolutely no cost. Half the time should be spent outside the capital to curb capital city oriented missions often not reflective of national human rights situation.

¹⁰ Besides dealing with urgent matters, preliminary reports put the mission in phases such that its progress can be monitored. In the same way, they influence a timely final report in that questions of fact are responded to and

2. A final preliminary report shall be send to the investigated government prior to the preparation of the final report to be considered by the Assembly of Heads of State and Government (AHSG).¹¹
3. The response solicited from the investigated government shall be attached to the final report, which final report shall be prepared not later than 180 days from the last day of the investigative mission.¹²

Article 9 (Publication of the final report)

All preliminary reports shall not be accessible to the public unless with the consent of the investigated government. However, the final report (and comments),¹³ shall be published after a copy has been sent to the investigated government and with due regard to the relevant provisions of the Charter governing such activities.¹⁴

Article 10 (Enforcing recommendations)

1. Upon preparing the final report, the FCC shall make specific recommendations to the institutions it deems necessary for appropriate remedial action.
2. The Commission shall ensure that an update on the implementation of the recommendations is lodged within 90 days of the service of the final report on the state concerned.¹⁵
3. The Commission may recommend the conduct of an investigative fact-finding mission to monitor and assess the implementation of the recommendations should the investigated state fail to submit an update as required by these provisions.¹⁶

verified as they come rather than waiting to pose them in their numbers at the end of the mission with the FCC having no time to verify the same.

¹¹ This stage marks the final opportunity for the state to exercise its right to be heard. Omitting this stage renders the AHSG's decision to postpone the publication of the 17th Annual Activity Report entirely applicable, a development inconsistent with prompt protection of human and people's rights.

¹² A time frame within which a report should be made available ensures that a report shall be prepared. This negates the problem of non-reporting as in respect of missions to Nigeria, Sudan and Togo. It also ensures timely reports to get rid of having the ACHPR preparing reports already overtaken by events.

¹³ Pursuant to para. 4 of the Decision referred to in n 11 above.

¹⁴ It is unwise to directly refer to art. 59 of the Charter as applicable to the publication of the report as this would tend to entrench the restrictive interpretation of art.59, namely, that all publications should be authorised by the AHSG.

¹⁵ This is aimed at making recommendations binding in a way since the non-binding nature of ACHPR decisions, recommendations and concluding observations is retrogressive to their enforcement. A threat of yet another investigative mission to assess implementation of recommendations goes a long way in exhorting the state to file a progress report. States are by their nature, opposed to investigative fact-finding.

¹⁶ This is pursuant to the ACHPR's commitment during the 19th Session when it stated that, "The dispatch of investigative missions, would clearly be one of our ways of showing, within these countries, that we hope for the provisions of the African Charter on Human and Peoples' Rights to be properly respected". See the 19th Session Transcripts.

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