

CHAPTER 1

INTRODUCTION

1.1 Background of the Study

The International Labour Organisation (ILO) has over the years since its formation in 1919 created a very unique supervisory system for the International Labour Standards (ILS) that it adopts. According to Thomas, Oelz and Beaudonnet (2004:254) the ILO has “established supervisory mechanisms on the basis of regular reporting and dialogue with the ILO’s supervisory bodies as a means to promote and ensure the proper application of its ILS”. According to the International Training Centre of the ILO, “through its history, the ILO’s principal means of action has been the establishment of international labour standards” (www.itcilo.org). The two main forms of ILS developed by the ILO are conventions and recommendations.

Bronstein (2009:7) writes that “ILO conventions are only binding on the ILO members only on ratification” and adds that ratified conventions can be “directly applicable in individual litigation in a monist system” while domestication is required in a dualist system. Conventions are therefore instruments which create legal obligations upon ratification and entry into force, whereas recommendations are not open to ratification but contain guidance on policy, legislation and practice. Rodgers et al (2009:20) state that “governments are obliged to report to an independent Committee of Experts on ratified conventions” and add that “some 3000 reports are now due per year”.

Valticos (1998) states that “a precise and differentiated mechanism to monitor compliance” with ILO standards was established right from the organisation’s establishment (www.training.itcilo.it). The methods introduced by the ILO have had a pioneering and positive role that has influenced those of other international human rights instruments (*ibid*). The application of ILS is subject to constant supervision by the ILO, with each member state required to regularly present reports on the measures taken, in law and practice, to apply ratified conventions.

The ILO's supervisory system has two forms, that is, the regular system of supervision and the special procedures supervision. Under the regular system, member states are required to submit reports due to the International Labour Office in terms of Articles 19 and 22 of the ILO Constitution, on unratified and ratified conventions, respectively. The ambit of Article 19 reports also extends to surveys on subject matters covered by recommendations. According to the ILO, supervisory measures under the special procedures include the procedure for representations on the application of ratified conventions, procedure for complaints over the application of ratified conventions and the special procedure for complaints regarding freedom of association (www.ilo.org).

The nature of the ILO's supervisory mechanism has the potential to present compliance challenges upon member states. A case in point is that of Zimbabwe which has failed to fully honour its international obligations to the point of being subjected to a Commission of Inquiry in terms of Article 26 of the ILO Constitution. Article 26(1) of the ILO constitution states that "any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified".

The Commission of Inquiry procedure is an extreme and rare measure to be imposed upon a member state by the organisation in relation to the application of ILS. Only 13 countries have so far been subjected to this procedure in the entire history of the organisation. The ILO lists these countries as Belarus (2003), Chile (1975), Dominican Republic (1983), Germany (1985), Greece (1968), Haiti (1983), Liberia (1963), Myanmar (1996), Nicaragua (1987), Poland (1982), Portugal (1962), Romania (1989) and Zimbabwe (2010) (www.ilo.org). Of these, Belarus, Greece, Dominican Republic, Nicaragua, Poland and Zimbabwe were subject to the Article 26 measure concerning similar conventions on rights to freedom of association and collective bargaining. Zimbabwe is the most recent case within the ILO to have the Article 26 procedure applied.

According to the ILO Commission of Inquiry Report (2009), Zimbabwe was the first ever country to have such a procedure applied resulting from concurrent complaints by both employers and workers delegates. The author contends that this is reflective of the serious magnitude of the non compliance issues surrounding Zimbabwe's case. The basis for the

delegates' complaints related to alleged violation by the government of Zimbabwe of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The two conventions shall, respectively, be individually referred to as Convention No. 87 and Convention No. 98 and collectively as Convention Nos. 87 and 98. Additionally, the delegates cited refusal by the government to appear before the Conference Committee on the Application of Standards (CAS) over the years 2007 and 2008. The appearance of governments before this particular committee is an essential part of the ILO's regular supervisory system, which the government of Zimbabwe disregarded and failed to comply with. This dissertation therefore sought to study the government of Zimbabwe's compliance challenges with respect to the ILO supervisory system.

1.2 Statement of the Problem

For many years the government of Zimbabwe failed to comply with the requirements of the ILO supervisory system resulting in the establishment of an ILO Commission of Inquiry in 2008. The history of ILO Commissions of Inquiry shows that this measure, pursued in terms of Article 26 of the ILO Constitution, is rarely applied and only invoked in cases of gross non-compliance. A Commission of Inquiry is the highest supervisory body of the ILO that is put in place when the intervention of other supervisory bodies has proved inadequate in securing compliance with ILS. The other supervisory bodies include the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the Committee on Freedom of Association (CFA) and the International Labour Conference Committee on the Application of Standards. In vain, the ILO supervisory bodies repeatedly called upon the government to fully implement Convention Nos. 87 and 98, citing violations both in law and practice, most notably from 2000 to 2009. During the same period government sometimes failed to avail its country reports to the supervisory bodies as was the case in 2001. In 2007 and 2008 the government failed to appear before the Conference Committee during the examination of its case with regard to alleged serious violation of Convention No. 87 and as a result failed to give its own account of the implementation status. In filing the complaints that gave way to the Commission of Inquiry in 2008, both the workers' and employers' delegates to the 97th session of the International Labour Conference thus cited government's non-cooperation, obstructionist and contemptuous attitude towards the ILO supervisory

system. The government of Zimbabwe has therefore had serious problems in complying and submitting itself to the requirements of the ILO's system of supervision. The case of Zimbabwe potentially exposes the complicated nature of the ILO supervisory system, which can present serious compliance problems and consequences for member states.

1.3 Objectives of the Study

The broader objective of the study is to investigate the government of Zimbabwe's compliance challenges with the ILO supervisory system. The specific objectives of the study are:-

- To examine the application of the ILO supervisory system on Zimbabwe;
- To evaluate the level of compliance with the ILO supervisory system by Zimbabwe;
- To explore the prospects for full compliance with the supervisory system; and
- To proffer policy recommendations

1.4 Hypothesis

The stand point of this study is that the intricate nature of the ILO's supervisory system presents challenges with respect to Zimbabwe's compliance with its obligations hence its continued appearance before the supervisory bodies.

1.5 Justification of the Study

The importance of this study lies in its attempt to examine the complexities posed by the ILO's supervisory system in the specific context of Zimbabwe. The majority of available literature has tended to be of a general nature and the case of Zimbabwe has not been focused on. Ghebali (1989:223) writes that the work of the supervisory system has multiplied significantly since 1926 when "the Committee of Experts had to examine only 180 reports submitted by 26 member states" compared to around 2000 annual reports at the time of his writing. Ghebali (ibid) analyses the supervisory work of the ILO in greater detail but does not particularize attention to any specific country.

Other eminent figures in international labour law, such as Layton (2006)¹ have addressed issues concerning the implementation of ILS in countries such as Zimbabwe training (www.itcilo.org). However, the analysis is restricted to a specific Labour Court decision concerning the application of ILS in a sexual harassment case. The scope of his work did not include a comprehensive overview of ILS in Zimbabwe. Thomas, Oelz and Beaudonnet (2004) have looked at the use of international labour law in domestic courts, focusing on theory, recent jurisprudence, and practical implications. Although they discuss the situation of Zimbabwe, reference is made only to a Supreme Court opinion on the use of ILS in judicial proceedings.

In arguing why the ILO's supervisory functions are recognised as better developed at the international level, Valticos (1998) cites “the participation of the non-governmental employers' and workers' organizations and the qualities of independence and expertise of the members of the supervisory bodies”, as the major reasons for the superiority of the system (www.training.itcilo.it). The International Training Centre of the International Labour Organisation (2010), writing on the nexus between international labour law and domestic law, considers Valticos to be the leading authority on the ILO's supervisory system. However, the latter's published literature does not specifically focus on the case of Zimbabwe.

This study is therefore a pioneering attempt to evaluate the complexities of the ILO supervisory system and the compliance challenges by Zimbabwe. In view of the limited literature on Zimbabwe's compliance challenges within the ILO, the study will be of immense benefit to scholars in the field of International Law. Additionally, given the practical examination of the case of Zimbabwe and the ILS system, the study's recommendations will be useful to practitioners and policy makers.

1.6 Methodology

This section of the study describes the various activities and procedures undertaken during the research. These activities included research design, sample design, selection of data

¹ Judge at the Supreme Court of South Australia, Chairperson of the ILO Committee of Experts on the Application of Conventions and Recommendations (at the time).

collection tools as well as data presentation and analysis. In the main, documentary search and in-depth interviews with key informants on the subject area were used in gathering relevant data and information during the field research. The section also details the data analysis and presentation methods employed. The purpose of the study was to explore the intricacies involved in the supervision of member states by the ILO machinery as far as Zimbabwe is concerned. The study was thus not a superficial exercise to narrate the structural features of the ILO and its systems but one to investigate the practical situation as it obtains in the case of Zimbabwe. As such, the study required an in-depth understanding of the ILO, ILS and the supervisory system.

1.6.1 Research Design and Methodology

Mouton (2001:55) defines research design “as a plan or blue print of how a researcher intends to conduct a study”. This involves plans for data collection, data gathering instruments, and data processing and analysis to give meaning to research findings. A qualitative research methodology was employed in the research. According to Shah and Corley (2006:1824) the “primary benefits of qualitative methods are that they allow the researcher to discover new variables and relationships, to reveal and understand complex processes, and to illustrate the influence of the social context”. The methodology was based on a case study of Zimbabwe. Marshall and Rossman (1995) suggest that, among other reasons, qualitative research is designed to understand processes, describe poorly understood phenomena and understand differences between stated and implemented policies or theories. The approach suited the research topic in that practical and expert knowledge concerning the circumstances surrounding Zimbabwe’s compliance with the ILO supervisory system was to be relied on.

According to Merriam (2002:8), a case study is “an intensive description and analysis of a phenomenon or social unit and by concentrating upon a single phenomenon or entity (the case), this approach seeks to define the phenomenon in detail”. The case study approach enabled the researcher to gather comprehensive and systematic information about the working of the ILO supervisory system. In view of the specific focus on Zimbabwe, the researcher was called upon to understand the experience of Zimbabwe within the ILO. The researcher has been involved in the work of the ILO in Zimbabwe and this allowed for value addition. A rich knowledge-based exchange of information with targeted interviewees was

also enabled. The main means of data collection and information gathering were documentary search and interviews with key informants. Thematic analysis was used for data analysis throughout the study and a highly descriptive and interpretive style was utilised for data and information presentation.

1.6.2 Sampling

Best and Kahn (1998:12) describe a population as “a group of individuals that has one or more characteristics in common that are of interest to the researcher. Blanche, Durrheim and Painter (2006) define sampling as involving the selection of the specific research participants from the entire population, and is conducted in different ways according to the type of the study. Merriam (2002) states that qualitative inquiry seeks to understand the meaning of a phenomenon from the perspectives of the participants and that it is therefore important to select a sample from which the most can be learned. Purposive or purposeful sampling was accordingly employed in the study. Due to time and funding constraints, it was necessary for the researcher to come up with a sample of respondents highly knowledgeable in the work of the ILO supervisory system. This sampling method is called purposive sampling. Gray et al (2007:105) state that purposive sampling refers to a “judgemental sampling in which the researcher purposely selects certain groups or individuals for their relevance to the issue being studied”.

The targeted interviewees were particularly chosen on the basis of their involvement with the ILO’s work in the Zimbabwean context. In other words, the interviewees were chosen purely on the basis of the needs of the study. The sample frame consisted of nine interviewees from the government of Zimbabwe, employers’ and workers’ organisations and a legal practitioners’ firm. The interviewees from government comprised four from the Ministry of Labour and Social Services and one from the Ministry of Foreign Affairs. From the employers’ organisations Mr. John W. Mufukare, the Executive Director of the Employers’ Confederation of Zimbabwe (EMCOZ), was interviewed. From the workers’ organisations, Mr. Zakeyo Mtimtema and Ms. Vimbai Mushongera, Legal Advisor and Advocacy Officer of the Zimbabwe Congress of Trade Unions (ZCTU), respectively, were interviewed. From the legal practitioners and academia, Mr. Caleb Mucheche of Matsikidze and Mucheche Commercial and Labour Law Chambers, was interviewed. Mr. Mucheche is a practising

lawyer and lecturer at the University of Zimbabwe's Faculty of Law. The interviewees mentioned by name freely consented to having their respective contributions specifically cited. A questionnaire sent to the ILO Country Office for Zimbabwe secretariat was not returned, possibly due to the sensitivity concerning the issues that involve a specific member state.

1.6.3 Data Collection Techniques

The research methods used were interviews and documentary search. The primary data collection tool for interviewees was an interview guide consisting of open ended questions that were directly administered during interviews. According to Hesse-Biber and Leavy (2010:98) "an in-depth interview is a way of gaining information and understanding from individuals on a focused topic". The interview method was chosen for its efficacy in enabling the possibility of immediate clarification and follow up. The interview technique allowed the leeway for free expression of the respondents to cater for relevant dialogue on issues beyond the pre-empted questions. The questionnaire is contained in Appendix A. The researcher also utilised his expert knowledge of the ILO system as a civil servant working in this field, although in this study such knowledge bears a purely scholarly appreciation of the subject matter.

Apart from interviews, documentary search was also relied upon. According to Scott (2006) documentary research involves the use of texts and documents as source materials, including visual and pictorial sources in paper, electronic or other hard copy form. The study relied on written records, including academic books, in order to gain insight on the historical and existing relations between the government of Zimbabwe and the ILO supervisory system. Official publications of the ILO such as the reports of the CAS and the ILO CEACR were used. Beyond these sources, the researcher also consulted newspapers, journals, as well as the internet as these often provide up to date and relevant information.

1.6.4 Data Analysis and Presentation

Merriam (2002:14) says that "in qualitative research, data analysis is simultaneous with data collection". Accordingly, data analysis is crosscutting throughout this study. Marshall and

Rossmann (1995:111) state that data analysis is “a process of bringing order, structure and meaning to the mass of collected data”. Guest, MacQueen and Namey (2012:10) state that “thematic analyses move beyond counting explicit words or phrases and focus on identifying and describing both implicit and explicit ideas within the data, that is, themes”. Thematic analysis is the most commonly used method of analysis in qualitative research (ibid). Thematic analysis was therefore used to distil the gathered data in order to abstract meaning and sense in relation to the research questions.

Data presentation is both descriptive and interpretive. The former is concerned about the presentation of useful data and information as gathered, while the latter entails deeper analysis. Key themes or subjects that emerge from the research are presented in separate sections for a focused appreciation of the investigation and its findings. Simple, coherent and user friendly data presentation that elucidates on some of the technical terms or elements of the subject matter under consideration was used.

1.6.5 Ethical Considerations

The study was cognisant of the fact that qualitative research is essentially concerned with human interaction that is subject to ethical considerations. In view of the focus on the international obligations of a sovereign state, the researcher upheld the anonymity of interviewees and treated all data and information in the strictest confidentiality when requests were made. The individual consent of the respondents to participate in the study was also emphasized throughout the interview process.

1.7 Delimitations

This study was limited to the ILO supervisory system and compliance aspects by the government of Zimbabwe. The study does not attempt to broadly discuss compliance issues relating to the actual implementation of conventions and recommendations.

1.8 Limitations

The study took into account the challenges of accessing the few practitioners involved with the ILO's work as it focuses on a highly specialised area. Scholarly and independent work on the ILO's supervisory work is also not easily accessible. To overcome these obstacles, the study employed a highly analytical focus of the resources available online, as well as ILO materials obtainable from the ILO Country Office for Zimbabwe. The interviews with local practitioners involved in the work of the ILO were carefully designed in order to get as much quality information as was practicable.

CHAPTER TWO

LITERATURE REVIEW AND CONCEPTUAL FRAMEWORK

2.1 Literature Review

A number of scholars and practitioners in the field of ILS have written quite extensively about the ILO's supervisory system. Chinkin (2007) writes that in praising the ILO's supervisory system, Leary (1992) stated that the "ILO's wide range of innovative supervisory mechanisms laid the foundations for the United Nations human rights processes for promoting compliance". Rodgers et al (2009:20) state that "ratification alone would have little value without follow-up, and here the ILO has a number of distinctive mechanisms, which no other international organisation shares". The Institute for International Economics also states that the ILO has extensive mechanisms for supervising the application of conventions, including a routine reporting and review process as well as *ad hoc* procedures for handling complaints (www.piie.com). While commenting on the award of the Nobel Peace Prize to the ILO in 1969, Romano (1996) highlighted that the organisation's ability to improve compliance in the implementation of conventions was the major reason. Valticos (1994), as quoted by Tapiola (2007:32), in commenting on why he perceived the ILO supervisory system to still be a model for the international system, said the following,

The reasons remain numerous. The fact that it combines two basic methods of supervision, periodic reports and complaints, the fact that on some basic matters freedom of association it provides for supervision even on the absence of ratification. The fact that reports are requested and examined, even on unratified conventions and on recommendations. The fact that it has established the principle of quasi-judicial assessment by independent persons and the due process of law. The fact that it has worked out methods for on-the-spot inquiries and that it has also developed methods of quiet diplomacy. All these aspects constitute solid achievements and significant progress in the field of international supervision and, more generally, international law.

The above view by Valticos (1994) is quite apt and details the essential features that make the ILO supervisory system rather unique. However, like many other writers on this subject Valticos, does not attempt to highlight the compliance challenges that are faced by the member states. Scholars who have written about the ILO's supervisory system seem to focus on the completeness of the system as a model without going further to interrogate the practical feasibility of the system, taking into account important issues such as compliance challenges faced by member states. The writer is of the view that any of the obstacles that

could be faced by the member states in complying with the supervisory system would be essential features of the supervisory system warranting attention. The available literature does not sufficiently address this point of view.

Ahamed (2012:588) posits that ILS are supervised by a supervisory system that is “unique at the international level and that helps to ensure that countries implement the conventions they ratify”. Ahmed thus attempts to bring out a relationship between the supervisory system and the implementation of the international labour standards, highlighting that the uniqueness of the system facilitates better implementation of the standards (ibid). However, Elliot (2000:3) notes that member states encounter reporting challenges in respect of obligations under Articles 19 and 22 of the ILO Constitution with “a little over 50 percent of the reports being received on time by the committee of expert-advisers”. The non-compliant countries “are overwhelmingly countries with fewer resources, those involved in internal conflicts or lacking a functional central government” (ibid).

The yearly publications of the CEACR show that the countries that are found wanting in respect of reporting obligations are generally from the developing world. For example, the Report of the CEACR (2010) records that of the 22 countries that had failed to supply reports in accordance with Article 19 of the ILO Constitution for five or more years, 12 were from the African countries. In terms of economic status, the list of the 22 countries is of developing third world countries, with the exception of the Russian Federation.

Speaking of the ILO’s supervisory mechanisms in the context of the 1998 Declaration and for unratified fundamental conventions, Kombos and Hadjisolomou (2007:24) claim that the Declaration’s follow up mechanism has been unsuccessful with a “64% reporting rate from States in 2003, while the information contained in those national reports has been described by the Expert-Advisers as limited and lacking sufficient comments from the workers and employers”. Expert-Advisers are an ILO group of experts that was formed in 2001 to examine the reports of member states on unratified fundamental conventions in the context of the 1998 Declaration. In 2005, the Expert-Advisers for the Declaration expressed concern that since the start of the annual review exercise in 1999, five governments had never fulfilled their reporting obligations, namely Afghanistan, Kyrgyzstan, Sierra Leone, Solomon Islands and Somalia (ibid).

The International Labour Organisation (2007b:13) writing about the Decent Work Agenda in Africa (2007-2015) highlights that “while there is a commitment to respect international labour standards in Africa in the form of fundamental rights and rights at work, their effective application on the continent is still lagging behind”. A number of factors are suggested for this situation, including incomplete and outdated legislation, a lack of effective enforcement and labour courts and the limited capacity of trade unions and incapacity on the part trade unions and employers’ organisations (ibid).

Fashoyin (1998:56), contends that there is “perhaps no other part of Africa where International Labour Standards have played a greater role in the recognition of workers’ rights in industrial relations than Southern Africa”. In addition, “the most important instrument by which the ILO contributes to the legal framework and practice of industrial relations in member states is the adoption and supervision of international labour standards” (ibid). Fashoyin thus argues that the ILO supervision system has progressively helped ILO member states in Southern Africa to better implement international labour standards. Fashoyin’s work does not however go on to look at the compliance aspects by member states with regard to the ILO supervisory system.

Tajgman (1994), writing about Southern Africa, observed that the reporting on ratified conventions does not always take place on time or with responses to the comments of the supervisory bodies. Tajgman further laments the “scanty and irregular use made of the ILO’s supervisory machinery” pointing out that “since 1964 no single comment had been made by the workers and employers in the ordinary course of the ILO Committee of Experts’ work” (ibid:3). It is however contended that compared to other sub-regions of the continent, ILS are relevant and stand a chance of implementation although the practice indicated a certain “reticence in the use made of the international system of labour standards in Southern Africa” (ibid:1). The historical perspective that is given by the author is indeed pertinent in the consideration of the Zimbabwean case as it shows the widespread nature of the challenges posed by the ILO supervisory system even across the region.

At the international level, many countries have also faced compliance challenges. A pertinent case within the ILO supervisory system is that of the consideration of Colombia by

the Committee on Freedom of Association. The International Labour Organisation (2012a:110-129), in the 363rd Report of the Committee on Freedom of Association details three cases reported against the Government of Colombia, details case no. 2761 concerning alleged murders, violence against trade unionists and death threats, among other issues. The report paints a very dismal picture concerning the enjoyment of protections guaranteed by the ILO's conventions on freedom of association in the country. In 2002, the International Labour Organisation (2002b), in the 328th Report of the Committee on Freedom of Association, raised concern over 113 new murder cases of trade unionists, of which as many as 40 related to the year 2002 alone. Although the Committee on Freedom of Association repeatedly lamented the lack of sufficient information provided by the government in respect of the often grave allegations, no Commission of Inquiry has yet been set up by the ILO regarding Colombia.

Another example is that of Myanmar concerning the Forced Labour Convention, 1930 (No. 29). According to the Institute for International Economics the case of Myanmar started when it commenced a massive infrastructure-building campaign in 1988 subsequent to which allegations of forced labour by the ruling military junta were brought to the attention of the ILO supervisory system (www.piie.com). The complaints procedure against the government resulted in a Commission of Inquiry being appointed in 1997, concluding its work in 1998 when it called on the government to fully comply with the convention by 1999.

Following inaction by the Myanmar authorities, the 88th Session of the International Labour Conference held in June 2000 adopted a resolution under Article 33 of the ILO Constitution on measures to secure the compliance of Myanmar. Article 33 of the constitution states that “the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance” with the recommendations of a Commission of Inquiry. The 101st session of the International Labour Conference in 2012 recalled that this is the only case in ILO history where article 33 of the Constitution was applied to ensure the compliance of a member with international obligations. At its November 2000 session, the ILO Governing Body passed a conference resolution calling on member states “to review their relationship with the Government of Myanmar [Burma] and to take appropriate measures to ensure that Myanmar ‘cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labor...’.”

Kombos and Hadjisolomou (2007:17) pointed out that in June 2000, the ILO “called for sanctions under Article 33 of the ILO Constitution for the first time in its history and on the basis that there was persistent and serious breach of the standards”. Ahamed (2012:591) reports that in the most extreme case in Burma (Myanmar), “increasing exhortations at the governing body have led ILO member States (European Union members in particular) to restrict government assistance measures to that country”. According to documents pertaining to the 292nd session of the ILO Governing Body in 2005, Australia, Canada, Japan, Switzerland and the United Kingdom were some of the countries that imposed restrictions and reviewed the relationship with Myanmar as a direct response to the measures pursuant to action by the ILO under Article 33 of the constitution. The overview of the Myanmar experience within the ILO proves that compliance challenges exist for some countries within the ILO. The Myanmar case also lends credence to claims by Romano (1996) that in some cases ILO supervisory procedures are not able to overcome major cases of noncompliance.

To highlight some of the compliance challenges faced by some countries with the supervisory system, Romano (ibid) cites the case of Poland. In 1983, Poland refused to cooperate with a Commission of Inquiry established to investigate violation of conventions on freedom of association on grounds that “the decision of the Governing Body constituted interference in Poland’s internal affairs” and that the ILO was being used “in a manner contrary to the spirit and letter of its Constitution” (ibid:13). Although the Commission was ultimately able to come up with its findings and recommendations, the Poland case shows that the supervisory mechanisms do have their shortcomings. As has been mentioned above these shortcomings are not always reflected upon by many scholars.

In view of the relationship between the implementation of international labour standards, conventions in particular, and the supervisory system itself, the author briefly looked at the application of conventions in other countries focusing on aspects to do with member states’ challenges. Ahamed (2012) observes that the UK was the first to ratify Convention Nos. 87 and 98, during the tenure of the Conservative government. Novitz (2003), as quoted in Ahamed (2012:590), states that “since the 1980s, in almost every year, complaints relating to non-compliance with these conventions have been drawn to the attention of the UK government”. The “ILO’s supervisory bodies have been concerned that Australia’s

compliance with Conventions Nos. 87 and 98 falls short of the required standards (ibid:591). Ahamed (2011), quoted in Ahamed (2012:591), further observes that in Bangladesh, “the right to strike is not recognised by law and workers are regularly sacked, beaten or subjected to specious charges for being active in union activities”. This state of affairs is in spite of Bangladesh having ratified Convention Nos. 87 and 98.

When it comes to reporting obligations, a review of the literature thus shows that compliance challenges abound. The Institute for International Economics points out that in “2002 roughly a third of the required reports under the supervisory system were not sent by the governments, adding that ten countries had completely not responded to the follow up to the 1998 Declaration on Fundamental Principles and Rights at Work” (www.piiie.com). Kombos and Hadjisolomou (2007:17) report that “in 2005, 2,569 reports were requested and only 1,645 of these reports were received, which marks a tremendous workload for the secretariat and an increase of 1025 % since 1927”.

The author perceives this scenario to be related to the cumbersome nature of the demands placed by the supervisory system on countries, which may be little understood by some member states. The Report of the CEACR (2010) suggests that persistent failure to comply with reporting obligations is likely linked to national administrative problems hence its call for increased ILO technical assistance to affected member states. Kombos and Hadjisolomou (2007:15) citing the Report of the CEACR (2003), note that States are required to submit periodical reports on the Conventions they ratified, “but nonetheless it must be noted that thirteen states have failed to comply for two or more years with that reporting obligation”.

The literature review of the ILO’s international labour standards supervision system has undertaken a global, regional and country specific review of the complexities and challenges faced by some member states. While some scholars speak well of the supervisory system especially when focusing on its form, others have gone further to look at its shortcomings paying particular attention to the compliance challenges faced by member states with regard to reporting obligations. The literature review has shown that many countries largely fail to supply the periodic mandatory reports required by the ILO under Articles 19 and 22 of the constitution. This study will further attempt to go beyond the work so far undertaken by other scholars by focusing on the specific case of Zimbabwe and its compliance challenges

with regard to the ILO supervisory system. Scholars in the field of international labour standards are yet to comprehensively work on the Zimbabwean case study.

2.2 Conceptual Framework

According to Griffiths and O'Callaghan (2002) international law comprises two branches, that is, private and public international law. Of the two branches, "the former is concerned with the resolution of international disputes between individuals and companies, while the latter governs relations between states" (ibid:159). The context of this study is public international law, which according to Shaw (2008:2) covers "relations between states in all the myriad forms, from war to satellites, and regulates the operations of the many international institutions". In other words, public international law is basically concerned with the regulation of rights and responsibilities between and among states. On the other hand and as defined by Dugard (1997:2) private international law "concerns relations between individuals whose legal relations are governed by the laws of different states". There is also supranational law whereby acceding states adopt enforceable legal obligations. To give an example of supranational law, Bronstein (2009:7) cites European Community (EC) law which is "binding upon all European Union (EU) members' without ratification. In the context of this study, any reference to international law is to the specific branch of public international law.

As is the case with all other bodies of law, international law has its own specific sources. Article 38 of the Statute of the International Court of Justice details the various sources of international law as "international conventions (treaties), international custom, as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations and judicial decisions and the teachings of the most highly qualified publicists". While it is not for this study to discuss the various sources of international law, it suffices to mention that treaties are the most referred to sources of rights and obligations among states at international level. Treaties are open for ratification by States, after which they become binding upon the state parties. Shaw (2008:10) states that much of international law is "constituted by states expressly agreeing to specific normative standards, most obviously by entering into treaties".

Dugard (1997:23) argues that “although no provision is made for a hierarchy of sources, in most instances treaties, which take the place of legislation in the domestic sphere, are viewed as the primary source”. Given the great importance of treaties in the maintenance of international peace and order, the United Nations, in 1969, concluded the Vienna Convention on the Law of Treaties. The Convention, commonly called the Law of Treaties (or the Treaty of Treaties), entered into force on 27 January 1980 after it received the sufficient number of ratifications. According to the 1969 Vienna Convention on the Law of Treaties, a treaty “means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

This study, by premising itself on ILS and their supervision, is conceptually anchored within the Law of Treaties. The entire body of ILO Conventions is regulated by the provisions of the Law of Treaties. The Vienna Convention practically sets the parameters on how questions arising out of treaties are to be addressed. The International Training Centre of the International Labour Organisation (2010) cites Article 5 of the Vienna Convention to show its applicability to the ILO’s conventions. The article states that the “Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization”. The questions or issues addressed by the Convention also include those relating to the observance of treaties, under Part III. Part III of the Law of Treaties starts with Article 26, which is entitled “*Pacta sunt servanda*”, stating that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. According to Dugard (1997:264) treaties are “binding upon states in accordance with the principle of *pacta sunt servanda*, which constitutes the foundation stone of international law”.

The Article 26 principle is therefore cardinal in international law for if treaties did not have binding force then treaty making would be a futile exercise. The *Pacta sunt servanda* principle states that agreements (treaties) must be honoured. Indeed, ILO conventions as well as their implementation and supervision should be approached within the realm of understanding provided by the principle. Thomas, Oelz and Beaudonnet (2004) give a contextual difference between conventions and recommendations by stating that while international labour conventions are treaties in the sense of the Vienna Convention on the

Law of Treaties, which are binding upon ratifying members of the ILO, international labour Recommendations are non-binding instruments addressed to all member states. The implication is that the focus of the study will be on the application of the ILO supervisory system in Zimbabwe based on conventions rather than recommendations, although both constitute ILS.

Within the ILO, many countries find themselves in arrears in their reporting obligations and are subject to quasi-court appearances before International Labour Conference every year. As alluded to in the ILO Commission of Inquiry Report (2009), the author observes that in the case of the government of Zimbabwe, its repeated appearances before the ILO's CAS since the year 2002 came on the back of the government having failed to honour its reporting obligations on Convention No. 98 to the CEACR in the year 2001. The author is therefore of the view that the genesis of the government of Zimbabwe's consecutive appearances before the ILO supervisory bodies was its failure to fulfil its reporting obligations as per the ILO constitution in 2001.

The overwhelming burdens presented by the supervisory system generally present obstacles to full observance by member states. The author observes that the regular system of supervision and its yearly reporting requirements to the CEACR present a huge workload for governments both in terms of quantity and technical requirements. This challenge is exacerbated by the scrutiny and further demands of the annual meetings of the CAS usually on the basis of an adverse report of the CEACR. The rigorous nature of the supervision process can thus be daunting and result in the disenfranchisement of member states, leading to a circle of repeated censures. Given that the government of Zimbabwe was consecutively called upon to appear before the CAS from 2002 to 2008, the author's viewpoint may have credence.

Ghebali (1989) notes that the ILO's standards supervision system has generally been criticised by developing and socialist countries which alleged that the supervisory procedures are undemocratic owing to their unrepresentative nature and unilateral approach of the supervisory bodies. The countries considered that they were being victimised by a system being used more and more arbitrarily as a kind of "supranational tribunal" (ibid:49). Of note is the significant number of member states that fail to honour their reporting obligations

under the Constitution. The International Labour Organisation (2012b) reports that following the 100th session of the International Labour Conference in 2011, 40 members failed to submit reports as requested by the supervisory bodies. It is further reported that there were 39 such member States in 2010, 44 in 2009, 55 in 2008, 45 in 2007, 49 in 2006 and 53 in 2005 (ibid).

From a total of 3,013 requests in 2011, (under articles 22 and 35 of the Constitution) only 2,084 reports had been received by the International Labour Organisation (ibid:12). The figure corresponds to less than 70 per cent of the reports requested. In 2010 the International Labour Office had received a total of 2,002 reports under the same articles, again representing less than 70 per cent. In accordance with article 22 of the Constitution, 2,735 reports were requested in 2011 from governments. Of these, 1,855 had been received by the Office corresponding to 67.82 per cent of the reports requested (compared to 67.98 per cent in the previous year) (ibid). While the CEACR does not suggest reasons for the full fulfilment of reporting obligations, it is probable that the requirements of the supervisory system may be overwhelming for some member states. The Ministry of Labour and Social Services (2013) indicates that the Government has no overdue requests pending before the ILO supervisory bodies in respect of Article 19 and 22 of the Constitution.

Shaw (2008:47) argues that international organisations “have now been accepted as possessing rights and duties of their own and a distinctive legal personality” and further cites the International Labour Organisation and the Food and Agriculture Organisation as examples of international organisations with a judicial character. When one considers Article 29 of the ILO Constitution that entitles any government that is the subject of a Commission of Inquiry complaint to have leeway to refer the matter to the International Court of Justice, it is evident that international organisations have indeed assumed a real international *legal persona*. This view further suffices in highlighting the requirements of member states to comply with their international obligations arising out of membership to the ILO.

2.3 Supervision of International Labour Standards

According to Gheballi (1989:221), “ever since 1919 the ILO already boasted supervisory machinery second to none, which still places it today at the forefront of the UN agencies”. It was the ILO that laid the groundwork for international monitoring of state obligations, international protection of human rights, technical cooperation and the international civil service (ibid). The International Labour Organisation (2012b:1) states that “in order to monitor the progress of member States in the application of international labour standards, the ILO has developed supervisory mechanisms which are unique at the international level”. According to Article 22 of the ILO Constitution member states become legally bound to comply with the terms of ratified conventions and to report regularly to the ILO on how they are complying, including for those conventions unratified under Article 19. Article 22 of the Constitution states that, “each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request”.

From its beginning, the ILO sought to achieve these ends through International Labour Conference sessions. However, from the Eighth Session of the International Labour Conference in 1926, the CEACR and the CAS were given responsibility for regular supervision of compliance. Since 1926 the two committees have firmly established themselves as the cornerstones of the ILO’s supervisory system.

According to the International Labour Organisation (2006a), members of the Committee of Experts are appointed by the ILO Governing Body on the basis of their individual standing and as neutral persons with recognisable international repute in legal matters. They are drawn from across the world to take advantage of experiences from different legal, economic and social systems. The Committee is the competent authority to examine reports made by member states pursuant to Articles 19 and 22 of the ILO Constitution. The CAS is set up under article 7 of the ILO’s Standing Orders. It is tripartite, consisting of representatives of governments, employers and workers. The Committee supervises the extent to which member states are implementing ratified conventions.

The International Labour Organisation (2012b:1) states that “a number of supervisory mechanisms exist whereby the organisation examines the standards-related obligations of member states deriving from ratified conventions. This supervision occurs both in the context of a regular procedure through annual reports under article 22 of the ILO Constitution, as well as through special procedures based on complaints or representations to the Governing Body made by ILO constituents (Articles 24 and 26 of the Constitution)”. In the case of ratified conventions, the outcome of the CEACR’s work is an examination of the practical and legislative implementation of the conventions in question, especially identifying shortcomings with a view to enhancing compliance by member states. The CEACR’s report is also used to draw up a list of countries considered to have committed the most serious violations of ratified conventions by employers and workers at the International Labour Conference. The listed countries are then called to appear before the CAS for formal proceedings over the alleged violations, with all accredited delegates taking part in the deliberations.

Within the ILO system, the appearance of Governments before the Committee on the Application of Standards to defend themselves against the situations raised in the report is seen as a censure and sign of disapproval of the member state’s standing *vis-a-vis* the conventions in question. At the end of its sittings, the Committee reports to the plenary Conference sitting on the challenges member states are encountering in implementing the provisions of the ratified conventions as well as the obligations arising out of the ILO Constitution. In plenary discussion, selected cases of serious violations noted in a special paragraph are once again deliberated upon.

Valticos (1998) points out that “the ILO’s implementation methods might be summarised as consisting of a given method characterised by tripartite discussions and decisions and the independence of the monitoring bodies combined with a particular spirit whereby situations are objectively examined and solutions sought in the context of the ILO’s principles of freedom and progress” (www.training.itcilo.it). It is also recorded that “discussions are often heated, as one particular session regarding freedom of association which finished at three o’clock in the morning with a vote recognizing the violation of the convention in question by a prominent State” (www.training.itcilo.it).

In the case of unratified conventions, a special procedure in the field of freedom of association was set up by the ILO in 1950. It is based on complaints submitted by governments or by employers' or workers' organizations against a member state even if it has not ratified the relevant conventions. According to the ILO (81st session of the International Labour Conference, 1994), the failure by a state to ratify the ILO's conventions on freedom of association made it impossible to supervise their application under the general supervision procedures, despite the fundamental importance attached to respect for the standards and principles relating to trade union rights.

As a result and according to the International Labour Organisation (2006b:2), a "Fact-Finding and Conciliation Commission on Freedom of Association was established in 1950" and thereafter in 1951, the Committee on Freedom of Association (CFA) was formed. The most important aspect to note is therefore that the CFA examines complaints relating to violations of conventions on freedom of association regardless of ratification by countries. Valticos (1979:248) states that member states, by virtue of accepting the ILO Constitution, also accept the "principle of freedom of association". Freedom of association has a special place in international labour law "because of the tripartite nature of the ILO" (ibid:79).

In parallel with the above regular supervisory mechanisms, employers' and workers' organisations can initiate "representations" against a member state for non-compliance with a ratified convention through Article 24 of the Constitution. Such representations require the immediate response by the government concerned. Moreover, in terms of Article 26 of the Constitution, any member state can lodge a complaint with the International Labour Office against another member State which, in its opinion, has not ensured, in a satisfactory manner, the implementation of a convention which both have ratified. In such a case, the Governing Body has the option to establish a Commission of Inquiry to study the question and present a report on the subject matter.

The establishment of a Commission of Inquiry over a matter signifies a serious intervention measure under the ILO supervisory system. The Governing Body can, on its own, initiate this measure or implement it as a follow up to a complaint by a conference delegate. The Commission of Inquiry formulates recommendations on measures to be taken to remedy

alleged violations as it finds appropriate. If governments do not accept these recommendations, they may submit the question to the International Court of Justice in terms of Article 29 of the Constitution.

CHAPTER THREE

THE INTERNATIONAL LABOUR ORGANISATION AND ITS SYSTEM OF SUPERVISION: ZIMBABWE'S EXPERIENCE

3.1 Introduction

This chapter covers the practical aspects concerning the ILO and its work as well as the experience of the government of Zimbabwe in the context of the ILO's supervisory system. The chapter therefore elaborates on the concepts and scholarly literature discussed above. The chapter essentially outlines the compliance challenges that have been faced by the government.

3.2 The International Labour Organisation (ILO)

The ILO was established through Article XIII of the Treaty of Peace between the Allied and Associated Powers and Germany, commonly called the Treaty of Versailles, which ended the First World War in 1919, in an effort to secure lasting peace through the pursuit of social justice. According to the International Training Centre of the International Labour Organisation (2008:249) "the ILO Constitution, incorporated into Part XIII of the Treaty of Versailles, for the first time established a link between peace and social justice, stating that universal and lasting peace can be established only if it is based upon social justice". In line with Article 3 of the ILO Constitution and as stated by the International Training Centre of the International Labour Organisation (2010) the ILO is the world's only international organisation with a tripartite structure representing governments, employers and workers. Rodgers et al (2009:2) state that the ILO was created to "promote social progress and overcome social and economic conflicts of interest through dialogue and cooperation". As a tripartite organisation, employers and workers' representatives take part in its work on an equal status with those of governments. According to the ILO, the number of member countries stood at 185 as at 14 April 2013 (www.ilo.org).

Ghebali (1989:xv) mentions that the ILO "was both forerunner and model to today's specialised agencies, by virtue of its formative linkage with the League of Nations". The ILO

was the first organisation to conclude, “with the United Nations (UN), the first of the inter-organisation agreements contemplated in article 57 of the UN Charter” (ibid). Shaw (2008:338) states that “the ILO was expanded in 1946 through the Declaration of Philadelphia of 1944, which was incorporated in the ILO constitution in 1946, reaffirming the basic principles of the organisation”. According to the Declaration, these principles are “that labour is not a commodity, that freedom of expression and of association are essential to sustained progress and that poverty anywhere constitutes a danger to prosperity everywhere” (www.ilo.org). After the Second World War the ILO became a specialised agency of the UN to address issues in the world of work. The ILO is thus the only surviving agency from the defunct League of Nations.

As mentioned in the Zimbabwe Decent Work Country Programme (2008) the ILO formulates International Labour Standards in the form of conventions and recommendations which set minimum standards of basic labour rights. According to Article 2 of the ILO Constitution, the main organs of the ILO are the annual General Conference, the Governing Body, and the International Labour Office. The annual General Conference, commonly referred to as the International Labour Conference (ILC) is the highest authority of the organisation, composed of governments, employers and workers. It meets in June every year in Geneva, Switzerland. As stated by the International Training Centre of the International Labour Organisation (2010:8), the conference has, among others, the task of “adopting ILS and plays an important role in supervising their implementation”.

The Governing Body of the ILO meets three times every year in Geneva, Switzerland in March, June and November. It is composed of 56 members, 28 representing government and the remainder employers and workers in equal proportion. Ten countries of Chief Industrial importance have permanent Government representatives and the others are elected every three years by the Conference. The following are the States of Chief Industrial importance; Brazil, China, France, Germany, India, Italy, Japan, Russia Federation, United Kingdom, and United States. Zimbabwe is representing Southern Africa as a Deputy member of the Governing Body during the period 2011 to 2014. The other members from the region are Zambia (Titular) and Botswana (Deputy).

The Governing Body takes decisions on ILO policy and programmes, decides on the Agenda of the International Labour Conferences, establishes the programme and budget and elects the Director General of the International Labour Office. The Governing Body also plays a pivotal role in the supervision of international labour standards. The International Labour Office is the secretariat of the organisation with its headquarters in Geneva.

3.3 International Labour Standards (ILS)

According to the ILO “since 1919 the organisation has maintained and developed a system of ILS aimed at promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity” (www.ilo.org). As stated by the International Labour Organisation (2012b:1) “the mandate of the ILO has included adopting ILS, promoting their ratification and application in its member states and the supervision of their application as a fundamental means of achieving its objectives”. The ILO further states that a total of 7863 ratifications have been registered and that the organisation has so far adopted 189 conventions and 202 recommendations (www.ilo.org). The ILO also adopts instruments referred to as Protocols if it is decided that a convention or recommendation is not suitable. According to the ILO (2006) such instances occur when minor revisions or amendments of earlier conventions are being made. As of March 2013, the ILO had adopted a total of five Protocols. In total, the organisation has adopted 396 International Labour Standards, as at 14 March 2013 (www.ilo.org). The ILS are therefore the backbone of the ILO.

3.4 The Government of Zimbabwe and the International Labour Organisation

Zimbabwe became a member of the ILO upon independence in 1980 and has to date ratified 26 ILO conventions of which 25 are in force following the denunciation by government of the archaic ILO Convention No. 45 on Underground Work (Women). According to the Ministry of Labour and Social Services (2012), the government has ratified all the eight fundamental ILO conventions as well as three of the four governance conventions. The author understands that the denounced convention sought to prevent underground work by women in direct conflict with the more modern ILO conventions that promote non discrimination at the workplace on the grounds of gender. Apart from attending the annual

International Labour Conferences, Zimbabwe has twice been a member of the ILO Governing Body, for the periods 1993 to 1996 and 2011 to 2014.

The relations between Zimbabwe and the ILO's supervisory system have been very extensive. These relations include interactions mainly between the CAS, the Committee on Freedom of Association (CFA), the CEACR, the International Labour Office, the Government of Zimbabwe, employers' and workers' organisations. In line with the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), which the government ratified on 14 December 1989, the International Labour Office has traditionally interacted with the Employers' Confederation of Zimbabwe (EMCOZ) and the Zimbabwe Congress of Trade Unions (ZCTU) as the most representative organisations for employers and workers, respectively.

Although the Government of Zimbabwe has traditionally fulfilled its reporting obligations to the ILO, with the exception of the reports requested in the year 2001, the country has been the subject of continued scrutiny by the supervisory system concerning two of the core conventions, these being Convention Nos. 87 and 98. To illustrate this, the ILO Commission of Inquiry Report (2009:9) states that "from 2002 to 2005 the CAS dealt with aspects concerning Convention No. 98, as well as from 2006 to 2008 when it dealt with Convention No. 87". The government of Zimbabwe has been the subject of scrutiny by all the supervisory bodies of the ILO, which are the CEACR, CAS, CFA and Commission of Inquiry. It is therefore apparent that compliance issues concerning freedom of association and collective bargaining rights in Zimbabwe have persistently been on the agenda of ILO supervisory bodies.

While the ILO supervisory machinery has, to different extents, dealt with all the ILO conventions ratified by the Government of Zimbabwe this study focuses in particular on Convention Nos. 87 and 98. This takes into cognisance that it is only in relation to these conventions that the government has been subject to supervision that goes beyond the scrutiny of the CEACR.

3.5 The Committee of Experts on the Application of Conventions and Recommendations (CEACR)

The CEACR (also sometimes referred to as the Committee of Experts) was established by the 8th Session of the International Labour Conference in 1926 to receive reports in terms of Articles 19 and 22 of the ILO Constitution as the basis of its supervisory work. Articles 19 and 22 of the constitution impose reporting obligations for member states with respect to the implementation of recommendations and conventions, respectively. As stated in the ILO Commission of Inquiry Report (2009:11) the first government report concerning Convention No. 98 was considered by the Committee of Experts in November 2000 whereupon “it addressed concerns involving legislative discrepancies concerning, in particular, interference in trade union affairs, compulsory arbitration and collective bargaining”. Despite the Committee’s request for a report in 2001, the government did not fulfil its reporting obligations and so it repeated its previous comments as an observation (ibid:12).

The Provisional Record of the 90th session of the International Labour Conference of 2002 on observations and information concerning particular countries elaborates on the point that the government report was not received by the Committee of Experts. Subsequent to these developments, in 2002 the government was called upon to appear before the CAS, which is a superior body, in relation to its observance of Convention No. 98. The CAS went on to propose assistance for the government in the form of an ILO mission, which was rejected by the government.

As will be argued later under the consideration of the Committee on the Application of Standards, the author is of the view that the failure by the government to submit its report to the Committee of Experts played a key role in marking the beginning of a difficult period for the government before the supervisory bodies. In 2003, the Committee of Experts contended that legislative reforms had not been sufficient citing, for example, the exclusion of prison workers from collective bargaining. The Report of the CEACR (2006) mentions the regret of the Committee concerning the refusal of a direct contacts mission by the government.

The Committee of Experts examined the country's first report on Convention No. 87 in 2005 when it dealt with issues concerning civil liberties, arrests and detentions of unionists. The Committee requested that the Government should take measures to ensure that the Public Order and Security Act (POSA) "is not used to infringe upon the right of workers' organizations to express their views on the government's economic and social policy and to keep it informed on the measures taken or envisaged in this respect" (ibid:132). According to the ILO Commission of Inquiry Report (2009:13), the CEACR adversely commented on various matters including the "governmental involvement in trade union elections and activities and the ability to launch investigations into unions, as well as the limitation of the right to strike".

It can be observed that following the ratification of Convention No. 87 on 9 April 2003, and its coming into force on 9 April 2004 and Convention No. 98 on 27 August 1998, and its coming into force on 27 August 1999, the CEACR has supervised the implementation of the conventions, requiring the government to submit reports in accordance with Article 22 of the ILO Constitution in every year. Up to the period 2007, the government continued to refuse suggestions for ILO missions, while the CEACR reiterated their importance. The author perceives this conflict to be a salient feature of government's disregard of its international responsibilities as a member of the ILO and free willing signatory to the conventions in question.

The repeated censure of the government by the supervisory bodies potentially signalled political fallout that the former should have been more proactive to manage in a more conciliatory manner. Such an approach could have prevented the subsequent setting up of a Commission of Inquiry in 2008, a development that signalled a real breakdown of relations between the government and the regular supervisory bodies concerning the two core conventions.

3.6 The Committee on Freedom of Association

According to the ILO Commission of Inquiry Report (2009) the Committee on Freedom of Association (CFA) was the first supervisory body of the ILO to receive a complaint against the government of Zimbabwe in 1996, lodged by the International Confederation of Free

Trade Unions (ICFTU), alleging violence by the police during a demonstration of workers. Subsequent to this complaint, organisations as varied as the International Federation of Commercial, Clerical, Professional and Technical Employees, the Zimbabwe Congress of Trade Unions (ZCTU), The Organization of African Trade Union Unity (OATUU), the UNI Global Union and the International Trade Union Council (ITUC) variously reported different complaints concerning freedom of association to the CFA as mentioned in the ILO Commission of Inquiry Report (ibid:12).

As detailed in International Labour Organisation (2007a) concerning the 344th and 345th Reports of the CFA, the bulk of the complaints concerned alleged dismissals of trade unions officials, detentions, intimidation, harassment and assault of trade unionists by state organs. The allegations, as put forward by the CFA's 336th Report, also included alleged unwarranted interference in the affairs of trade union affairs by government including through the appointment of a government investigator into the Zimbabwe Congress of Trade Unions' financial affairs in 2000, as well as the refusal to allow foreign trade unionists to enter the country. Legislative shortcomings were also cited, in particular the limited enjoyment by public servants of the rights to freedom of association and to organise, such as the rights to establish and operate trade unions in pursuit of workers' interests.

According to the International Labour Organisation (2005), in the 336th Report of the Committee on Freedom of Association, the CFA called for the ILO Governing Body's special attention on the extreme seriousness of the general trade union situation in Zimbabwe. This was arrived at having regard to its consideration of the longstanding Case No. 2365 concerning the ICFTU's allegations of attempted murders, assaults, intimidation, arbitrary arrests and detentions, activists and leaders of the country's trade union movement and the members of their families made in 2004. According to the International Labour Organisation (2007:64), the CFA subsequently "regretted the government's continued and long-standing failure to cooperate and reiterated the committee's deep concern with the extreme seriousness of the general trade union climate in Zimbabwe, and called on the Governing Body's special attention to the situation". The 336th Report of the Committee on Freedom of Association (2005) had considered four different set of allegations against the government, these being cases no. 1937, 2027, 2328 and 2365.

The ILO Commission of Inquiry Report (2009) observed that government totally rejected the recommendations of the CFA for independent inquiries and legislative reforms. It is therefore notable that when the Governing Body met at its 303rd session in November 2008 to decide on the appointment of a Commission of Inquiry on Zimbabwe, the meeting noted that the compliance issues under consideration largely pertained to freedom of association.

3.7 The Conference Committee on the Application of Standards (CAS)

The most notable work of the CAS (also called the Conference Committee) is to hear cases of 25 countries listed by the employers' and workers' delegates as representing the most serious violations of ILS following the examination of the annual report of the CEACR. The Committee operates in accordance with Article 7 of the Standing Orders of the International Labour Conference. The yearly Reports of the CAS from 2002 to date show that the government of Zimbabwe has appeared before the Conference Committee nine times, seven of which were prior to the establishment of the ILO Commission of Inquiry up to 2008. The ILO Commission of Inquiry Report (2009:9) shows that "the comments of the CEACR were discussed by the Conference Committee in relation to Convention No. 98 in 2002, 2003, 2004 and 2005; and in relation to Convention No. 87 in 2006, 2007 and 2008".

In 2002, upon the first ever appearance by the government before the Conference Committee, the International Labour Organisation (2002a) records that government refused the suggestion of an ILO mission with respect to Convention No. 98. The government's attitude was regarded as "arrogant" and that the case was ultimately scheduled for further discussion in 2003 with the possibility of a special paragraph (ibid:52). After its second successive listing and appearance before the CAS in 2003, for the first time, Zimbabwe's case was mentioned in a special paragraph of the report of the CAS, signifying that the situation on the ground had not improved.

In the course of these developments, government commented that its listing was "unnecessary as it was going through labour law reform processes, and emphasised its cooperation with African political leaders to address the problems it faced" (ibid:12). The CAS' proposals for a direct contacts mission were also turned down as the government felt that these would be political in nature. The government further appeared before the

Conference Committee in 2004 and 2005 concerning the same convention and the outcomes were essentially of the same nature as those of the first two engagements, characterised by its defiance of suggested ILO high level missions.

From 2006 to 2008, the listing of the government to appear before the Conference Committee concerned Convention No. 87. The appearance in 2006 was preceded by the initial consideration of the government's first report to the CEACR in November 2005. According to the International Labour Organisation (2006c), the CAS commented that the use of POSA curtailed the full enjoyment of trade union rights as well as civil liberties. In the same report, the government stated that it still considered that its listing was politically motivated and therefore rejected the CAS' recommendations for an ILO high level visit to Zimbabwe.

In June 2007, the relations between the government and the Conference Committee reached a melting point as the former refused to participate in the committee's proceedings concerning Convention No. 87 arguing that its listing was not warranted. The International Labour Organisation (2007c) details the contents of a letter by the Zimbabwean Minister of Labour and Social Services to the ILO Director of International Labour Standards stating that the government had made a determined not to appear before the Conference Committee. The letter argued that the government had comprehensively responded to the charges being repeatedly levelled against it during previous appearances and that it had decided not to continue to be an accomplice to the abuse of the "august mechanism of the Committee on the Application of Standards". This development was in spite of the fact that the government was duly accredited to fully participate in the work of the entire session of the Conference. Notwithstanding the government position, the committee proceeded to discuss the issues and mentioned the matter in a special paragraph.

A special paragraph means that the debate on the case in question is further escalated to a conference plenary discussion after the Committee has presented its report. A special paragraph is therefore a way of keeping the spotlight on countries that are found wanting in their application of conventions by the Committee. The author notes that the continued discussion of a matter in a plenary session of the conference results in considerable embarrassment on the part of the government delegation of the member state in question. The measure accordingly puts pressure on the member state to effect the necessary changes to

better comply with the conventions. In 2008, the government was once again listed to appear before the conference committee and it yet again refused to appear before the committee's proceedings. As in the previous year, the committee proceeded to discuss the matter subsequently mentioning the same in a special paragraph. The Report of the Committee on the Application of Standards of 2008 basically invited member states to invoke Article 26 of the ILO Constitution.

In light of the 2007 and 2008 events, the employers' and workers' delegates at the 2008 session of the International Labour Conference proceeded to file separate complaints in terms of Article 26 of the ILO Constitution. Both complaints mentioned the refusal by government to participate in the work of the Conference Committee. The employer delegates specifically believed that the government's conduct hampered the work of the ILO's supervisory bodies. The 13 employer delegates concerned were from Argentina, Australia, Austria, France, Guinea, Honduras, Kenya, South Africa, Tunisia, United Kingdom and two from the United States of America. The 13 worker delegates came from Angola, Australia, Barbados, Belgium, Botswana, Brazil, Colombia, Cote d'Ivoire, Guinea, Pakistan, Senegal, South Africa and Swaziland. The majority of the employer delegates come from those Western countries that have had strained political relations with Zimbabwe thus lending some support to government's claims that its listing and appearances were politically motivated. The majority of the workers are from the African continent, possibly signifying a measure of greater regional solidarity within the workers group.

3.8 The Commission of Inquiry on Zimbabwe

Following the repeated censure of the government of Zimbabwe by the Committee of Experts and the Conference Committee, in 2008 employers and workers delegates at the 97th session of the ILC put in motion a complaint procedure in terms of Article 26 of the ILO Constitution. The delegates filed a complaint against the government concerning its observance of ILO Conventions Nos. 87 and 98. According to the ILO Commission of Inquiry Report (2009) the employer delegates cited alleged violations of Convention No. 87 on Freedom of Association mentioning the continued recourse to POSA and the Criminal Law (Codification and Reform) Act of 2006 to repress basic civil liberties and trade union rights, while the workers delegates cited both conventions.

With respect to Convention No. 87, the employers based their complaints on the proceedings of the Conference Committee citing the “persistent obstructionist attitude demonstrated by the government through its refusal to come before the Conference Committee in two consecutive years” (ibid:4). The employers’ delegates contended that the government had shown “contempt in its conduct towards the Conference Committee, considering that the Zimbabwe delegation was duly accredited to fully participate in the proceedings” (ibid). Although the employers proceeded to cite other technical reasons consistent with the arguments presented before the Conference Committee, the gist of their complaint was the government’s election not to appear before the Conference Committee. The employers also mentioned what they considered to be vast information presented to the ILO supervisory bodies concerning the surge in trade union rights and human rights violations in the country. The formal complaint by the employers’ delegates is marked as Appendix B.

On the other hand, the workers’ delegates observed that “since 2002, the Conference Committee has consistently attempted to create a constructive dialogue with the Government to find durable solutions to ever-increasingly serious violations of these Conventions” (ibid:3). The delegates further charged that the government had steadfastly turned down the missions requested by the Conference Committee adding that the government had failed to participate in the Committee’s proceedings in respect of Convention No. 87 in 2007 (ibid). The worker delegates further recorded that the Government also declined to come before the Committee in 2008, despite repeated requests for it to attend.

As with the employers, the delegates cited “an escalation in the violation of trade union rights, alleging that trade union leaders and members had been systematically arrested, detained, harassed and intimidated for the exercise of legitimate trade union activity” (ibid:4). The formal complaint by workers’ delegates is marked as Appendix C. Pursuant to Article 26 of the ILO Constitution, the ILO Governing Body, at its 303rd session in November 2008 decided to set up a Commission of Inquiry to investigate the observance by the government

of the two conventions in question. The ILO Governing Body also decided on the composition of the Commission of Inquiry.²

The Commission had meetings in Harare, Bulawayo, Gweru and Mutare, managing to meet with almost all its intended contacts (ibid:26). Although the Commission failed to meet with key figures such as the President of Zimbabwe and the Commissioner of Police, the Commission commended the cooperative response it got from the government. Amongst the persons that the Commission met were the Prime Minister, Mr. Tsvangirai, the Ministers in the Organ for National Healing, Reconciliation and Integration, as well as various government Ministers (ibid). The list of persons also included representatives of employers and workers organisations as well as civil society.

It is recorded that the interviewees alleged extreme and concerted government action to deprive workers and their representatives the rights enshrined in Convention Nos. 87 and 98, citing violence, anti-union discrimination, unlawful arrests and detentions, among many other issues (ibid:159). The ILO Commission of Inquiry on Zimbabwe concluded that the government had failed to honour its obligations in respect of Convention nos. 87 and 98. The conclusions are detailed in paragraphs 543 to 598 of the ILO Commission of Inquiry Report (ibid:151), detailing the government failure to uphold “freedom of association and civil liberties, freedom of association in law and practice” as well as the exclusion of public servants from the right to organise. The conclusions mention the “systematic and systemic nature of the violations” perpetrated by government. Drawing from its conclusions on the observance by Zimbabwe of the conventions in question, the Commission drew up a list of recommendations calling for the government to make far reaching changes in legislation and practice in order to fully comply with the conventions in question. The recommendations

² The Governing Body decided that the Commission of Inquiry would have the following members; Judge Raymond Ranjeva (Chairperson) (Madagascar) – Former Vice-President of the International Court of Justice; Conciliator at the World Bank International Centre for Settlement of Investment Disputes, Dr Evance Kalula (Zambia) – Professor of Employment Law and Social Security and Director of the Institute of Development and Labour Law of the University of Cape Town; Chairperson of the South African Employment Conditions Commission and Dr Bertrand Ramcharan (Guyana) – Former Acting UN High Commissioner for Human Rights and UN Under Secretary-General; Commissioner of the International Commission of Jurists; former professor (Swiss Chair of Human Rights), Graduate Institute of International and Development Studies.

also called on the government to strengthen its institutional governance system citing, among others, the Judiciary and the Organ for National Healing, Reconciliation and Integration. Through a written response directed to the Director General of the ILO in 2010, the government communicated its acceptance of the Recommendations of the Commission of Inquiry. The Recommendations of the Commission of Inquiry are marked as Appendix D.

3.9 Key Features of the Enforcement Mechanism

The study reveals that Articles 19 and 22 of the ILO Constitution provide the bedrock for the effectiveness of the organisation in supervising member states. The periodic reports requested from member states under these articles provide the basis for the supervision by the CEACR and the CAS. Should these Committees fail to succeed in bringing a member into conformity with a particular convention, the issues in question are subject to plenary conference discussions through the mechanism of a special paragraph in the Conference Committee's report. Beyond the supervision of the Conference Committee, the ILO constituents can resort to a Commission of Inquiry. In the event of non acceptance of the recommendations of a Commission of Inquiry at the close of its work, concerned member states can refer the dispute to the International Court of Justice for a final decision in accordance with Articles 29 and 31 of the ILO Constitution.

From the above, it is clear that the government of Zimbabwe has had a troubled relationship with the ILO supervisory system. In this same connection, it can also be opined that the government faced compliance challenges with its reporting obligations as well as with the broader work of the supervisory bodies by seemingly neglecting to take full stock of its international obligations in respect of the two conventions. The deliberate strategy of the government not to cooperate with the supervisory bodies is evidence indicating that it did not fully comprehend the responsibilities it had before the supervisory bodies and indeed, its treaty obligations with respect to the *pacta sunt servanda* principle. As a result, the full rigour of the work of the ILO supervisory bodies was relentlessly applied on the country leading to even the rarest of interventions in the form of a Commission of Inquiry.

The author finds a close relationship between the non-fulfilment of the government's reporting obligations and the escalation of action by the ILO supervisory bodies. It is indeed

notable that when the government failed to submit its Article 22 report to the CEACR in 2001 for Convention No. 98, it was subsequently listed to appear before the superior CAS in the following year in June 2002. From then onwards, the government was repeatedly called to appear before the same Conference Committee until the establishment of a Commission of Inquiry. When the government decided not to present itself before the Conference Committee in 2007 and 2008 those decisions were subsequently met by the escalation of the supervisory mechanism to the level of a Commission of Inquiry. It is therefore the author's view that the failure by the government to fulfil its reporting obligations as above stated was instrumental in heightening the action brought against the government through the ILO supervisory system.

3.10 Conclusion

It can be concluded that although the government initially pursued a policy of non cooperation, evidenced by the outright rejection of the supervisory bodies' recommendations and the refusal to appear before the conference committees, the government reversed this stance in 2009 when it accepted the recommendations of the Commission of Inquiry. The relentless nature of the work of the ILO supervisory system thus comes out quite plainly when the case of Zimbabwe is concerned. The case of Zimbabwe also shows the uniqueness of the ILO within the multilateral system by revealing the strength of non state entities within the organisation, that is, the employers' and workers' representatives. Lastly, the Zimbabwean experience also shows the binding nature of international law upon state parties, including a compelling demonstration of the existence of effective enforcement mechanisms at the international level.

CHAPTER FOUR

ANATOMY OF COMPLIANCE CHALLENGES AND PROSPECTS FOR ZIMBABWE

4.1 Introduction

This chapter interrogates the circumstances that militated against the government's full compliance with the ILO supervisory mechanisms, incorporating the views of key informants who are involved in the work of the ILO supervisory system in Zimbabwe. The chapter examines the country's political, social and economic context within which the government operated over the period during which its compliance record in the ILO deteriorated. The views of the key informants in this chapter are further analysed in conjunction with other sources that provide a clear picture of the push factors that affected the government's performance.

4.2 The Structural Factor: Political Activism versus Labour Activism

All interviewees were of the view that a clear understanding of the cause for government's poor record before the ILO supervisory bodies necessitated a full appreciation of the political, social and economic context which obtained in the country from 1999 to 2009. The mentioned time period corresponds to the formation of the MDC party in 1999 to the signing of the Global Political Agreement³ (GPA) in 2008 between the Presidents of the Zimbabwe African National Union – Patriotic Front (ZANU–PF) party, and the two Movement for Democratic Change (MDC) parties, MDC (T) and MDC (M), Messrs. Robert G. Mugabe, Morgan R. Tsvangirai and Arthur G. O. Mutambara, respectively. The GPA, through Article II, has the aim of “resolving once and for all the current political and economic situations and charting a new political direction for the country”. The global view of the respondents was that the scrutiny of the ILO supervisory bodies on the government of Zimbabwe had a connection with the political developments in the country given the central role played by the ZCTU in founding the MDC party. The author is persuaded by the interviewees' claims

³ Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe (2008).

taking into account that the pre-MDC and post-GPA eras are indeed characterised by a non-confrontational relationship between government and the ILO supervisory bodies. As such, it is imperative for the study to explore the political, social and economic context of Zimbabwe during the period in question.

The GPA committed Zimbabwe's political parties, through Article II, "to work together to create a genuine, viable, permanent, sustainable and nationally acceptable solution to the Zimbabwe situation" (www.copac.org.zw). Article XII of the GPA is also noteworthy as it recognises "the importance of the freedoms of assembly and association in a multi-party democracy" and commits the Parties "to work together in a manner which guarantees the full implementation and realisation of the right to freedom of association and assembly" (www.copac.org.zw).

Pursuant to the signing of the GPA, in February 2009 the Parliament of Zimbabwe voted in favour of Constitutional Amendment No. 19 thus effectively paving way for the establishment of a new Inclusive Government in which the former ZCTU Secretary General, Mr. Morgan Tsvangirai, was sworn in as Prime Minister with other MDC party members assuming Ministerial portfolios. Of note and as highlighted by some of the interviewees is the fact that the new Minister of Labour and Social Services, Ms. Paurina Mpariwa, was a former General Council member of the ZCTU. Having regard to these political developments, the interviewees drew the conclusion that, post GPA, it was inevitable that the vilification of government within the ILO would be greatly reduced as the erstwhile complainants within the ILO supervisory system were now part of central government.

4.3 The Labour Movement and Political Contestation in Zimbabwe

Upon Zimbabwe's independence in 1980, the new government ensured the enjoyment of basic liberties, including the right to freedom of assembly and to belong to trade unions, which were guaranteed in the Lancaster House constitution of 1979 that ended the liberation war. The government went on to organise the then fragmented trade union organisations to form an umbrella body, the ZCTU, in 1981. The strategic place of the labour movement in politics has been aptly put forward by Gwisai (2006:5) who states that "trade unions provide

an autonomous platform for workers to learn to organise and develop political consciousness and thereby enable workers to fully exercise their rights as citizens”.

The mentioned point of view is important in so far as it shows that trade union activity cannot be easily restricted from encroaching onto the political platform. The strong alliance that existed between the ZANU government of the time and the ZCTU is seen in the fact that the latter’s Secretary General Mr. Alfred Mugabe, was brother to the Prime Minister Mr. Robert G. Mugabe. Gwisai (2002) argues that government had sought to undermine the workers’ power by imposing the ZCTU and staffing it with its supporters. The author finds this claim persuasive considering that the close relationship between government and the ZCTU did not last following the latter’s leadership changes in 1988, as well as the changes in the government’s socio-economic policies of the early 1990s.

In 1988 Mr. Jeffrey Mutandare became the new President of the ZCTU, while Mr. Morgan R. Tsvangirai became the Secretary General. According to the interviewees from the ZCTU, the new leadership constantly clashed with the government arguing that the thrust of government’s policies was markedly shifting from the socialist agenda proclaimed during the 1980s. In particular, the ZCTU was said to have been staunchly opposed to the Economic Structural Adjustment Programme (ESAP) introduced in 1991, which sought to liberalise the economy by, among other means, deregulating the labour market. In 1995 the ZCTU published a book entitled *Beyond ESAP* as an alternative to ESAP. *Beyond ESAP* proposed fundamental changes to government policy such as advocating for a state interventionist policy to correct market failures and the redistribution of economic assets, including land. The ZCTU unsuccessfully attempted to sell the alternative policy prescription to government and as the ILO Commission of Inquiry Report (2009:78) noted, the publication was mainly perceived as a manifestation of political interests within the ZCTU leadership.

Having been frustrated by the poor reception and impact of the *Beyond ESAP* initiative, between 1996 and 2000 the ZCTU worked with various civil society organisations on the development of a different and more aggressive strategy in the engagement with government. On the other hand, the economic situation in Zimbabwe continued to decline. As Mr Tsvangirai’s online biography reveals, in 1997 he became the first chairperson of the National Constitutional Assembly (NCA), “which was a broad-based movement established

by church, civil society and human rights groups to demand a new people-driven constitution” (www.zimbabweprimeminister.org). Olaleye (2004:11) observes that the NCA was a “formation of more than 40 civic organisations and opposition parties dedicated to promoting constitutional reforms that also provided the support base within the labour movement, especially Mr. Tsvangirai’s ZCTU”. The author thus observes that a politicisation element had thus crept into the ZCTU thus vindicating some of the government’s positions before the ILO’s supervisory bodies that the ZCTU outfit had transformed itself into a political entity.

According to Gwisai (2002), “the year 1997 was to witness the largest number of strikes and demonstrations in the history of Zimbabwe”. Workers, students and peasants, among others, came out in protest against the massive fall in their living standards due to the economic crisis occasioned by the reforms of the 1990s (ibid). Mr Morgan Tsvangirai’s online biography, who was at the time the ZCTU Secretary General, points out that “in January 1998, food prices in Zimbabwe rose almost 40 percent, prompting riots in which eight people died and nearly 2000 were arrested, including Tsvangirai. The food riots were notable for the direct manner in which citizens expressed their displeasure with government which, until this time, was rarely confronted publicly” (www.zimbabweprimeminister.org).

According to the Zimbabwe Congress of Trade Unions (2000), the ZCTU convened a National Working People’s Congress in February 1999, which among other issues decided that it was no longer possible to successfully engage government without resorting to a wider process of democratisation in the country. This decision was subsequently deliberated upon by the ZCTU during its extra ordinary congress in August 1999, whereupon the ZCTU formally made the decision to enter into a strategic alliance with the Movement for Democratic Change (MDC) as a way to better forward the interests of the workers (ibid). The ZCTU interviewees confirmed the authenticity of a ZCTU press statement issued on 2 May 2007, which declared that the organisation had “no apology to make for spearheading the formation of the MDC”. Olaleye (2004:6) observed that the MDC managed to “gather considerable political strength through its wide spread support from the trade union movements, disgruntled intelligentsia community, student movement and civil society”.

After its formation in September 1999, the MDC held its inaugural congress in February 2000 providing it with a leadership that drew heavily from the ZCTU as follows; President – Mr. M. Tsvangirai (former ZCTU Secretary General), Vice President – Mr. G. Sibanda (former ZCTU President), Chairman – Mr. I. Matongo (Acting ZCTU President) and Vice Secretary General – Mr. G. Chimankire (trade unionist). In that same year, the NCA under Mr. Tsvangirai’s chairpersonship led the successful “No Vote” campaign against the 2000 constitutional referendum in opposition to the ZANU (PF) party government’s position. According to government interviewees, these developments changed the face of the ZCTU from the point of view of government as the organisation was thereafter regarded as a political force agitating for regime change. The tight political contestation that then ensued between the ruling ZANU (PF) party and the MDC did not spare the ZCTU.

According to Moss (2007), the quest for the ZANU (PF) party to remain in power during the general elections in parliamentary and presidential elections in 2000 and 2002, respectively, brought with it an escalation of violence and an unprecedented attack on Western countries such as the United States of America (USA) and the United Kingdom (UK). The country’s land reform programme had already created a rift between Zimbabwe and the UK, with the latter refusing to support the government led resettlement programme. The United States responded to the Zimbabwe situation by enacting the Zimbabwe Democracy and Economic Recovery Act of 2001, which is the enabling legislation for the USA to “support the people of Zimbabwe in their struggle to effect peaceful, democratic change, achieve broad-based and equitable economic growth and restore the rule of law”⁴.

The support, in terms of sections 4 and 6 of the Act, is through punitive measures, whereby the US determines the ineligibility of the Government of Zimbabwe to access support from international finance and developmental institutions, including the International Monetary Fund and the International Bank of Reconstruction and Development. Furthermore, the Act, in section 6 prescribes travel and economic sanctions on individuals that are deemed instrumental in the alleged deliberate breakdown of the rule of law, among other issues. These developments only served to entrench ZANU (PF)’s determination to fight the MDC

⁴ Zimbabwe Democracy and Economic Recovery Act of 2001, 22 USC 2151

with all the means at its disposal, with the former arguing that the West was working with both the MDC and ZCTU to effect regime change in the country.

Over the years from the formation of the MDC, the party's political activism was effectively not distinguished from ZCTU's labour activism by the ZANU (PF) government. The principal instrument used against the MDC and ZCTU by government was the Public Order and Security Act (POSA), which in its definition of "public meeting" criminalized meetings of fifteen or more individuals without police clearance. Although POSA explicitly excludes bona fide trade union meetings from its coverage, the police allegedly repeatedly resorted to its use to prevent the ZCTU from convening its meetings.

The schedule of exclusions in terms of sections 24 and 41 of the Act nevertheless removed the jurisdiction of POSA from "public gatherings held by a registered trade union for *bona fide* trade union purposes for the conduct of business in accordance with the Labour Relations Act [*Chapter 28:01*]". The blurred distinction of ZCTU from MDC was often cited as qualifying its meetings as political in nature thus warranting prior authorisation from the police. The majority of cases that were brought before the CFA related to the use of POSA against the ZCTU. The list includes CFA case no. 2313 in 2003 concerning the alleged arrest of 390 trade unionists following a public protest action and CFA case no. 2365 which details numerous incidents of alleged arrests, detentions, torture of ZCTU members for alleged violation of POSA.

The Attorney-General, as detailed in the ILO Commission of Inquiry Report (2009), confirmed this state of affairs when he showed ignorance at the arrest of trade unions under POSA arguing that the police may have queried the true identity of the individuals or workers' organisations concerned. The Attorney General further mentioned that "the general perception that the ZCTU was linked to the MDC meant that ZCTU activities were considered by the authorities not to be bona fide trade union events, but to be political in nature".

Makumbe (2002), quoted in Olaleye (2004:7), writes that during the presidential election in 2002, "POSA was used to stop no less than seven MDC election campaign rallies in one week, as well as voter education meetings organised by civil society groups in Harare,

Bulawayo, and Mutare’’. Thus it can be reasonably inferred that the political factor was at the heart of the troubled relationship between government and ZCTU and by implication, between government and the ILO supervisory bodies. The interviewees in the study were also of the view that the overt politicisation of the labour movement in 1999 in spearheading the formation of the MDC was the genesis of the fallout between government and the ILO supervisory bodies.

4.4 Economic and Social Crisis Context

To gain a deeper understanding of the reasons underlying Zimbabwe’s performance before the ILO supervisory bodies, it is also important to understand the social and economic context that obtained in the country during the time period in question, that is 2000 to 2009. During this decade Zimbabwe experienced the worst decline in its socio-economic fundamentals since independence, the impact of which was felt in the labour market in the form of rising unemployment and rapidly falling disposable incomes due to hyperinflation. According to the Central Statistics Office, as of January 2008, the year on year inflation rate officially stood at 100 580.2%⁵.

By own admission, the then Minister of Finance, Dr. Herbert Murerwa in the 2007 Budget Statement estimated that the fiscal deficit had reached 43% of the GDP. Moss (2007:15) argued out that the country’s Gross Domestic Product “had shrunk every year since 1999” and had cumulatively declined by more than 40%. This decline is contrasted with the 15% average economic impact of full scale civil wars in Cote d’Ivoire, Democratic Republic of Congo and Sierra Leone (ibid). It is further estimated that between 2000 and 2005, the economy was also estimated to have suffered an 86% decline in commercial maize production and tobacco exports had fallen by over 60% (ibid). Given that Zimbabwe has an agro based economy, these statistics show that the country’s macroeconomic fundamentals deteriorated significantly in the period under review.

In an article published by New African (May 2007), the Governor of the Reserve Bank of Zimbabwe (RBZ), Dr. Gideon Gono stated that the protracted foreign currency shortages the

⁵ Central Statistics Office, 2008

country had been facing since 2000 had crippled the operations of industry, which heavily relied on imported inputs for operations. Dr. Gono also added that the declines in the key sectors of the economy had occasioned high unemployment, an inefficient health delivery sector, reduction in Foreign Direct Investment (FDI) and the drying up of balance of payments support.

The ILO Commission of Inquiry Report (2009) records an interview with the Attorney General in which he mentioned the capacity constraints in the justice delivery system, indicating “that the court system was operating on a one per cent budget and that there was a lack of human resources in his office and the judiciary as a result of a brain drain from the country”. The Commission’s interviews with the Chief Magistrate also confirmed the lack of qualified personnel at the Magistrates’ Courts thus showing that even the justice delivery system in the country had been affected in a serious way (ibid). These admissions by high ranking authorities in government confirm that the socio-economic situation had seriously deteriorated.

Within the context mentioned above, it was inevitable that deep seated conflict would be characteristic of the relationship between government and the labour movement over the implementation of key socio-economic policies. Throughout the 2000s, government and the social partners, that is, employers’ organisations and workers’ organisations, unsuccessfully pursued a social contract within the framework of the Tripartite Negotiating Forum (TNF) in an attempt to mitigate the effects of the deteriorating socio-economic situation. According to the Founding Principles of the TNF, the Forum had been established in August 1998 to bring the three parties together to negotiate solutions to the country’s socio-economic challenges. The TNF was established in accordance with the ILO Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

In part, the TNF attempted to implement a protocol to facilitate the management of incomes and prices in 2003 and 2007 without notable success. Protocols on Restoration of Business Viability and the Mobilisation, Management and Pricing of Foreign Currency were also crafted and signed in 2007 although these were never implemented. According to the interviewees, the failure of social dialogue at the TNF in managing the pre-GPA crisis era was largely attributed to a lack of mutual trust and dishonesty among the negotiating parties.

The author observes that the socio-economic situation in Zimbabwe eventually experienced significant improvement following the signing of the GPA in September 2008, the introduction of the multi-currency regime in January 2009 and the formation of the Inclusive Government in February 2009. The author concludes that the pre-GPA socio-economic challenges greatly compromised the government's service delivery capacity. The disgruntlement of the generality of the workers, including through the ZCTU, thus kept the confrontation with government persistent. This confrontation, because of its usually violent nature, inevitably came to the attention of the ILO supervisory bodies.

4.5 Government Intransigence before the ILO Supervisory Bodies

All the interviewees in the study were of the view that the government of Zimbabwe was too rigid and unwavering in its stance before the ILO supervisory bodies, in particular the CAS. The interviewees were of the view that the government of Zimbabwe had genuine cases of non compliance to account for before the CAS, relating to gaps or shortcomings in its legislation as well as to blatant violations in practice. The interviewed legal practitioner contended that the government's appearance before the CAS was mainly precipitated by a pronounced violation of labour unions' rights and harassment of trade union leaders and worker representatives through repressive and draconian legislation. The author notes that some of the gaps included the non extension of collective bargaining rights to the public service sector in accordance with Convention No. 98 and the violence against trade unionists by state security agents during protest actions such as those led by the ZCTU on 13 September 2006 following which, according to CFA case no. 2365, 265 trade unionists were assaulted and arrested, contrary to the principles of Convention No. 87.

While the interviewees noted that there was always a political underhand in the government's confrontation with the ZCTU in practice, it was felt that the government's position before the supervisory bodies should have been more conciliatory rather than hostile. The records of the International Labour Conference, particularly the yearly reports of the CAS, show that whenever the government appeared before the CAS it never lost the chance to discredit the Committee as being manipulated by the West for political reasons, including the country's land reform exercise. Over the years since 2002 the government refused to accept either a high level assistance mission or a direct contacts mission from the ILO to assist it with

reforms or to enable the ILO to ascertain the actual situation on the ground. As recorded in International Labour Organisation (2007c:57), the government's position was eventually crowned when it decided not to present itself before the Committee in 2007 mentioning that "it would no longer be an accomplice to the abuse of the august house" and that its previous dismissals of the political debate in the Committee sufficed. The government boycott was repeated in 2008.

The interviewees therefore believed that government intransigence and non cooperation played a key part in perpetuating the scrutiny of the supervisory bodies leading to the establishment of a Commission of Inquiry in 2009. Three out of the four interviewees from government felt that the decision of the government not to participate in the Committee's deliberations in 2007 and 2008 was ill conceived, only serving to prove that the allegations levelled against the government were indefensible. While the other government official was in moderate agreement with the majority view, his view was that whether or not the government had attended the Committee's proceedings the political situation of Zimbabwe and its poor international standing would have seen the Commission of Inquiry being established anyway. It is also interesting to record the view by the one government official that government was reasonably not able to accept the ILO supervisory bodies' suggestions of high level missions and direct contacts due to the real political, social and economic challenges that the country was experiencing.

The interviewees from EMCOZ and ZCTU were convinced that the government had openly violated the conventions in question and that the decision to boycott the CAS was a direct attack on the entire system of ILO supervision. They cited the fact that Zimbabwe is the only country so far to have had a Commission of Inquiry procedure arising from simultaneous complaints from both employers and workers as signifying the grave nature of the circumstances surrounding Zimbabwe's case, including the unyielding and negative attitude of government representatives at the International Labour Conferences.

4.6 Prospects for the Improvement of Government's Record

The interviewees were cautiously optimistic that the relationship between the government of Zimbabwe and the ILO supervisory bodies would continue to improve going into the future. The interviewees cited the acceptance by government of the Recommendations of the ILO Commission of Inquiry in 2010 as a clear demonstration that government had abandoned its hitherto uncompromising stance in favour of a more collaborative one. The interviewees highlighted the importance of ongoing initiatives to enhance government's compliance with the ratified ILO conventions, mentioning in particular the harmonisation and labour law reform process, the legislation of the TNF, the training seminars for law enforcement agents on International Labour Standards and capacity building seminars for the judiciary.

One government official indicated that the activities government was implementing had already started bearing fruit citing that unlike in previous years when trade unions were being denied the right to hold processions during the International Workers Day on the 1st of May, the year 2012 was different with all trade unions managing to organise their processions throughout the country. Another government official revealed that the recent appearances of the government before the CAS in 2011 and 2012 were no longer based on fresh violations of the conventions but on the need to periodically update the Committee on the ongoing implementation of the Recommendations of the Commission of Inquiry. The interviewed legal practitioner also mentioned that the persecution and systematic harassment of trade union leaders had subsided, adding that trade unionists and workers were no longer being indiscriminately arrested and detained.

A representative of EMCOZ however felt that the dormancy of the TNF had robbed government and the social partners an opportunity to make greater progress in the effort to improve government's observance of ILO conventions. He strongly felt that although the TNF was not yet fully established as a legal entity, it still possessed persuasive and moral authority to bring relevant players together in programming national activities that would reconcile the nation and provide a platform for inclusive and shared policy formulation and implementation. The interviewees from the ZCTU expressed reservations on the slow pace

with which government led processes were taking, in particular the harmonisation and reform of labour laws and legislation of the TNF.

The author was informed by government interviewees that draft principles for the former activities were pending before Cabinet while a zero draft of the TNF Bill was already being considered by the Attorney General's office. They mentioned that the delay in government processes was natural by virtue of the bureaucratic processes which take time, adding that the government was discharging its functions in good faith. The government representatives were concerned that the ILO had been erratic in its technical and financial support to the national initiatives under the technical assistance framework relating to the recommendations of the ILO Commission of Inquiry launched in August 2010. They felt that the inadequacy of funds was hampering the full impact of the programmes aimed at enhancing government capacity to fully honour its international obligations within the ILO.

The optimism of the interviewees was guarded as most of them cited that the progress being achieved was in a context in which the political contestation was minimal as a result of the GPA inspired Inclusive Government. The interviewees constantly recalled that the compliance difficulties on the part of government had been occasioned by the serious political, economic and social crises that predated the signing of the GPA in 2008. Given that Zimbabwe is bracing itself for a new round of general and presidential elections in 2013, which would effectively bring the Inclusive Government to an end, all the interviewees felt that the real test for government's sincerity to make progress within the ILO was yet to come.

The interviewees contended that the outcome of the envisaged electoral process and its unforeseeable impact on the political, social and economic scene made it virtually impossible to ascertain the direction that the implementation of the recommendations of the ILO Commission of Inquiry would take. The author thus observed a mixed sense of optimism and caution on the part of the interviewees as far as the prospect of government improving its record before the ILO supervisory bodies is concerned.

4.7 Conclusion

It can be concluded that the underlying forces that affected government's performance within the ILO supervisory system were the political, economic and social crises experienced from 2000 to 2009. Although technical elements concerning the violation of Convention Nos. 87 and 98 that warranted the repeated listing of the government to appear before the CAS existed, the motivating factor for the violations was largely seen in the perceived connection between labour activism by the ZCTU and political activism by the MDC party. The point that the poor international standing of the country due to the political factor merits attention in explaining the inertial obsession, particularly by employers' and workers' delegates at the International Labour Conference to always have the Zimbabwean case on the agenda. The views of the key informants largely corroborate the documentary evidence as discussed in chapter three, which detail the government's compliance challenges from the point of view of the ILO supervisory system.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The study provided an investigative analysis of the compliance challenges faced by the government of Zimbabwe within the context of the ILO supervisory system. The analysis relied on documentary evidence and the views of key informants with expert and practical knowledge in the subject matter. The standpoint of the study was that the complexities of the ILO's supervisory system presented challenges with respect to Zimbabwe's compliance with its obligations hence its continued appearance before the supervisory bodies. This Chapter synthesises the essential elements of the study and draws conclusions and recommendations on how the record of the government *vis-a-vis* the ILO supervisory system can be improved.

5.2 Conclusion

The study concludes that the government has had tremendous difficulties in complying with the provisions of ILO Conventions Nos. 87 and 98 both in law and in practice. As a result of these compliance shortcomings, the government was repeatedly subjected to the relentless scrutiny of the CEACR and the CAS from 2002 to 2008, leading to the establishment of the Commission of Inquiry in 2008. Throughout the period 2002 to 2008 when the government was listed to appear before the CAS, it adopted a highly defensive and dismissive attitude which only served to protract the attention of the ILO supervisory system on it. During this period, the government seemed convinced that its appearances before the CAS were purely politically motivated, often referring to the close relationship between the ZCTU and the MDC party. The government strongly felt that the ILO system was aligning itself to the political contestation of the MDC party and Western countries, such as the USA and UK, with whom Zimbabwe had a diplomatic row. This view was so deep-seated within government that in 2007 and 2008 government boycotted the proceedings of the CAS, adjudging them to be politically manipulated.

The relationship between the government of Zimbabwe and the supervisory bodies started showing signs of improvement following the formation of the Inclusive Government in 2009. The Inclusive Government dramatically changed the outlook of the government within the ILO as key social and economic ministries were now under the direction of the MDC (T) party, including the Ministries of Finance, Economic Planning and Investment Promotion, Public Service, Home Affairs (with co-ministers) as well as Labour and Social Services. In any case, it is sufficient to note that one of the complainants in the then outstanding cases before the ILO supervisory bodies was the new Prime Minister, Mr. Morgan Tsvangirai, having the responsibility to preside over a Council of Ministers that brought together all government Ministers. Although the ZANU (PF) government had categorically refused the suggestions of ILO High Level Assistance missions and Direct Contacts in the past, the Commission of Inquiry carried out its work in Zimbabwe smoothly from May to August 2009.

In 2010 the government plainly accepted the recommendations of the Commission of Inquiry undertaking to implement them in the context of the then existing Government Work Plan and with regard to the work of the Organ for National healing, Reconciliation and Integration. The government is currently well within the implementation phase of the programme on the recommendations of the Commission of Inquiry. It is therefore possible to conclude that the compliance challenges that the government of Zimbabwe experienced within the ILO were to a considerable extent determined by the deep political, social and economic crisis that existed from the time of the formation of the MDC in 1999 to the signing of the GPA in 2008. The political element was especially contributory given that the ZCTU had helped to form the MDC party, with key figures in the ZCTU emerging as the political party's leaders.

Whereas the standpoint of the study was that the government's compliance challenges were due to the complexities of the ILO supervisory system, the documentary search and information obtained from the key informants largely point instead to the country's difficult political, social and economic situation during the period 2000 to 2008. The fact that the ZCTU was deeply involved in the establishment of the MDC party meant that its corporate distinction from the party was blurred and the ZANU (PF) party indiscriminately treated the two organisations as one. The application of POSA on ZCTU and its members was therefore seen as legitimate by government, which argued that the latter was organising politically,

while the same members resorted to the ILO's complaints mechanisms in respect of the conventions in question. Ultimately, the government failed to satisfactorily account for its actions, before the ILO supervisory bodies, when these were contrasted with its obligations to fully observe Convention Nos. 87 and 98 in both law and practice. The contention by government that the ZCTU was a political outfit did not satisfy the supervisory bodies. It is also important to note that the legislative framework mainly in the form of the Labour and Public Service Acts continued to have provisions that were not consistent with the ratified conventions. This point was raised by the key informants.

In the final analysis, it can be concluded with a great measure of certainty that the government did not honour the *pacta sunt servanda* principle with respect to its international obligations under Conventions No. 87 and 98. The government abandoned its international commitment regarding the conventions under the weight of political, social and economic crises. Additionally, the government did not exercise good faith in its interaction with the ILO supervisory bodies evidenced by its decision to formally disparage the CAS and refuse to appear before it in line with the constitutional and well established procedure of the ILO.

5.3 Recommendations

Having regard to the foregoing, the author's broad recommendation is for the government to take a deliberate policy position to improve its image within the ILO by fully participating in the work of the supervisory bodies and by implementing their recommendations. The author also proffers the following specific recommendations;

5.3.1 Utilisation of Inclusive Government

Given that there is a very close relationship between the challenges encountered by the government within the ILO and the political contestation of the ZANU (PF) and MDC parties as reflected upon in this study, it is very difficult to project the implications of the lapse of the Inclusive Government's tenure in relation to the future government relations with the ILO supervisory system. The present government must therefore move with speed to take advantage of the prevailing political, social and economic tranquil occasioned by the existence of the Inclusive Government to put in place key labour market reforms that promote

the observance of Convention Nos. 87 and 98. Some of these reforms include the ongoing Harmonisation and Labour Law Reform Programme which seeks to fully domesticate the Convention Nos. 87 and 98 in national legislation, including the Public Service Act.

5.3.2 The New Constitution and Labour Relations

The author has been cognisant of the fact that this study was carried out during Zimbabwe's constitution making process under the auspices of COPAC, established through the GPA. Through a referendum held on 16 March 2013, Zimbabweans overwhelmingly voted for the new Constitution. The Herald of 20 March 2013 reported the "overwhelming endorsement of the draft constitution by millions of Zimbabweans" citing that 3 079 966 people had voted for the new Constitution compared to 179 489 who voted against it. The author notes very progressive sections of the new Constitution that essentially domesticate the provisions of Conventions Nos. 87 and 98. Of note is section 65 of the constitution on labour rights, which extends the right to organise, collective bargaining and collective job action to all workers including those in the civil service, with the exception of security services. The new Constitution legislatively brings Zimbabwe's labour legislation *vis-a-vis* the private and public sectors into conformity with the conventions in question. The author thus finds the new Constitution a vital impetus in the normalisation of government relations with the ILO supervisory system and recommends its expeditious adoption in so far as it relates to issues in the world of work.

5.3.3 Raising the Profile of Social Dialogue through the TNF

The government must vigorously pursue reforms on the legislation of the TNF in order to make it a juristic persona and to give its decisions legal authority. At the moment the TNF is a voluntary and unlegislated chamber of social dialogue and this status limits its influence on issues of social and economic importance. Closely related to the legislation of the TNF is the establishment of an independent and full time secretariat that will be fully dedicated to the work of the forum. Presently, the secretariat of the TNF is housed within government, a scenario which potentially compromises the secretariat's impartiality and accessibility by the social partners. The special place of the TNF in assisting government to fully observe the principles of ILO conventions is in the fact that the forum is presently set up in accordance

with the ILO Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). Within the realm of the TNF the government can also forge a stronger partnership with the national employers' and workers' organisations, who are the typical complainants within the ILO system. Furthermore and as articulated by the EMCOZ interviewee, the TNF has the potential to galvanize national consensus on issues of importance and to continually improve the quality of the relationship between government and the social partners.

5.3.4 All Stakeholders' Participation

The government should continue to pursue capacity building and information sharing indabas on ILS with key government institutions and players such as the police, judiciary, the Organ for National Healing, Reconciliation and Integration (ONHRI) as well as the Human Rights Commission. The information sharing helps to deepen the knowledge base on government's obligations vis-a-vis its ratified conventions and to ensure harmony and cooperation within the government system. It is notable that the violations that came before the ILO's CFA largely related to action by law enforcement agents and the administration of POSA. This example shows that any durable reformation in the approach to managing compliance issues pertaining to the ILO would have to be broad based to incorporate even those players ordinarily outside of the labour market.

5.3.5 Transformation of the Government's Engagement Approach

The government should abandon its bravado attitude in its engagement with the ILO supervisory system. By virtue of its voluntary membership to the ILO, the government is compelled to act in utmost good faith in discharging its obligations within the ILO. Furthermore, the government is bound by the *pacta sunt servanda* principle, which affirms the binding nature of ratified treaties, including ILO conventions and requires acceding states to honour their obligations in good faith. The author is of the view that it is in the best interests of government to adopt a non confrontational approach within the ILO so that its commitment to the values shared by members of the organisation is not questionable. Such an approach would greatly enhance the international image of the country within the ILO and facilitate greater progress towards compliance with its ratified conventions, including Conventions Nos. 87 and 98.

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