



**TORTURE IN ZIMBABWE,
PAST AND PRESENT**

PREVENTION, PUNISHMENT, REPARATION?

A SURVEY OF LAW AND PRACTICE

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FOREWORD

The Redress Trust (REDRESS) is an international human rights organisation with a mandate to assist torture survivors to seek justice and other forms of reparation for the harm they have suffered. Its' national and international programmes are aimed at ensuring that the rights of torture survivors, whoever they are, and wherever they are located, are realised in practice. Over the past few years, we have produced a number of reports on the prevalence of torture in Zimbabwe and the prospects for Zimbabwean victims to obtain redress nationally and internationally. This Report is written to draw attention to the ongoing difficulties such victims face, given the impunity which perpetrators continue to enjoy. It is an update of a report produced by REDRESS in March 2003 as part of a survey of law and practice in thirty-one selected states and published on our website as the *Zimbabwe Country Report* along with the other countries surveyed. We believe it is important that all interested parties at the international, regional and national level be kept as fully informed as possible both of the reality of torture in Zimbabwe and the problems with which torture survivors and those working with them, especially human rights lawyers and other human rights defenders, have to deal. It is also a contribution to keeping the conscience of the world alive to the issues at stake in that troubled country.

It is in this context that this revised report draws attention to the manifold legal and institutional obstacles and problems which continue to face local, regional and international organisations and individuals, as well as governments, concerned about torture in Zimbabwe and the need for justice and reparations for its victims. Torture has been practiced in Zimbabwe for decades, both before and since independence in 1980, and remains an ever-present reality in Zimbabwe, as does the culture of impunity for perpetrators.

The crackdown on civil society continues unabated, manifested in the persecution of human rights defenders by an increasingly partisan police force. For survivors of gross and systematic human rights violations in Zimbabwe, including those who have been tortured, the future remains bleak. We believe, however, that the rights of all such survivors to justice and other forms of reparations must be upheld and championed, as must the fundamental right not to be tortured, and the fight against torture itself.

ACKNOWLEDGEMENTS AND COMMEMORATION

June 26th is the United Nations International Day in Support of Victims of Torture. This Survey acknowledges and commemorates victims of torture in Zimbabwe, keeping hope alive for reparation for their suffering, punishment for the perpetrators and the prevention of torture in Zimbabwe.

This Survey was researched and written by Kevin Laue and edited by Carla Ferstman and Rob Monro.

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I. INTRODUCTION

I.1. The Legal Framework

A. The Constitution

Zimbabwe is an independent republic and has a population of about 12 million people, comprised of two main ethnic groups, the Shona (83%) and the Ndebele (16%). There is a small white population of less than ½ %. The official language is English.

Zimbabwe, formerly Rhodesia, was under white-minority rule until achieving independence on 18 April 1980 under a new Constitution.¹ This followed a British-supervised general election won by Robert Mugabe's Zimbabwe African National Union party (Zanu, later called Zanu-PF), the first democratically held multi-party election in which the black majority could fully participate. Independence ended the rule of Ian Smith's racist Rhodesian Front (RF) government, which had illegally declared the country independent from Britain 15 years earlier on 11 November 1965, an event known as the Unilateral Declaration of Independence (UDI).

The 1980 Constitution is commonly referred to as the Lancaster House Constitution.² The Constitution contains a justiciable bill of rights (called the Declaration of Rights³), which recognises a wide range of civil and political rights, including the protection of the right to life and to personal liberty. There are also provisions to secure every person's entitlement to the protection of the law.⁴

The courts of general jurisdiction consist of the Magistrates Courts and the High Courts, which hear both civil and criminal cases. The High Court has both original and appeal jurisdiction. The Supreme Court hears appeals and constitutional cases. A person who alleges a contravention of the Declaration of Rights is entitled to approach the Supreme Court directly for redress.⁵ There are also local courts and small claims courts, which with Magistrates Courts are known as inferior courts, while the High Courts and the Supreme Court are known as superior courts. The local courts have limited jurisdiction over civil disputes involving persons subject to African customary law. Magistrates Courts hear certain civil cases as courts of first instance, depending on the amount of money involved, and appeals from local courts. The High Courts⁶ hear certain criminal and civil appeals from inferior courts,

¹ The Constitution of Zimbabwe was published as a Schedule to the Zimbabwe Constitution Order 1979 (SI 1979/1600) of the United Kingdom.

² It arose from negotiations held at Lancaster House in London in 1979 under the auspices of the British Government. These negotiations led to a ceasefire in the guerrilla war which the black liberation movements had been waging against the UDI regime. These movements were Zanu-PF, and the Zimbabwe African Peoples Union party (Zapu, later called PF-Zapu) led by Joshua Nkomo. The armed wing of Zanu-PF was Zanla, and that of PF-Zapu was Zipra.

³ See Chapter 3, Sections 11-26 of the Constitution.

⁴ Section 18 of the Constitution.

⁵ Section 24(1) of the Constitution. The Supreme Court therefore has original jurisdiction to adjudicate on contraventions of the Declaration of Rights. This is dealt with more fully below at IV. 1.A. , p. 31.

⁶ The High Courts are in Harare and Bulawayo. High Court judges also go on circuit to hear criminal cases only in Mutare, Masvingo and Gweru.

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have unlimited jurisdiction in civil disputes, and try grave criminal cases as courts of first instance. The Supreme Court⁷ hears some appeals from inferior courts, and all appeals from the High Courts. There are also certain disciplinary courts for service personnel (with civilian courts having some concurrent jurisdiction) with some appeals to superior courts.⁸ A recent innovation has been the establishment of an Electoral Court to deal with any disputes or issues concerning elections.⁹ There is no separate Constitutional court *per se*, and the Supreme Court sits with five judges to hear cases involving the interpretation of the Constitution, while other Supreme Court hearings usually consist of a three-judge bench. The independence of the judiciary is stipulated in the Constitution.¹⁰

B. Incorporation and Status of International Law in Domestic Law

Zimbabwe has ratified or acceded to the following relevant international treaties¹¹:

Convention relating to the Status of Refugees (1951) (*entered into force 25/1/81*)

Protocol relating to the Status of Refugees (*entered into force 25/1/81*)

Convention on the Rights of the Child (*entered into force 11/10/1990*)

Convention on the Elimination of All Forms of Discrimination Against Women (*entered into force 12/6/91*)

International Convention on the Elimination of All Forms of Racial Discrimination (*entered into force 12/6/91*)

International Covenant on Civil and Political Rights (ICCPR) (*entered into force 13/8/1991*)

International Covenant on Economic, Social and Cultural Rights (*entered into force 13/8/1991*)

Zimbabwe has *not* acceded to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹² *nor* the statute of the International Criminal Court.¹³ There are a number of other specific Commonwealth declarations and principles, which were applicable to Zimbabwe before it left the Commonwealth in 2003.¹⁴ In addition, Zimbabwe is a signatory to the African

⁷ The Supreme Court is in Harare, and sometimes also sits in Bulawayo.

⁸ For example, see Part V (Discipline), Sections 29-50 of the Police Act [*Chapter 11:10*]. The Defence Act [*Chapter 11:02*] establishes courts martial in terms of Section 45. This deals with disciplinary offences under the Military Code such as desertion, mutiny, malingering, insubordination and so on. Prison officers and prisoners come under the Prisons Act [*Chapter 7:11*]. But all service personnel also come within the jurisdiction of ordinary civilian courts for many purposes.

⁹ The Electoral Court was established in February 2005 as part of the Government's efforts to comply with the Southern African Development Community's (SADC) Protocol on Principles and Guidelines Governing Democratic Elections, which has also seen the establishment of the Zimbabwe Electoral Commission. Under the statute governing the Electoral Court, judgment on any petition must be handed down within six months.

¹⁰ Section 79B of the Constitution.

¹¹ United Nations Human Rights – Treaty Bodies Database: <http://www.unhchr.ch/tbs/doc.nsf> (last visited on 26/4/2005.)

¹² *Ibid.* Zimbabwe has also not acceded to the (First) Optional Protocol to the ICCPR (allowing individual petition), nor to the (Second) Optional Protocol to the ICCPR (aiming at the abolition of the death penalty). It has also not ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights – see <http://www.amdatatechnologies.com/acc/UploadedDocuments/210200544747PM609.pdf> (last visited 27/4/2005).

¹³ The Rome Statute of the International Criminal Court, 1998, located at <http://www.un.org/law/icc>

Charter on Human and Peoples' Rights adopted by the African Heads of States and Governments in Banjul, the Gambia, in 1981, and which entered into force on 21 October 1986.

The Constitution provides that any international convention acceded to "shall be subject to approval by Parliament, and shall not form part of the law of Zimbabwe unless it has been incorporated into the law by ... Parliament."¹⁵ The Constitution is the supreme law and makes no mention of customary international law, or international treaty law, apart from setting out the mechanisms for the accession to and incorporation of treaties. It therefore takes precedence over customary international law¹⁶ and over treaties, which have been incorporated into domestic law. In interpreting the Declaration of Rights, the courts have had recourse to international law treaties and their interpretation in other jurisdictions.¹⁷

¹⁴ For example The Harare Commonwealth Declaration, signed 20 October 1991, by the Heads of Government of the member countries of the Commonwealth, which re-affirms member countries' commitment to the primacy of equal rights under law, and includes a specific pledge by member countries to concentrate, with renewed vigour, on establishing national systems based on the rule of law and the independence of the judiciary: see The Harare Declaration, 1991, located at <http://www.anc.org.za/ancdocs/commonwealth/Harare.html>. See also The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, located at: <http://www.comparlhq.org.uk/download/latmrhse.pdf>. (A Joint Colloquium held at Latimer House in the United Kingdom, from 15-19 June 1998, which adopted guidelines for judicial autonomy among member countries of the Commonwealth). Zimbabwe was under suspension from the councils of the Commonwealth from March 2002 until December 2003 when it withdrew from the organisation after the suspension was extended. Zimbabwe is a member of the United Nations, the African Union (the former Organisation of African Unity), the Southern African Development Community, and the Non Aligned Movement. It is also an African Caribbean Pacific (ACP) State of the European Union.

¹⁵ Section 111B (Effect of international conventions, etc.): "(1) Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organisations –

(a) shall be subject to approval by Parliament; and

(b) shall not form part of the law of Zimbabwe unless it has been incorporated in to the law by or under an Act of Parliament.

(2)...

(3) Except as otherwise provided by this Constitution or by or under an Act of Parliament, the provisions of subsection (1)(a) shall not apply to – (a) any convention, treaty or agreement, or class thereof, which Parliament has by resolution declared shall not require approval in terms of subsection (1)(a); or (b) any convention, treaty or agreement the subject-matter of which falls within the scope of the prerogative powers of the President referred to in section 31H(3) in the sphere of international relations; unless the application or operation of the convention, treaty or agreement requires- (i) the withdrawal or appropriation of moneys from the Consolidated Revenue Fund; or (ii) any modification of the law of Zimbabwe". [Section as substituted by Section 12(1) of Act 4 of 1993 (Amendment No.12). Section 12(2) of Act 4 of 1993 provides that the new section 111B shall not have the effect of requiring approval by Parliament of any convention, treaty or agreement which was acceded to, conclude or executed by or under the authority of the President before 1 November, 1993, and which, immediately before that date, did not require approval or ratification by Parliament.]

Section 31H of the Constitution deals with the executive functions of the President, including in subsection (4)(b) the power, subject to the provisions of the Constitution, to enter into international conventions, treaties and conventions. Section (1) vests executive authority in the President, and section (3) grants the President "such powers as are conferred upon him by this Constitution or by or under any Act of Parliament or other law or convention and, subject to any provision made by Parliament, shall, as Head of State, in addition have such prerogative powers as were exercisable before the appointed day." In entering into international conventions, treaties and conventions the President "shall act on the advice of the Cabinet, except in cases where he is required by this Constitution or any other law to act on the advice of any other person or authority" – section (5).

¹⁶ Under Roman-Dutch law (which can be regarded as the Southern African variant of the Common Law) and as in the Common Law tradition, rules of customary international law are part of the law of the land except insofar as they are inconsistent with the Constitution or some other statute. As has been made clear above, the same is not true of rules created by treaties: see, for instance, *Inter-science Research and Development Services (Pvt) Ltd v Republic Popular de Mozambique* 1980 (2) ZLR 111 (S), and *Barker McCormac v Government of Kenya* 1983 (2) ZLR 72 (S).

¹⁷ For example in *S v Ncube & Others* 1987 (2) ZLR 246 (S) the Supreme Court was called upon to interpret section 15 of the Constitution, a Declaration of Rights provision which outlaws torture, inhuman or degrading treatment. In reaching its decision the court had regard to Article 3 of the European Convention on Human Rights and Fundamental Freedoms (the European Convention) as interpreted by the European Court of Human Rights. What it

I.2. Practice of Torture: Context, Occurrence, Responses

A. The Practice of Torture

Before independence in 1980, torture was systematic and widespread particularly during the UDI period from 1965 onwards and especially during the 1970s when the guerrilla soldiers of Zanla and Zipra escalated their war against the white-minority RF regime. Captured and suspected guerrillas, as well as their suspected supporters especially in the rural areas where the war raged, were mercilessly treated in order to extract confessions and information as well as a deliberate tactic aimed at intimidation and deterrence. This occurred within the context of institutionalised racism where the guerrillas and their supporters were black and the security forces were white or white-controlled. Torture was but one of the many forms which gross human rights violations took during the independence struggle.¹⁸ Numerous commentators then and since,¹⁹ as well as human rights reports at the time, have catalogued the extreme cruelty meted out by the Smith security forces on civilians.²⁰

The time since independence in 1980 can be divided into four²¹ fairly distinct periods:

did in effect was incorporate into Zimbabwean law a norm of international law from European human rights jurisprudence, where a provision of the European Convention is almost identical to section 15. This interpretive approach to the incorporation of human rights norms into domestic law focuses on the norms and not any particular treaty or convention: see Pearson Nherere, *The limits of litigation in human rights enforcement*, Legal Forum (Harare) Vol 6, No 3, (Sept 1994), p. 27-36. In *S v A Juvenile* 1989 (2) ZLR 246 (S) Dumbutshena CJ held that Zimbabwean courts are free to import into the interpretation of Section 15 (1) of the Declaration of Rights interpretations of similar provisions in international and regional human rights instruments.

¹⁸ The injustices and suffering caused during the ninety years of colonial rule which began in 1889, and in particular during the last 15 years of colonialism (the UDI period), have been well documented, especially the abuses of the 1970s. The Catholic Commission for Justice and Peace (CCJP) in the country played an important role in this process of documentation, as one of the few independent human rights organisations active during the UDI-provoked armed liberation struggle. They were able to collect evidence of gross human rights abuses committed during this time, and were able to publicise these abuses abroad. CCJP facilitated the international publication of several reports, including *The Man in the Middle* (1975), *The Civil War in Rhodesia* (1976), and *Rhodesia, The Propaganda War* (1977). After independence, CCJP archival material was also used to document the history of the 1970s: see *Reaching for Justice* (1992), a history of CCJP, published by Mambo Press; also *Caught in the Crossfire*, a CCJP video detailing the plight of rural Zimbabweans during the liberation war, released the same year. Up to 60,000 people were killed during the war, all but a few thousand of whom were black. Thousands more were injured and maimed, and many still carry the physical and psychological scars of torture. See also *Racial Discrimination and Repression in Southern Rhodesia*, International Commission of Jurists, Geneva, 1976, pp. 62-65.

¹⁹ The Amani Trust in Zimbabwe, established in the country in 1993, has been at the forefront of documenting torture and other human rights violations both before and since independence. Amani has retrospectively examined the UDI period: see *Survivors of Torture and Organised Violence from the 1970s War of Liberation*, Amani, Harare (1998). See also *An Investigation into the Sequelae of Torture and Organised Violence in Zimbabwean War Veterans*, A.P. Reeler and M. Mupinda, Amani, published in Legal Forum (Harare) Vol 8, No. 4, (December 1996), at pp. 12 -26; *The Prevalence and Nature of Disorders due to Torture in Mashonaland Central province, Zimbabwe*, A.P. Reeler, P. Mbape, J. Matshona, J. Mhetura, and E. Hlatywayo, *Torture*, 11, (2001), pp. 4-9; *The Psychosocial Effects of Organised Violence and Torture: A Pilot Study Comparing survivors and their Neighbours in Zimbabwe*, A.P. Reeler and J. Mhetura, *Journal of Social Development in Africa*, 15, (2000), pp. 137-169.

²⁰ These included those a former Rhodesian soldier has listed: beatings, suspensions, electric shocks, suffocations in water and other methods of asphyxiation, mock executions and arbitrary killings; see *White Man, Black War*, Bruce Moore-King, (1986), Harare, Baobab Press.

²¹ In an interesting and important review by one of Zimbabwe's top practising advocates, Adrian de Bourbon SC, the post-independence period is examined from the perspective of litigating human rights. He divides the past 25 years into three periods: "...[T]he human rights position in Zimbabwe falls into three broad time groups. Firstly, there is the period between Independence and roughly mid-1985, covering in the main the period when Chief Justices Fieldsend and Georges presided over the Supreme Court. The second period, which to my mind was the golden era of human rights in Zimbabwe, covers the time from mid-1985 to mid-2001 when the Supreme Court was headed by Chief Justices Dumbutshena and Gubbay. The third period, which is still current, commenced in mid-2001 when the Supreme Court fell to be headed by Chief Justice Chidyausiku." See *Litigation – human rights in*

(i) 1980-1982

Compared to the years before independence, this was a period of relative peace when human rights abuses fell dramatically during the euphoria following the end of the bitter civil war.²² On coming to power with an absolute majority, Mugabe adopted a policy of reconciliation towards the whites and towards his black rivals, forming a Government of national unity with Nkomo's PF-Zapu party. The state of emergency which Smith had announced in 1965 before UDI, however, was retained and indeed was to continue right up to 1990,²³ along with almost all of the repressive security laws inherited from the previous regime.

(ii) 1982 – 1988 (Gukurahundi)

The uneasy coalition between Mugabe and Nkomo was short-lived, and for a variety of reasons broke down completely during 1982, leading to six years of civil war known as the *Gukurahundi*.²⁴ The two leaders had never trusted each other, and there was an ethnic element involved in that Zanu-PF was predominately a party of the Shona majority in the east, while the older PF-Zapu party drew most of its support from the Ndebele minority in the west. Agents of apartheid South Africa played a role in exacerbating existing rivalries, leading to serious security problems in various parts of the country, particularly in the western half. Bandits or "dissidents" began killing civilians and destroying property, and the government responded with a huge security clampdown on Matabeleland and parts of the Midlands. What followed were two overlapping conflicts. The first was the one between the dissidents and the Government security forces. The second was that directed by Government agencies against all those thought to support PF-Zapu. In this latter conflict the Government units committed many gross human rights violations.²⁵ Thousands of unarmed civilians died, were physically tortured (torture included rape and the phenomenon of mass beatings), or suffered loss of property,

Zimbabwe: Past, present and future, a paper presented to the Centre for Human Rights at the University of Pretoria on 19 March 2003, published by Zimbabwe Lawyers for Human Rights in *Zimbabwe Human Rights Bulletin Issue No 9*, Harare, October 2003, p. 113.

²² It was by no means entirely peaceful. There were a number of major clashes between Zanla and Zipra soldiers during their amalgamation with the former Rhodesian security forces into a new national army. Agents of apartheid South Africa also committed serious acts of sabotage including the destruction of a substantial percentage of Zimbabwe's Air Force aircraft at the Thornhill air base in Gweru in July 1982. This latter episode led to the detention, torture and trial of six local white air-force officers (including Air Vice Marshall Hugh Slatter, the Chief of Staff of the Zimbabwe Air Force) who had been members of the Rhodesian Air Force and who had remained after independence and sworn allegiance to the new state, but who were suspected of having been involved in the destruction. They were acquitted, the judge ruling that their confessions made under torture were inadmissible, but they were promptly re-detained and only released on condition that they immediately left their country. See *S v Slatter & Others* 1983 (2) ZLR 144 (H).

²³ The state of emergency had to be renewed by Parliament every six months, and was so renewed by Mugabe's Government for the next ten years until being finally lifted in July 1990. Thus for a quarter of a century, from 1965 to 1990, a state of emergency prevailed. This gave the power to legislate by regulation, rather than through Parliament. Regulations included the Emergency Powers (Maintenance of Law and Order) Regulations, which gave sweeping powers of arrest and detention without trial, the right to control meetings, and so on. During those twenty-five years, both the RF and Zanu-Pf Governments used emergency powers to authorise many infringements of human rights.

²⁴ The name means "the rain that washes away the chaff from the last harvest, before the spring rains", after the notorious North Korean-trained Five Brigade which led the Government's assault against unarmed civilians in those rural areas which traditionally supported PF-Zapu.

²⁵ In the conflict between the security forces and the dissidents there were few actual military engagements between the two sides. The Government saw the conflict with dissidents and the conflict with PF-Zapu as the same, and that to support PF-Zapu was tantamount to supporting dissidents, which was not the case. Rural civilians again bore the brunt of the violence as they did during the liberation struggle, as once more they were caught in the middle of a problem not of their making.

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most as a result of the actions of the Government forces and some at the hands of dissidents.²⁶

(iii) 1988-1998

This was the longest period of relative peace²⁷ since independence, following an end to the civil war brought about by the Unity Accord signed by Mugabe and Nkomo in December 1987, which saw PF-Zapu submerged into Zanu-PF. This, along with the beginning of the end of apartheid in South Africa in 1990 and the end of the cold war, led to the lifting of the 25 year old state of emergency in July 1990. Torture and ill-treatment continued to be widespread but was probably at its lowest level since before UDI, and was sometimes used by the police in their investigations of 'ordinary' crime, mainly to extract confessions and information, rather than for political purposes. There were also serious outbreaks of Zanu-PF organised political violence surrounding the 1990 and 1995 elections. However, despite political repression, the period saw university student protests, the emergence of a human rights oriented civil society, and the growing militancy of the Zimbabwe Congress of Trade Unions (ZCTU), as it severed its links to Zanu-PF. These strands joined together to campaign for constitutional reform to curb the powers of the Government, especially the sweeping powers of the executive presidency installed in 1987.²⁸ (This campaign for radical change to the *de facto* one-party State system was later to culminate in the launch of the Movement for Democratic Change (MDC).²⁹) The new democratic challenge to Zanu-PF was also reflected in the emergence of a vigorous free press, which began to play a crucial role in the whole process, giving as it did a platform for criticism, ideas and policies which previously had to be filtered through the State-controlled media.

(iv) 1998-2005

The current period of widespread and systematic human rights abuses, including torture on a scale not seen since the bitter days of the liberation struggle in the 1970s, commenced with the Government's response to spontaneous food riots in January 1998. The police were unable to contain the situation which went on for four days and the army was used to restore order. Several civilians were shot dead and hundreds were severely assaulted in their homes or held in custody and tortured.³⁰ In 1999 tension between the Government and the growing constitutional

²⁶ This whole period has been carefully documented in *Breaking the Silence, A Report on the Disturbances in Matabeleland and the Midlands 1980 to 1988*, CCJP and Legal Resources Foundation (LRF), Harare, 1997. See also *Zimbabwe: Wages of War - Report on Human Rights*, Lawyers Committee for Human Rights, New York, 1986; *Choosing the Path to Peace and Development: Coming to Terms with Human Rights Violations of the 1982-1987 Conflict in Matabeleland and Midlands Provinces*, Zimbabwe Human Rights Organisation, Harare, 1999; *Zimbabwe – A Break With the Past? Human Rights and Political Unity: An African Watch Report*, Richard Carver, October 1989; *Zimbabwe: Drawing a Line through the Past*, Amnesty International, Richard Carver, June 1992.

²⁷ There was still very little tolerance for public protests. Student demonstrations and trade-unionist strikes, although nominally legal, were regularly and viciously attacked by riot police. There was a particularly violent police attack on lawful protesters in Harare in December 1997.

²⁸ The Lancaster House Constitution has been amended sixteen times since independence. As part of the Unity Accord, Amendment No 7 (Act 23 of 1987) established the executive Presidency, and Prime Minister Mugabe became the first executive President. The former Presidential position was largely ceremonial. Mugabe has therefore been in power for an uninterrupted period of 25 years.

²⁹ The MDC was launched in September 1999.

³⁰ The events were documented by local human rights groups: see *A Consolidated Report on the Food Riots, 19 – 23 January 1998*, Report compiled by The Amani Trust on behalf of the Zimbabwe Human Rights NGO Forum; see also the earlier report, Zimbabwe Human Rights NGO Forum (10 March 1998), *Human Rights in Troubled Times: An Initial Report on Human Rights Abuses During and After Food Riots in January 1998*.

reform movement increased rapidly, and Zanu-PF tried to seize the initiative by appointing a Government Constitutional Commission³¹ leading to a Referendum in February 2000 on the draft Constitution produced by the Government Commission. The result was a historic defeat at the polls as the government's proposed Constitution, which had been designed to consolidate Mugabe's position, was rejected. Within days, the Government-organised invasions of white commercial farms began, to be soon followed by widespread and systematic physical attacks on MDC supporters, especially farm workers. This campaign of violence and intimidation was Zanu-PF's open strategy to avoid another defeat at the polls in the general Parliamentary election set for June 2000.

Despite being virtually outlawed in large parts of the country, and despite the widespread use of physical violence against its perceived supporters at the hands of Government-organised so-called war veterans,³² the MDC won nearly half the seats in Parliament. It immediately launched election petitions in the High Court challenging the results in 37 constituencies on the basis of Zanu-PF's violence before the general election. Faced with the prospect of losing the general election *ex post facto* if the courts upheld these election petitions, the Government increased attacks on the then still relatively independent judiciary. It also intensified the violence against MDC supporters and stepped-up the unlawful invasion and occupation of more farms, often accompanied by the ill-treatment and even killing of white owners and black workers. This deliberate strategy continued throughout 2001³³ in preparation for the Presidential election set for March 2002. The result was an ever-increasing level of state-sponsored violence, and torture became endemic. The period saw the fraudulent re-election of Mugabe, the destruction of the rule of law and the independence of the judiciary, and economic collapse.³⁴

During 2003 human rights violations on a widespread and systematic scale continued unabated, peaking during local, mayoral and parliamentary by-

³¹ On 28 April 1999, Mugabe set up a Commission of Inquiry under the Commission of Inquiry Act (Chapter 10:07) in terms of Proclamation No. 6 of 1999 (SI 138A/99), to review the Lancaster House Constitution. Mugabe appointed all the members of the Commission, the vast majority of whom were Zanu-PF supporters, including the Commission's head, Godfrey Chidyausiku, Judge President of the High Court. Within two years, after the Government had forced Chief Justice Gubbay into early retirement, Chidyausiku became Chief Justice.

³² A great deal of work has been done by The Amani Trust, and by the Zimbabwe Human Rights NGO Forum of which Amani is a key member, to document the gross human rights violations in the current period. Some of the Amani reports covering the years 1999-2001 published in 2002 in Harare are: *Organised Violence and Torture in the June 2000 General Elections; Neither Free nor Fair: High Court Decisions on the Petitions on the June 2000 General Election; Organised Violence and Torture in the Bye-Elections held in Zimbabwe during 2000 and 2001*. Some of the Zimbabwe Human Rights NGO Forum reports covering 1999-2001, all published in Harare, are: *Organised Violence and Torture in Zimbabwe in 1999*, (1999); *Organised Violence and Torture in Zimbabwe in 2000*, (2000); *Organised Violence and Torture in Zimbabwe in 2001*, (2001); *Who is Responsible? A Preliminary Analysis of Pre-Election Violence in Zimbabwe*, (2000); *Human Rights and Zimbabwe's June 2000 Election*, (2001); *Who was Responsible? A Consolidated Analysis of Pre-Election Violence in Zimbabwe*, (2001).

³³ See: *Politically Motivated Violence in Zimbabwe 2000-2001: A Report on the Campaign of Political Repression conducted by the Zimbabwean Government under the Guise of carrying out Land Reform*, Zimbabwe Human Rights NGO Forum, Harare, 2001; *A Report on Post-Election Violence*, Zimbabwe Human Rights NGO Forum, Harare, 2000; *Evaluating the Abuja Agreement*, Zimbabwe Human Rights NGO Forum, Harare, 2001.

³⁴ See the following Amani reports published in Harare in 2002: *The Presidential Election and the Post-Election Period in Zimbabwe; Preliminary Report on Internally Displaced Persons from Commercial Farms in Zimbabwe; Beating your Opposition: Torture During the 2002 Presidential Election in Zimbabwe*. See also the following Zimbabwe Human Rights NGO Forum reports published in Harare in 2002: *Human Rights and Zimbabwe's Presidential Election: March 2002; Teaching Them a Lesson: A Report on the Attack on Zimbabwean Teachers; Are They Accountable? Examining Alleged Violators and their Violations Pre and Post the Presidential Election March 2002*. The destruction of the independence of the judiciary and the rule of law during the period since 1999 is comprehensively analysed in *Justice in Zimbabwe*, Legal Resources Foundation, Harare, 2002. See also the earlier report of the Research Unit of the Zimbabwe Human Rights NGO Forum, *Enforcing The Rule of Law in Zimbabwe*, Special Reports 3, (Harare), September 2001.

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elections.³⁵ In 2004 there was no significant improvement in the observation of human rights, although there was a drop in reports of torture and organised violence in the few months immediately preceding the March 2005 general parliamentary election.³⁶ During the period July 2001 to November 2004 inclusive one human rights coalition reported 2,742 allegations of torture, comprising the single largest category of gross human rights violations (24%) of all types of violation reported to it.³⁷ The decline in reported torture just before March 2005 reflected a change in tactics on the part of the Government.³⁸

Torture takes many forms and is perpetrated by the police, army, Government militias, the Central Intelligence Organisation (CIO), Government-organised war veterans and party members. Beatings, rape and electric shocks are some of the methods used. One major problem within the current situation is that increasingly 'irregulars' commit the abuses. They may be in civilian clothes and their identity may be unknown, or they may be youth militia brought into a specific area from outside so that they will not be easily recognised, or they may be dressed up in police or military uniforms to further hide their identities.³⁹

B. Domestic Responses

During UDI, virtually anything done in defence of the Smith regime was lawful.⁴⁰ At independence in 1980, no attempt was made to deal with the gross human rights violations which had taken place during the liberation struggle. It was part of the Lancaster House settlement that there would be an all-round and total amnesty: nobody would be held accountable for anything done in the past, including atrocities, torture and other human rights crimes, whether committed by those who

³⁵ See Zimbabwe: Tortuous Patterns Destined to Repeat Themselves in Upcoming Election Campaign – Preliminary Study of Trends and Associations in the Pattern of Torture and Organised Violence in Zimbabwe, July 2001-December 2003, REDRESS, November 2004 - <http://www.redress.org/publications/ZimbabweNov2004.PDF> This report was based on the data contained in the Monthly Violence Reports of the Zimbabwe Human Rights NGO Forum which has been reporting monthly totals of cases of organised violence and torture since July 2001.

³⁶ See *Zimbabwe: The Face of Torture and Organised Violence – Torture and Organised Violence in the Run-up to the 31 March 2005 General Parliamentary Election*, REDRESS, March 2005 - <http://www.redress.org/publications/ZimbabweReportMar2005.PDF>.

³⁷ Ibid, p.7. The total number of reported gross human rights violations for the same period was 11,456. Another report put the figure of human rights violations since 2001 as high as 300,000: see *Solidarity Peace Trust (2004), "NO WAR IN ZIMBABWE". An account of the exodus of a nation's people, November 2004, HARARE & SOUTH AFRICA: SOLIDARITY PEACE TRUST.*

³⁸ There have been a large number of national and international reports and statements highly critical of the run-up to the elections, and the election itself. Those international observers who were allowed into the country were to a large extent 'hand-picked.' See the following national reports: Zimbabwe Lawyers for Human Rights: *Report on March 2005 Parliamentary Elections (Zimbabwe)*, April 2005; National Constitutional Assembly (NCA): *The 2005 Parliamentary Elections. Flawed, Unfree and Unfair!* April 2005; Idasa Press Statement, 3 April 2005; Media Monitoring Project Zimbabwe 30 March 2005: *Statement on the Media Environment in Zimbabwe Prior to the March 2005 Elections*; Zimbabwe Election Support Network (ZESN): *"Statistical pattern analysis and hypothesis testing of the 2005 parliamentary election in Zimbabwe"*, 22 April 2005. Some international reports before the election include Amnesty International: *Zimbabwe: An assessment of human rights violations in the run up to the March 2005 parliamentary elections*, 15 March, 2005; Human Rights Watch: *Not a Level Playing Field: Zimbabwe's Parliamentary Elections in 2005*, March 21, 2005; International Bar Association Human Rights Institute, *Free and Fair?* 25 March 2005.

³⁹ Although the numbers killed have been small compared to the past, in many ways the population is suffering more than at any time previously, as the endemic torture and other forms of State-sponsored violence are being perpetrated in the context of economic collapse, mass hunger, and the HIV-Aids pandemic. There are no official figures of those killed in political violence, but human rights groups estimate that over the past seven years over a thousand have died. The actual figure could be much higher as parts of the rural areas are now inaccessible to NGOs and indeed to anyone who is not overtly pro-Zanu-PF.

⁴⁰ Under the Indemnity and Compensation Act 45 of 1975, which was retroactive to 1972: see below III. 1.1.

had fought to maintain white-minority rule or by those who had fought to attain black-majority rule.⁴¹ After winning the election, Mugabe explicitly stated that his Government would pursue a policy of reconciliation and nation-building. One result was that a considerable number of people directly or indirectly responsible for gross human rights abuses on the RF side not only remained in the country but also continued in or were given positions of authority, and were soon to commit similar crimes again.⁴² Nobody who had been involved in often brutal incidents within the liberation movements was called to account either, and such people were also given places in the State machinery. Nothing was done to investigate and document what happened during this period by holding public hearings and encouraging victims to relate their experiences.⁴³

The 1980 Lancaster House Constitution contains a comprehensive list of human rights. However, there were serious restrictions from the start: for the first five years of independence no pre-existing law in conflict with the Declaration of Rights could be struck down,⁴⁴ most of the repressive security laws were retained,⁴⁵ and the state of emergency continued uninterrupted. There was little public revelation and protest against the torture and other gross human rights abuses of *Gukurahundi*.⁴⁶ With the signing of the 1987 Unity Accord, the pattern set at independence was repeated: amnesties for the dissidents⁴⁷ and the security forces⁴⁸ meant nobody was held accountable.

During the more 'tolerant' (approximately ten year) period which followed, sporadic attempts were made to begin building less violent state authorities. As a *de facto*

⁴¹ Both white and black personnel in the Rhodesian forces had committed most atrocities, but the liberation movements themselves were by no means blameless, as they too had abused the civilian population. There had also been periodic fierce fighting between Zanla and Zipra forces in training camps and in the field, as well as bitter and violent internal disputes within the military organisations and within their parent political bodies.

⁴² See *Breaking the Silence* (supra) at p. 26: "The very men who had been responsible for inhuman and degrading torture in the 1970s used exactly the same methods to torture civilians in the 1980s."

⁴³ Two amnesties were granted by the British Government acting through the Governor, Lord Soames, who had resumed *de jure* control of the territory. He issued Ordinance 3/1979 (date of commencement 21 December 1979) and Ordinance 12/1980 (date of commencement 21 March 1980). These became the Amnesty Act [*Chapter 9:02*] and the Amnesty (General Pardon) Act [*Chapter 9:03*] respectively.

⁴⁴ Section 26 (2)(b) as read with Section 26 (3)(b) of the Lancaster House Constitution. These were later removed when no longer relevant.

⁴⁵ In particular the draconian Law and Order (Maintenance) Act [*Chapter 11: 07*]. This was the central legislative weapon used by the white-minority to repress African nationalism. Its promulgation in 1960 pre-dated UDI by five years, and it was frequently amended to give wider and wider powers to the government and to narrow access to the courts. During the 1960 Parliamentary debate on the Bill a government member made the following contribution: "I have often wondered whether there has not been a particular angle of thought in regard to the question of human rights, the result of which has been to extend to people a right which is not really theirs. I believe we cannot apply to those who are backward and have cannibalistic tendencies the principles that are enjoyed by those who have reached a particularly high stage of development": see *The Law and Order (Maintenance) Act-An Anthology of Horrors?* J. R. Devittie, Bulletin of the Public Prosecutors' Association of Zimbabwe, (Harare), Vol 1, No. 2, March 1987, p. 3 (Editorial). As a judge later said who resigned in protest when the Bill became law: "It almost appeared as though someone had sat down with the Declaration of Human Rights and deliberately scrubbed out each in turn." (Sir Robert Tredgold, the then Chief Justice) - Ibid. at p. 4. The Act was eventually repealed in 2002, only to be replaced by the almost equally repressive Public Order and Security Act [*Chapter 11:17*]. This Act is commonly referred to as POSA. For a comprehensive analysis of POSA see Derek Matyszak *Democratic Space and State Security: Zimbabwe's Public order and Security Act*, Zimbabwe Lawyers for Human Rights, Zimbabwe Human Rights Bulletin Issue No 11, Harare, September 2004, p. 80.

⁴⁶ Some local church groups, such as the Catholic Commission for Justice and Peace, protested strongly and acted vigorously to try to stop what was happening, as did a number of international NGOs such as Amnesty International. Zimbabwe lawyers were largely silent, including the Law Society of Zimbabwe, which did not issue a single statement condemning the widespread and gross human rights violations taking place in the country.

⁴⁷ General Notice 257A of 1988.

⁴⁸ General Notice 424A of 1990.

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one party State, the Government felt relatively secure and stated that it supported human rights. It even began human rights training for police and prison officers and involved a number of NGOs in this training.⁴⁹ The role of civil society, as it strove to develop a culture of human rights, was tolerated and occasionally supported by some Government leaders.⁵⁰ The judiciary maintained its independence and spoke out against torture,⁵¹ and in a number of landmark judgments the Supreme Court showed that it was prepared to enforce the Declaration of Rights to protect individuals against state abuse.⁵² However, the State regularly resorted to amending the Constitution to reverse the gains which had been achieved through the courts.⁵³ After both the 1990 and 1995 elections, amnesties were once more proclaimed for pre-election and post-election violence, resulting in those who attacked opposition supporters again going unpunished.⁵⁴ Although detention without trial had ended in 1990 when the state of emergency finally fell away, the draconian Law and Order (Maintenance) Act continued on the statute books into and throughout the second decade of independence.

The State has not set up any independent body having strong powers to protect human rights. The Constitution in Section 107 provides for the office of the Ombudsman who is appointed by the President in consultation with the Judicial Services Commission. Section 108 sets out the functions of the Ombudsman which

⁴⁹ The Legal Resources Foundation (LRF) in particular tried working with the police and prison authorities to inculcate a sense of the importance of basic human rights, producing training materials and holding workshops and seminars.

⁵⁰ "In order to effectively safeguard peoples' rights, the Government needs to work closely with civil society especially non-governmental organisations" - Minister of Home Affairs Dumiso Dabengwa, speaking in Harare at a workshop on 'The Media and Human Rights' in April 1994: Legal Forum, (Harare), Vol 6, No 2, (June 1994), at p. 4. Such comments were more lip-service than anything else, however, as the Government routinely showed its contempt for basic human rights, especially that of peaceful public protest and the right to form opposition political parties.

⁵¹ In one case a female apartheid spy had been stripped naked and sexually abused during interrogation. The state did not challenge the evidence of torture, and on appeal the Supreme Court took the torture into account in mitigation of sentence, reducing the period of imprisonment which the trial judge had imposed from 25 to 12 years: see *S v Harrington* 1988 (2) ZLR 344 (S). 1990 (2) ZLR

⁵² For example, *S v Ncube & Ors* 1987 (2) ZLR 246 (S) in which it ruled that the whipping of adults was unconstitutional; *S v A Juvenile* 1989 (2) ZLR 61 (S) in which it ruled that corporal punishment of juveniles was unconstitutional; *S v Masitere* 1990 (2) ZLR 289 (SC), 1991 (1) SA 821 (ZS) in which it ruled that solitary confinement and reduced diet as a punishment imposed by the courts, is no longer permissible; *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Another* 1991 (1) ZLR 105 (SC), 1992 (2) SA 56 (ZS) in which it ruled that the deprivation of exercise to a prisoner constituted inhuman and degrading punishment; *Catholic Commission for Justice and Peace (CCJP) v Attorney General & Ors* 1993 (1) ZLR 242 (S) in which it ruled that keeping prisoners on death row for years on end was unconstitutional. In all these cases the Supreme Court found that the practice constituted inhuman or degrading punishment or treatment and therefore contravened Section 15 (1) of the Declaration of Rights in the Constitution. However, see the next footnote.

⁵³ To reverse the ruling in *S v A Juvenile* (supra) the Government amended the Constitution by Act 30 of 1990 (Amendment No. 11) to the effect that corporal punishment of juveniles did not contravene the Declaration of Rights; similarly the ruling in *CCJP v Attorney General & Ors* (supra) was reversed by Act 9 of 1993 (Amendment No. 13) whereby the Declaration of Rights was amended to the effect that the delay in carrying out the death sentence was not *per se* unconstitutional. There have been numerous other Supreme Court rulings over the years which gave a broad interpretation to fundamental provisions in the Constitution, thereby increasing the basic rights of citizens, only to have these gains quickly disappear when the Government amended the Declaration of Rights to re-instate what had been ruled unconstitutional. Until the June 2000 general Parliamentary election the country was a *de facto* one-party State making it easy for the Government to amend the Constitution, including the Declaration of Rights, as this can be done with a 2/3 majority in terms of Section 52 (2a) of the Constitution. However, after the MDC almost won the election in 2000 the Government was unable to amend the Declaration of Rights as it could no longer garner the required level of votes in Parliament. Following the disputed March 2005 election it once again has a 2/3 majority, and significant Constitutional changes to retain Mugabe's grip on power are now expected.

⁵⁴ General Notice 424A of 1990; Clemency Order No.1 of 1995. Almost all the violence was directly or indirectly attributable to Zanu-PF.

are to investigate actions of government officials 'where it is alleged that a person has suffered injustice in consequence of that action and it does not appear that there is any remedy reasonably available by way of proceedings in a court or on appeal from a court.' The Ombudsman Act [*Chapter 10:18*] was promulgated in 1982 and the office established, but the Ombudsman was specifically precluded from making any investigations relating to the police, army and prison services.⁵⁵ As a result, the Ombudsman could have no impact on human rights abuses. In 1996, the Constitution was amended in order for the Act itself to be widened, and in 1997 the Act was amended by the insertion of a new provision which gives the President the power to make Regulations providing for all the powers of the Ombudsman to be exercised over the Defence Forces, the Police Force and the Prison Service.⁵⁶ However, the President has made no such Regulations and thus the Ombudsman's office continues to be precluded from investigating allegations of human rights abuses by any of these forces. Even if the President was to pass such Regulations, the Act also provides that the Ombudsman may not investigate such allegations if the Minister of Justice, Legal and Parliamentary Affairs has given written notice that the investigation would not be in the interests of public security or foreign relations of Zimbabwe.⁵⁷

Since 1998, the State no longer even attempts to seriously deny the systematic use it makes of torture, which is now an integral part of its weaponry to repress dissent. Following the widespread abuses leading up to the June 2000 Parliamentary election, another amnesty was declared in October of that year.⁵⁸ The current position, therefore, is that the State is taking no steps to prevent or reduce torture, or to bring perpetrators to justice. For a variety of reasons, any right to reparation for victims which exists under Zimbabwe law is extremely difficult to pursue, and is becoming practically impossible in all but a small minority of cases.

C. International Responses

During the fifteen years of UDI, the exposure and condemnation of the widespread and institutionalised practice of torture under the RF Government became part of the international campaign to put an end to the illegal minority regime. Torture took place and was correctly seen in the context of the almost complete denial of *all* basic human rights for the majority. Like the other wars for black rule in Angola, Mozambique, Namibia and South Africa, events in Rhodesia took place in the context of the larger cold war in which Southern Africa was of considerable strategic value. The United Nations became an important arena of struggle: international economic sanctions and an arms embargo were imposed and no country recognised the rebel UDI 'state'.⁵⁹ However, Portugal and apartheid South Africa openly defied the UN and directly supported the Smith Government until 1974 and 1978 respectively, and the major western powers, including the colonial power Britain,

⁵⁵ Section 8.

⁵⁶ Section 108 of the Constitution was amended by Section 13 of Act 14 of 1996 [Amendment 14], and was followed by the Ombudsman Amendment Act, 1997, [No. 4 of 1997].

⁵⁷ Besides the inherent weakness in the legislation and the lack of political will on the part of Zanu-PF to protect human rights, the office of the Ombudsman has long been in disarray and is years behind in making the required annual report of its activities to Parliament. It was foreseen that the amendments would be purely cosmetic, and indeed irrelevant: see *The Ombudsman's new powers to deal with human rights abuses: How effective will these powers be?* Geoff Feltoe, Legal Forum, (Harare), Vol. 9, No. 1, (March 1997), p.37-38.

⁵⁸ Clemency Order No.1 of 2000, published on 6 October 2000 (General Notice 457A of 2000).

⁵⁹ For a summary of the General Assembly and Security Council Resolutions see, *Racial Discrimination and Repression in Southern Rhodesia*, International Commission of Jurists, Geneva, 1976, pp.8 -9.

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whose primary objective was to halt the spread of communism, were at best half-hearted in their efforts to force the minority to hand over power to the majority. In the result, the international community took no practical steps to deal with torture *per se* in Rhodesia, and all the parties at the 1979 Lancaster House negotiations finally agreed that none of the perpetrators would be brought to account for any of the 'politically motivated' crimes which they had committed prior to independence.

The lack of any significant international response to the torture and other violations which took place during *Gukurahundi* is less easy to understand. Although the true scale of the abuses may not have been brought fully to the attention of the outside world at the time, there was sufficient publicity.⁶⁰ Despite this, no significant condemnation of the Mugabe Government was forthcoming from the former colonial power, other western countries, the United Nations, or Africa, and few if any steps were taken to pressurise the Zimbabwe Government to halt the abuses or to bring the perpetrators to book.⁶¹

With the collapse of communism and the end of the cold war, along with the achievement of majority rule in South Africa, the present torture and other gross human rights abuses in Zimbabwe are not being regarded with the previous degree of indifference.⁶² The United States, the European Union, Norway, and the 'old' Commonwealth countries (Canada, Australia and New Zealand) have become more and more outspoken,⁶³ as have some organs of the United Nations.⁶⁴ The UN has,

⁶⁰ New York-based Lawyers Committee For Human Rights, and London-based Amnesty International (AI), both released documentary evidence at the time on the scale of the atrocities. On 25 October 1985 AI sent a telex to Mugabe urging him to stop the torture, and called for an independent inquiry into torture, with the results to be made public. On 13 November 1985 it released a report on "Torture in Zimbabwe". Mugabe (for whose release AI had campaigned in the 1970s when the UDI regime had detained and tortured him) responded by dismissing the report as the work of "Amnesty Lies International": see *Breaking the Silence* (supra) at p. 66. PF-Zapu leaders who had fled into exile, including Joshua Nkomo, also told the outside world what was happening, as did some sectors of the Western media.

⁶¹ The probable explanation for the lack of international concern is that the outside world wished to regard the country as an example of a successful transition from white to black rule in contrast to apartheid South Africa. In this context it was easier to turn a blind eye to the horrors of the *Gukurahundi*. Long after the events, the 52nd session of the UN Commission on Human Rights (Report of the Working Group on Enforced or Involuntary Disappearances: 15th January 1996) received an official response from the Zimbabwe Government that it had "decided to compensate all families with missing relatives, regardless of whether there were court proceedings concerning the circumstances of the disappearance(s)": see *Breaking the Silence* (supra) at p. 190, and the Commission's Report as Appendix C i (UN doc. E/CN.4/1996/38 15 January 1996). The Zimbabwean Government has certainly not carried out its stated decision in this regard. See also below V. Government Reparation Measures.

⁶² In addition to the detailed reports which were compiled by Zimbabwean human rights groups, a number of reputable international NGOs have produced their own documented accounts of present gross human rights violations in Zimbabwe: see *Zimbabwe: Terror Tactics in the run-up to the Parliamentary Elections, June 2000*, Amnesty International, London, 2000; *Zimbabwe: The Toll of Impunity*, Amnesty International, London, 2002; *Fast Track Land Reform in Zimbabwe*, Human Rights Watch, New York, 2002; *Organised Violence and Torture in Zimbabwe, 6th June 2000*, International Rehabilitation Council for Torture Victims (IRCT), Copenhagen, 2000 [with Amani in Harare]; *Organised Election Violence in Zimbabwe 2001*, IRCT, Copenhagen, 2001; *Organised Violence and Torture in Zimbabwe, 24th May 2001*, IRCT, Copenhagen, 2001 [with Amani in Harare]; *Zimbabwe 2002: The Presidential Election: 44 Days to go*, Physicians for Human Rights, Denmark, 2002; *Zimbabwe: Post Presidential Election: March-May 2002: "We'll make them run"*, Physicians for Human Rights, Denmark, 2002; *Zimbabwe: Voting ZANU for Food: Rural District Council and Insiza Elections*, Physicians for Human Rights, Denmark, 2002. For an analysis of the collapse of the rule of law see also *Report of the Zimbabwe Mission 2001*, International Bar Association, London, April 2001.

⁶³ For example, many foreign observers witnessed and condemned in their reports the Zanu-PF violence leading up to the June 2000 general Parliamentary elections, including the official Commonwealth and EU observer missions: see *The Parliamentary Elections in Zimbabwe 24-25 June 2000*, The Report of the Commonwealth Observer Group, 2000; *Report of the EU Election Observation Mission on the Parliamentary Elections which took place in Zimbabwe on 24th and 25th June 2000*, European Union Election Observation Mission, 4th July 2000, Harare- Strasbourg. This was repeated at the March 2002 Presidential elections, and although the EU observer mission was forced to leave prior to polling day, Commonwealth observers again condemned the government and concluded that the Presidential election had not been free and fair: see *Zimbabwe Presidential Election 9 to 11 March 2002*, Report of the Commonwealth Observer Group, 2002. It was as a result of the fraudulent Presidential election that Zimbabwe

however, been criticised for failing to properly investigate a Zimbabwean police officer allegedly involved in torture in Zimbabwe who was member of the UN civil police presence in Kosovo.⁶⁵ Certain limited but specific political steps have been taken to pressurise the Mugabe regime to stop flouting basic international human rights norms.⁶⁶

For a considerable time African countries showed little inclination to challenge the Mugabe Government, but a critical Report of the African Commission after its fact-finding mission to Zimbabwe in June 2002 was finally adopted by the African Union in January 2005.⁶⁷ This was a significant development which outraged the Zimbabwe regime, but foreseeing that the Report could no longer be blocked the Government used somewhat different tactics to those it had adopted in the run up to the 2000 and 2002 elections, and there was a reduction in state-sponsored violence prior to the March 2005 elections. Nevertheless, the major African power in the region, South Africa, continues to support Mugabe, as it has since 2000 when the current crisis began to escalate. South African President Thabo Mbeki has repeatedly assured the international community that South Africa's policy of 'quiet diplomacy' would help to halt Zimbabwe's slide into disaster. More than five years later, there is no sign that his support for Zanu-PF has brought Zimbabwe any closer to resolving any of its manifold economic, social, political and human rights problems. On the contrary, things continue to deteriorate and, following the South African Government's acceptance of the election process and outcome, in April 2005 the MDC reportedly stated that it was cutting off contact with the South Africa Government.⁶⁸

was suspended from the Commonwealth, and restrictions placed on Zanu-PF leaders travelling to the EU and the USA.

⁶⁴ For example, the Special Rapporteur on the Independence of Judges and Lawyers of the UN Commission on Human Rights has in recent years repeatedly called upon the Zanu-PF Government to desist from its attacks on the judiciary and the legal profession.

⁶⁵ See: *The case of Henry Dowa – The United Nations and Zimbabwe Under the Spotlight*, REDRESS, January 2004. This policeman, alleged to have committed torture in Zimbabwe before being sent to Kosovo, has been implicated in further allegations of torture in Zimbabwe after the UN sent him back. The latest incident was reported in the Zimbabwe Daily Mirror on 11 April 2005, linking him to allegations of torturing MDC MP Nelson Chamisa in police custody shortly after the March 2005 elections.

⁶⁶ In addition to EU and USA travel restrictions on Zanu-PF leaders, both the EU (in 2002) and the USA (in 2003) have applied "smart sanctions" against Mugabe and his key government personnel, including freezing their assets and banning any business with them. These restrictions and sanctions have been renewed annually and are still in force. For an example of a devastating summary of the current economic, social, political and legal crisis in Zimbabwe, with emphasis on massive food shortages, see *Zimbabwe on the Brink*, released on 18 February 2003. Launched at a press conference in London, it was compiled by Glenys Kinnock, (a Labour Member of the European Parliament), Derek Wyatt (a Labour Member of the House of Commons) and Lord Hughes of Woodside (a Labour Member of the House of Lords).

⁶⁷ For the full text of the *Executive Summary of the Report of the Fact-finding Mission to Zimbabwe 24th to 28th June 2002 Zimbabwe*, see Appendix I. Amongst other things, the Report stated: "Especially alarming was...the arrest and torture of opposition members of parliament and human rights lawyers like Gabriel Shumba". It also said: "By its statements and political rhetoric, and by its failure at critical moments to uphold the rule of law, the government failed to chart a path that signalled a commitment to the rule of law."

⁶⁸ Reuters South Africa reported as follows on 20 April 2005: *Asked to comment on South African media reports that the MDC had cut ties with Mbeki's government, [MDC spokesperson] Nyathi said: "We have simply said we see no purpose whatsoever in participating in a charade."*
http://www.reuters.co.za/locales/c_newsArticle.jsp;:426657ed:6d4f93e1d58d1be?type=topNews&localeKey=en_ZA&storyID=8238198

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

The Constitution provides a right to protection against torture: "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."⁶⁹ The right is non-derogable.

There is no specific crime of torture in Zimbabwean law, nor has torture been defined in Zimbabwean law, although Section 15(1) of the Constitution has been the subject of several leading Supreme Court judgments⁷⁰ where the meaning of inhuman or degrading punishment or other such treatment has been defined in its jurisprudence. In these cases close attention has been paid to norms of human rights law as expressed in international treaties and in decisions of other jurisdictions.

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS

III.1. Substantive Law: Criminal Offences and Punishment

There is no specific offence of torture in Zimbabwean law. Several common law offences may however be applied to prosecute and punish torture. Such offences are assault,⁷¹ assault with intent to do grievous bodily harm,⁷² rape,⁷³ administering poison or other noxious substance,⁷⁴ murder⁷⁵ and attempted murder.

The applicable sentences are largely at the discretion of the sentencing judge or magistrate.⁷⁶ Murder carries a mandatory death sentence unless extenuating circumstances are found,⁷⁷ in which case a period of up to life imprisonment may be imposed. Recent legislation has laid down a minimum sentence for rape in certain

⁶⁹ Section 15(1) of the Constitution.

⁷⁰ *S v Ncube & Ors* 1987 (2) ZLR 246 (S); 1988 (2) SA 702 (ZS); *S v A Juvenile* 1989 (2) ZLR 344 (S); 1990 (4) SA 151 (ZS); *CCJP V Attorney-General* 1993 (1) ZLR 242 (S); 1993 (4) SA 239 (ZS); 1993 (2) SACR 432 (ZS).

⁷¹ Assault consists in unlawfully and intentionally applying force to the person of another or inspiring a belief in that other that force is immediately to be applied to him; see P.M.A. Hunt and J.R.L. Milton: *South African Criminal Law and Procedure*, Vol. II, *Common-Law Crimes*, 2nd .Ed., Juta & Co., 1982, at pp.462 et seq. Although there are some relatively minor differences between modern non-statutory criminal law in Zimbabwe and South Africa, reputable legal writers and judicial decisions from South Africa are frequently referred to in Zimbabwe courts, and have considerable persuasive authority.

⁷² It has been said that there must be "the intent to do grievous bodily harm. It is not necessary that such harm has actually been done or that it should be either permanent or dangerous. If it be such as seriously to interfere with comfort or health it is sufficient."- *R v Matzukis* 1940 SR 76. This Zimbabwe case was quoted with approval in the South African case of *S v Madikane* 1990 (1) SACR 377 (N) at 385-386 where the court held that the application of electric shocks constituted assault with intent to do grievous bodily harm.

⁷³ Rape consists in intentional unlawful sexual intercourse with a woman without her consent: Hunt and Milton loc. cit. at pp.435 et seq. A lesser charge is one of indecent assault which consists in an assault which is itself of an indecent character: *ibid.* at pp. 494 et seq.

⁷⁴ This consists in unlawfully and intentionally administering to another person a poisonous or otherwise noxious substance: *ibid.* at pp. 502 et seq.

⁷⁵ Murder consists in the unlawful and intentional killing of another person: *ibid* at pp. 340 et seq. Culpable homicide consists in the unlawful negligent killing of another person: *ibid.* at pp.401 et seq.

⁷⁶ Magistrates have no jurisdiction to try murder cases, but do have jurisdiction over the other common law crimes listed, including attempted murder and culpable homicide.

⁷⁷ Section 337 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The only other offence for which the death penalty may be imposed is treason.

circumstances.⁷⁸ Depending on the nature of the offence, a first offender convicted of assault will usually receive a fine and/or a suspended prison sentence, while assault with intent to commit grievous bodily harm will often lead to imprisonment. Attempted murder invariably results in imprisonment.

Disciplinary proceedings against the police are governed by the Police Act [Chapter 11:10] which sets out the mechanisms for inquiries into breaches of the Act and Police Regulations.⁷⁹ Alleged crimes committed against civilians are also subject to the normal judicial process.

III.2. The Criminal Procedural Law

A. Immunities

Immunities, indemnities, amnesties, clemencies and pardons lie at the heart of Zimbabwe's failure to deal with gross human rights abuses committed by public officials, and have done so for decades.⁸⁰ During the pre-Independence period the key piece of legislation used by the white minority regime to countenance torture was the Indemnity and Compensation Act 45 of 1975, which was retroactive to 1 December 1972. It gave a blank cheque to human rights violators in the army, the police, the CIO and indeed to all and every person connected "with the suppression of terrorism."⁸¹ Given that "terrorism"⁸² was very widely defined, and in the absence of any constitutional protection in the form of a justiciable bill of rights, nobody responsible for torture could be prosecuted.⁸³

After Independence, four periods can be analysed as follows:

(i) 1980 -1982

The terms of the Lancaster House settlement put to rest any possibility that the end of the illegal UDI regime and the attainment of independence under majority rule

⁷⁸ Section 16 of the Sexual Offences Act [Chapter 9:21].

⁷⁹ It is an offence under the Police Act [Chapter 11:10] to use "unnecessary violence towards, or neglecting or in any way ill-treating any person in custody or other person with whom he may be brought into contact in the execution of his duties": Schedule of Offences No. 21.

⁸⁰ These terms are sometimes used interchangeably although not always correctly, but the factual position is beyond dispute: for years very many perpetrators of crimes relating to torture (in fact the vast majority of them) have either never been prosecuted at all or have escaped punishment altogether after having being sentenced, hence the often used description of Zimbabwe being a country with "a culture of impunity."

⁸¹ Section 4(1) of the Act provided that: "No civil or criminal proceedings shall be instituted or continued in any court of law against (a) the President or any Minister or Deputy Minister in respect of any act, matter or thing whatsoever advised, commanded, ordered, directed, or done or omitted to be done by him or by a person referred to in paragraph (b) in good faith for the purposes of or in connection with the suppression of terrorism; (b) any person who, at the relevant time, was (i) a member of the Security Forces or employed in any capacity or appointed to any person by the State, whether for remuneration or otherwise; or (ii) acting under or by the direction or with the approval of the President, any Minister or Deputy Minister or any person referred to in subparagraph (i); in respect of any act, matter or thing whatsoever advised, commanded, ordered, directed or done or omitted to be done by him in good faith for the purposes of or in connection with the suppression of terrorism." Prior to this Act, and despite the plethora of other statutes which had long been used to curtail basic human rights, members of the security forces had sometimes been successfully sued for human rights abuses.

⁸² See Sections 51 and 52 of the Law and Order (Maintenance) Act [Chapter 11: 07] .

⁸³ As can be seen from footnote 81 above, section (4)(1) of the Indemnity and Compensation Act 45 of 1975 also indemnified perpetrators from civil proceedings. In the result the security forces and other state agencies could and did kill, torture and maim at will: having been indemnified *in advance*, knowing they were immune from criminal and civil proceedings, they acted with impunity and took advantage of their legal inviolability, committing heinous crimes without being legally accountable.

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would see the gross human rights violators of the past brought to trial in Zimbabwe.⁸⁴ Immediately upon its signature by the British Government and by all the warring parties, amnesty was granted to everyone for everything which had been done with a political motive.⁸⁵ To avoid any doubt this was followed three months later with a general pardon in the form of another amnesty.⁸⁶ The Indemnity and Compensation Act of 1975 was repealed shortly after independence,⁸⁷ but its job was complete: nobody who had done anything in the war was held accountable.

(ii) 1982-1988

With military action against "dissidents" escalated in Matabeleland and the Midlands, in July 1982 the Government sought to exonerate its officials and security forces for any acts they might commit in connection with that action. As the pre-independence state of emergency had been retained,⁸⁸ the Government used this to issue the Emergency Powers (Security Forces Indemnity) Regulations 1982 (SI 487/1982), as amended by SI 159/1983.⁸⁹ These Regulations remained in force until the state of emergency was lifted in July 1990.

The signing of the Unity Accord on 27 December 1987 between Mugabe and Nkomo brought about a *de facto* one-party State as Zanu-PF absorbed PF-Zapu. On 18 April 1988 (Independence Day), an amnesty for all dissidents was announced, and on 28 April, Clemency Order No.1 of 1988 was signed and soon published.⁹⁰ Later, the amnesty was extended to include all members of the security forces who had committed human rights violations,⁹¹ and all army and any other state personnel

⁸⁴ Zimbabweans of all political persuasions frequently and with irony refer to the (Lancaster House) Constitution as 'not so much a Constitution as a ceasefire document.'

⁸⁵ Ordinance 3 of 1979 (date of commencement 21 December 1979). This became the Amnesty Act [Chapter 9:02] and effectively prevented any criminal or civil proceedings being brought relating to any pre-independence political acts in the broadest sense.

⁸⁶ Ordinance 12 of 1980 (date of commencement 21 March 1980). This became the Amnesty (General Pardon) Act [Chapter 9:03] which effectively gave a free pardon to anyone who had committed any pre-independence political criminal act in the broadest sense.

⁸⁷ The notorious Indemnity and Compensation Act of 1975 was repealed by the War Victims Compensation Act, 1980 (No.22 of 1980), which came into effect on 14 November 1980. The latter Act is now Chapter 11:16 of the Revised Statutes. For the role of the new Act see below: V. Government Reparations Measures.

⁸⁸ Under the Emergency Powers Act [Chapter 83 of 1974]. The indemnity Regulations were made in terms of Section 3 of this Act.

⁸⁹ Section 4(1) of the Regulations provided: "No liability for damages shall attach to: (a) the President or any Minister or Deputy Minister in respect of anything done in good faith by him or by any person referred to in paragraph (b) for the purposes of or in connection with the preservation of the security of Zimbabwe; or (b) any member in respect of the Security Forces or any person acting under the authority of any such member in respect of anything done in good faith by such member or person for the purposes of or in connection with the preservation of the security of Zimbabwe." Section 4A similarly granted immunity from prosecution. (The close resemblance to the wording of the notorious and repealed Indemnity and Compensation Act of 1975 is glaringly obvious – see above footnote 73.) Under section 4(2), a Ministerial certificate to the effect "that any matter or thing referred to therein was done in good faith for the purposes of or in connection with the preservation of the security of Zimbabwe" was *prima facie* proof that the matter or thing was done in good faith. The immunity was made retrospective by section 4(3). This good-faith provision was later ruled unconstitutional by the Supreme Court – see below Part IV: Claiming Reparations for Torture.

⁹⁰ Government Gazette Extraordinary, 3 May 1988 (GN 257A/1988). It stated that all dissidents (including those who had aided dissidents and 'political fugitives from justice') who reported to the police between a specified period would obtain a full pardon for any crimes committed. Agents of foreign states were specifically excluded. Pardon was also granted to certain people serving prison sentences for a multitude of crimes, and as a result many jailed criminals apart from those serving for dissident-related crimes were released.

who were serving prison sentences for crimes committed during the civil war were released.⁹²

(iii) 1988-1998

Two general Parliamentary elections took place during this period, in 1990 and in 1995. Both were marred by political violence perpetrated against opposition supporters and candidates. The Zanu-PF Government organised its supporters and members to carry out physical attacks (especially through the party's youth and women's organisations), but state agencies were also directly involved, especially the CIO, which played a significant role in orchestrating the violence. Torture *per se* was not a distinct feature of these elections, and the violence was more in the form of politically motivated intimidation, assaults and destruction of property. After each election amnesties were proclaimed.⁹³

(iv) 1998-2005

After losing the February 2000 Constitutional Referendum, the Government unleashed its all-out offensive (including the more systematic use of torture) the following month, which has continued unabated for five years. In October 2000, having only just obtained a majority in the June general Parliamentary elections, and in the face of the thirty-seven MDC election petitions, the Government declared a general amnesty for politically-motivated crimes committed during the period 1 January to 30 July 2000,⁹⁴ which amnesty was also intended to influence the outcome of the MDC election petitions.⁹⁵

⁹¹ How many persons had been tried and imprisoned is not known, but in the light of the 1982 Indemnity Regulations it is unlikely to have been very many. The Government said at the time that it was releasing 75 members of the security forces or Zanu-PF already sentenced or awaiting trial for human rights abuses in terms of a special category under the amnesty. This included four Five Brigade soldiers sentenced to death for murder: see *Can you have a reparations policy without justice?* A.P. Reeler, Legal Forum, (Harare), Vol.12, No.4, (Dec 2000), at p.204.

⁹² Mugabe's power to grant pardons or to declare amnesties derives from Section 31I of the Constitution (entitled 'Prerogative of mercy'): "(1) The President may, subject to such lawful conditions as he may think fit to impose – (a) grant a pardon to any person concerned in or convicted of a criminal offence against any law;". This power was found in the 1953 Constitution to the extent that the governor and later the head of state could grant a pardon to a person convicted of a crime; this was widened in the 1969 Constitution to allow the head of state to grant clemency to those involved in criminal activities, that is, whether they had been convicted or before any conviction. In the Lancaster House Constitution there are no criteria limiting this power or providing for any sort of further review by any other body, or by Zimbabwean society: see *Zimbabwe, The toll of impunity*, Amnesty International, June 2002 (AI Index: AFR 46/034/2002), at pp. 7-10. It has been suggested that in exercising his powers under Section 31I(1) the President is governed by Section 31H(5) of the Constitution and has to act on the advice of the Cabinet. It seems that this is not, however, the practice: see *The Constitutional Reform Process and the Constitutional Commission's Draft Constitution for Zimbabwe (Part I)*, G. Feltoe, C. Goredema & G. Linington, Legal Forum, (Harare), Vol 12, No 1, (March 2000), p. 38, footnote 61. Furthermore, in terms of Section 31K9(2) of the Constitution no court is permitted to inquire into the nature of any advice tendered to the President, or the manner in which he has exercised his discretion. The attitude of the Government was clearly illustrated by the well-known case of a CIO officer, Robert Masikini, who shot dead in cold blood and in front of witnesses a PF-Zapu detainee (who he had tortured) just prior to the 1985 elections. Masikini was tried in the High Court for murder, convicted, and sentenced to death, but was then pardoned by Mugabe and released.

⁹³ General Notice 424A of 1990; Clemency Order No. 1 of 1995

⁹⁴ Clemency Order No. 1 of 2000, published as General Notice 457A of 2000 in the Government Gazette Extraordinary on 6 October 2000. 'Politically-motivated crime' was defined as 'any offence motivated by the object of supporting or opposing any political purpose and committed in connection with the Constitutional Referendum...or the general Parliamentary elections...whether committed before, during or after the said referendum or elections.' A free pardon was granted to every person liable to prosecution for any politically-motivated crime excluding murder, robbery, rape, indecent assault, theft, possession of arms and any offence involving fraud or dishonesty.

⁹⁵ The Government realised that the election petitions would result in detailed evidence being lead in court of the many criminal acts committed by its supporters and agents, including the widespread use of torture, and that this would lead to calls for them to be prosecuted. By giving them amnesty this destroyed any prospect of prosecution, but more importantly, it was also intended to de-motivate MDC witnesses who now had to risk their lives giving

B. Statutes of Limitations

The right to institute a prosecution lapses after the expiration of a period of twenty years from the time when the offence was committed, in terms of section 23 of the Criminal Procedure and Evidence Act [Chapter 9:07]. This does not apply to the offence of murder, for which there is no prescriptive period.

C. Criminal Investigations

Complaints about torture can be lodged with the police,⁹⁶ while in terms of Section 76 (4a) of the Constitution, the Attorney-General "may require the Commissioner of Police to investigate and report to him on any matter which, in the Attorney-General's opinion, relates to any criminal offence or alleged or suspected criminal offence, and the Commissioner of Police shall comply with that requirement." Generally, the police are in charge of carrying out investigations into all crimes. There is no special procedure relating to a person in custody who raises a complaint regarding torture. If such a person appears in court to have an extra-curial statement confirmed and he informs the presiding magistrate that he has been assaulted, the magistrate can order that he be medically examined, and may make such other investigation as he considers necessary or desirable in the circumstances.⁹⁷

In Zimbabwe law, after a complaint has been lodged with the police, they should investigate.⁹⁸ Evidence is obtained by interviewing witnesses and recording affidavits from them, as well as collecting medical and other evidence. A torture survivor who is not in custody may consult a State doctor or any other medical practitioner of his choice for medical examination. Medical evidence can be led in court as expert evidence provided it is relevant. Peace officers⁹⁹ (magistrates, police, prison and immigration officers, and other defined persons) can arrest a suspect with or without a warrant, after which the person must be brought before a magistrate within 48 hours for an initial remand.¹⁰⁰ At the initial remand the suspect can be released on bail or remanded in custody.

evidence against criminals in a civil suit knowing that the culprits would not be brought to book. The timing of the amnesty was significant: the general Parliamentary elections results were announced in late June, and the petitions had to be filed within a month, that is, by the end of July, which they were; Zanu-PF then tried certain manoeuvres relating to security for legal costs, but by the end of September it was clear that the petitions could not be blocked; the amnesty was announced on 6 October. The Government also tried another tactic on 8 December 2000 when Mugabe issued a Notice under Section 158 of the Electoral Act [Chapter 2:01] [The Electoral Act (Modification) (No.3) Notice, 2000 (SI 318 of 2000)] purporting to nullify the petitions by validating the results of the election, declaring that the elections had been "free and fair" and that the petitions were frivolous and vexatious. The Supreme Court (which had long been under attack but at that stage was still independent), set aside the Notice as unconstitutional on 30 January 2001 in *MDC v Chinamasa NO & Anor* 2001 (1) ZLR 69 (S). Five days later Chief Justice Gubbay was induced to retire early, first from March and then from July 2001. Meanwhile he was also made to take leave. Thereafter, the Government delayed and manipulated proceedings in the High Court and the Supreme Court and, as a result, the petitions were never finalised by the time of the March 2005 general parliamentary elections and effectively lapsed.

⁹⁶ A complaint is lodged in the form of a sworn statement, usually at the charge office of a police station.

⁹⁷ Section 113(5) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The provision in the Act that allowed a 'mute confession' to be used, even if it was not obtained voluntarily, was held to be unconstitutional where such a 'mute confession' took place after the accused had been tortured - *S v Nkomo* 1989 (3) ZLR 117 (SC).

⁹⁸ The duty of the police to act in good faith and to do their duty to investigate alleged crimes was fully set out in *Chavanduka & Anor v Commissioner of Police & Anor* 2000 (1) ZLR 418 (S).

⁹⁹ Section 2 of the Criminal Procedure and Evidence Act [Chapter 9:07].

¹⁰⁰ If the arrest takes place at such time that a weekend or public holiday intervenes then the period can be extended to up to 96 hours. Application can also be made to a Magistrate for a warrant of further detention in some circumstances and on good cause shown.

The evidence collected is compiled in a police docket and sent to the public prosecutor (who is a delegate or representative of the Attorney-General, in practice appointed through the Director of Public Prosecutions [DPP] in the Attorney-General's office) at the Magistrates Court, or to the offices of the Attorney-General/DPP if the case is complex or is likely to take place in the High Court.¹⁰¹ The police can be directed to undertake further investigations or to answer queries, and eventually the Attorney General or the DPP or his delegate/representative decides if the accused is to face trial. Such a decision is within his discretionary power, and even when there is a *prima facie* case against an accused, he is not obliged to bring charges. Where the State has declined to prosecute, a private prosecution can be brought by someone who has a substantial and peculiar interest in the issue of the trial case, arising out of some injury which he has individually suffered by the commission of the offence.¹⁰² Private prosecutions are very rare in Zimbabwe. A party who qualifies to bring one has to provide security for the accused person's costs. The State can take over a private prosecution any time after it has commenced.

Where a death has occurred apparently as a result of unnatural causes, an investigation takes place and an enquiry is held to establish the cause of death, and whether anyone is *prima facie* connected with any offence linked to it. The investigation and enquiry procedures are set out and are held in terms of the Inquests Act [Chapter 7:07]. The police compile what is termed as a sudden death docket. The police must examine the body as soon as possible¹⁰³ and a careful note must be made of its appearance.¹⁰⁴ The police must then, where practicable, cause the corpse to be examined by a doctor¹⁰⁵ as soon as possible. The post-mortem report (if there is one), along with the police report, witness statements, photographs and any other relevant evidence is required to be placed in the sudden death docket and forwarded to the public prosecutor at the Magistrates Court 'without delay...in order that the Magistrate may take such further steps, if any, as may be needful, either to ascertain the cause of death or to bring to justice such person or persons as appear to have unlawfully caused such death.'¹⁰⁶ The Magistrate may then hold an inquest to ascertain the cause of death, or if there is no post mortem report he may direct that one be provided.¹⁰⁷ The inquest is a public hearing which is less formal than a criminal trial, and the next-of-kin can attend and be legally represented. They are also entitled to have a representative private pathologist present at the post-mortem. The Magistrate must send the

¹⁰¹ The Attorney-General is the State's principal law officer and his office is created in terms of the Constitution, which with the Criminal Procedure and Evidence Act [Chapter 9:07] sets out his powers. He is appointed by the President. All powers, authorities and functions relating to the prosecution of crimes in the name of the State vest in him. These powers do not extend to prosecutions in courts martial, trials by police officers' boards and prison trials. The powers of the DPP are not specified in legislation but he is a delegate of the Attorney-General, and he is also appointed by the President.

¹⁰² The detailed procedure for a private prosecution to take place is set out in Part III of the Criminal Procedure and Evidence Act [Chapter 9:07], Sections 12 to 22.

¹⁰³ A police officer must attend the scene 'with all convenient speed': Section 2.

¹⁰⁴ Section 3 provides that "In viewing the dead body the police officer shall take careful note of all appearances, marks and traces presented by it and about it which tend to show whether the deceased did or did not come to his death by violence, and if from violence, whether the same was used by himself or some other, and if by some other, who such other was or how he may be discovered."

¹⁰⁵ Section 4.

¹⁰⁶ Section 5.

¹⁰⁷ Section 6.

record of any inquest held to the Attorney General, and if he has not held an inquest he must send the police report; in both instances he must include his own conclusions and remarks upon the case as he thinks fit.¹⁰⁸ In practice therefore if the Magistrate can ascertain the cause of death from the post-mortem and there is no evidence of any foul play, then there will be no need to hold an inquest, but if the cause of death is not clear he may hold an inquest.

D. Criminal Trials

A trial is commenced by the bringing of charges in either the Magistrates or High Courts, depending on the gravity of the crime and the likely punishment, as well as where the offence occurred. The Attorney General or the DPP or his delegated public prosecutor decides on behalf of the State the precise charge and which court will hear the matter. There are magistrates with different levels of seniority and degrees of criminal jurisdiction, while all judges of the High Court have equal jurisdiction, which includes the jurisdiction to impose the death penalty in criminal cases. The discretion lies with the public prosecutor to institute, commence or continue criminal proceedings.

The accused will appear in court by way of a summons, or he will be remanded in or out of custody or indicted for trial.¹⁰⁹ Criminal proceedings are adversarial and based largely on the English system, although there are no jury trials but instead the judge sits with two assessors. Unless the accused pleads and is found guilty, a plea of not guilty will be entered, State witnesses called and oral evidence led in open court. The State is obliged to prove the accused's guilt beyond reasonable doubt. Documentary evidence can also be produced through witnesses. The accused or his lawyer is entitled to cross-examine the State witnesses, who can then be re-examined by the prosecutor. After the State has closed its case the accused can call witnesses in his defence and give evidence himself if he wishes, but he is not obliged to do so.¹¹⁰ Defence witnesses can be cross-examined by the prosecutor and re-examined by the defence. After the defence has closed its case, the presiding judicial officer gives judgment, with reasons, and if the accused is found guilty, sentence according to law is passed. This entails imprisonment (which can be partially or wholly suspended), monetary fines or community service.¹¹¹ Murder without extenuating circumstances carries the death penalty. The President has the Constitutional power to grant pardons.¹¹² All accused persons are entitled to be legally represented by a lawyer of their own choice and at their own expense.¹¹³

¹⁰⁸ Section 13.

¹⁰⁹ In the Magistrates Court the term used for the document setting out the alleged offence is the summons or the charge; in the High Court it is called the indictment.

¹¹⁰ Section 198 (9) of the Criminal Procedure and Evidence Act [Chapter 9:07]. However, an accused who does not give evidence may still be questioned by the prosecution and the court, and in terms of Section 199 a court can draw an adverse inference from a refusal to answer. Section 18(8)(3) of the Constitution states that no accused person can be compelled to give evidence, and the law making him liable to answer questions might therefore be unconstitutional, but is saved by Section 18(13)(d) which makes it clear that it is *not* a contravention of subsection (8) for an adverse inference to be drawn where an accused 'without just cause' refuses to answer any question put to him.

¹¹¹ Juveniles may also be given corporal punishment: see above footnotes 52 and 53, and Section 353 of the Criminal Procedure and Evidence Act [Chapter 9:07].

¹¹² See above III. 2.1.

¹¹³ Section 18(8) of the Constitution. If an accused person cannot afford a lawyer in the High Court (where only very serious offences are tried) he will invariably be provided with *pro deo counsel*, but the vast majority of accused

The role of a victim or complainant in criminal proceedings is limited to that of giving evidence if called to do so by the State. In terms of Part XIVA (Protection of Vulnerable Witnesses) of the Criminal Procedure and Evidence Act [Chapter 9:07], the court has the power to vary the normal procedure of a witness giving direct oral evidence in open court in the presence of the accused. Section 319A provides that 'if it appears to a court in any criminal proceedings that a person who is giving or will give evidence in the proceedings is likely to suffer substantial emotional stress from so doing, or to be intimidated, whether by the accused or any other person, or by the nature of the proceedings or by the place where they are being conducted, so as not to be able to give evidence fully and truthfully' it can adopt a number of measures to ameliorate the problem. These measures include appointing an intermediary and/or a support person to assist the witness, and/or arranging for the witness to give evidence from a different position either in or outside the presence of the accused.¹¹⁴

There is no witness protection scheme to re-locate witnesses after a trial, or to give them new identities.

III.3. Practice: Investigation and Prosecution of Torture

A. Before Independence

The extent of torture during UDI has been dealt with above.¹¹⁵ After the passing of the Indemnity and Compensation Act 45 of 1975 (which was retroactive to 1972) there was no legal basis to bring to book perpetrators involved "in the suppression of terrorism", which in practice meant torturers in any political case in the widest possible sense. During the 1970s the attention of the police and prosecutors was dominated by the war, and there was thus little if any reason for the regime to investigate and prosecute torturers involved in 'ordinary', that is, non-political cases, either. The vast majority of persons in custody were black, the whole system was based on institutionalised racism, the police were white or white-controlled, and the victims of torture were denied basic human rights whether or not they became embroiled with the police. It is little wonder that any investigations and prosecutions for torture of black persons were rare, even in ostensibly 'non-political' situations.¹¹⁶ Violence and racism were inherent in the system.¹¹⁷ At all times before independence, torture was used to extract confessions or to gather information in the pursuit of 'ordinary' as well as 'political' crime. The only real

persons in the Magistrates Court are undefended by lawyers and are obliged to represent themselves. There is no effective legal aid system or public defenders office.

¹¹⁴ The court can adopt these procedures, and others, either on application or *mero motu*. If the witness is to give evidence from another room provision has to be made for the accused to hear or see the witness through closed-circuit television or some such means. See generally Sections 319A-319H. In practice use is made of Part XIVA mainly in sexual assault cases involving juvenile victims who give evidence from a special room which is video-linked to the court.

¹¹⁵ See above I.2.A. and I.2.B.

¹¹⁶ In racist Rhodesia the distinction between political and non-political crime was in any event artificial. The black majority were denied basic civil, political, cultural, social and economic rights, and in such a context every facet of life had a clear political dimension.

¹¹⁷ "One of the main results of 90 years of colonial laws was that ordinary blacks came to see the law as their enemy": *Breaking the Silence* (loc. cit) at page 25. See also *Individual Freedoms & State Security in the African Context: The Case of Zimbabwe*, John Hatchard, Baobab Books, 1993, at p. 73, who quotes the following: " At Alexander Mashawira's inquest in 1965, the Salisbury magistrate confessed that the method of torture used in the prison cells was so sophisticated that it reminded him of Nazi Germany."

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deterrent was that if it was found that a confession had been made under duress it would not be legally admissible, but apart from such considerations little stood between the torturer and his victim. The Lancaster House settlement, and the amnesties just prior to independence, prevented the new Government from instituting any investigations and prosecutions relating to 'political' torture in the pre-independence period, and it had little interest in examining 'non-political' torture either.

B. Post Independence (1980-1998)

Although the police, the prosecuting authorities and indeed the whole State machinery was rapidly Africanised after 1980, the post-independent period still saw State officials making widespread use of torture to extract information and confessions. One clear difference was the disappearance of the blatantly racist element, as within two or three years of independence only a handful of whites remained in the police, the army and the CIO,¹¹⁸ and after a few more years the same process had been all but completed in the magisterial and prosecuting services.¹¹⁹ The other difference was that the country now had a Constitution with a justiciable Declaration of Rights. However, there was no political will to eradicate or seriously curb the use of torture, and no policy of investigating and prosecuting offenders. In 1983, Mugabe excused torture in custody on the grounds that the police work long hours and therefore "tend to do their work over-enthusiastically."¹²⁰ No independent structures were set up to deal with the issue, and torture only reached the public domain during criminal trials where accused persons who had been tortured raised the issue. Undisputed evidence of torture of those accused of being apartheid agents emerged in a number of high-profile cases, including *S v Slatter & Others*¹²¹ and *S v Harrington*.¹²² The judiciary condemned what had happened, but the authorities did nothing about the perpetrators who could easily have been identified and prosecuted. Indeed, when evidence of the torture of Air Vice Marshal Slatter and the other officers was given to the press by their lawyers in a desperate effort to halt what was being done at the time of their initial detention, the only response of the State was to charge the lawyers with contempt of court on the grounds that they were trying to influence future legal proceedings.¹²³

¹¹⁸ A few remained and worked as double-agents for apartheid South Africa: see *S v Hartlebury and Evans* 1985 (1) ZLR (1) (H).

¹¹⁹ Before independence the vast majority of magistrates and prosecutors were white, as were all judges. There were thousands of black soldiers and policemen, along with thousands of white soldiers and policemen, but at all levels of the security forces the whites were in command. At independence there was a mass exodus of whites from every level of the Rhodesian public sector, and these whites either left the country or went into the private sector. At the height of UDI the white population reached about 250,000 and then began to decline as the war intensified. Within a few years of independence there were less than a 100,000 whites remaining. Today there are probably about 25,000 still in Zimbabwe. Several million black Zimbabweans have left the country in recent years, most of them for political and economic reasons.

¹²⁰ Quoted at p. 68 of *Breaking the Silence* (supra). Justification for torture was also expressed in *The Chronicle*, the government's Bulawayo newspaper, during *Gukurahundi* (ibid).

¹²¹ 1983 (2) ZLR 144 (H); see also *Attorney General v Slatter and Others* 1984 (1) ZLR 306 (SC); sub nom *S v Slatter and Others* 1984 (3) SA 798 (ZS).

¹²² 1988 (2) ZLR 344 (S).

¹²³ The two lawyers, Michael Hartmann and Nigel Gardner, were later tried and convicted in the Regional Magistrates Court, but acquitted on appeal: see *S v Hartmann & Gardner* 1983 (2) ZLR 186 (S); 1984 (1) SA 305 (ZS).

The vast majority of victims at all times were black. Senior PF-Zapu leaders such as Sidney Malunga and Welshman Mabhena were tortured along with thousands of ordinary citizens, and their torturers too were not brought to account.¹²⁴ In summary, little effort was made to investigate and prosecute torturers. As in colonial times, the only real deterrent was that evidence obtained through torture ran the risk of being excluded, but otherwise there were seldom any legal consequences involving the criminal process.¹²⁵

This did not only occur in the 1980s. For example, in 1995 an Eritrean national, Solomon Ghebre Haile Michael, was arrested near the villa of the deposed Ethiopian dictator Mengistu Haile Mariam in Harare, and subsequently charged with offences relating to an alleged plot to kill Mengistu. Solomon Michael had been shot and captured by Mengistu's bodyguards; his alleged accomplice, another Eritrean man named Abrahama Goietom Joseph Kiefe, was arrested the following day.

At his trial in 1996, Solomon Michael told the court that after he had been shot he was taken to Mengistu's house where the former dictator told him that he would personally execute him unless he confessed to having planned an assassination. Here he was brutally tortured – including blows to his right arm where he had been shot – and taken to a civilian hospital, where the torture continued, including beatings, while he was refused medical treatment except for being placed on a drip. He was then told that he was being taken away to be executed, but was deposited in a military hospital where he was chained to a bed and threatened with an injection with blood tainted with the virus HIV. Solomon Michael was sentenced to 5 years imprisonment for illegal weapons possession. Abrahama Kiefe was sentenced to 10 years for conspiracy to murder. Like Solomon Michael, Abrahama Kiefe also said the police had severely tortured him after his arrest.

On appeal in 1998, the Supreme Court upheld the convictions but cut the men's jail terms to two years each; as they had already served more than this the court ordered their immediate release. The Supreme Court accepted that both men had been severely tortured after their arrest.¹²⁶ The Zimbabwe authorities have never taken any steps against the torturers of Solomon Michael and Abrahama Kiefe.

¹²⁴ *Breaking the Silence* (supra) at pp. 70-71. Malunga, for example, suffered severe beatings to his feet. See also the case of *Minister of Home Affairs v Dabengwa and Another* 1982 1 ZLR 681 (SC). See also *Individual Freedoms and State Security in the African Context* (supra) at pp. 74-77 for graphic details of some of the torture methods used by the CIO and ZRP in the 1980s, which emerged during trials of torture victims, and in which the State often did not even seek to dispute the evidence; further accounts of brutalities committed by the authorities emerged in trials which are reviewed in *The Constitutional Recognition and Popular Enjoyment of Human Rights in Zimbabwe*, W. Ncube, *The Zimbabwe Law Review*, Volume 5, 1987, pp. 78-88.

¹²⁵ Many cases were dismissed on the grounds of accused persons having been tortured: see *Breaking the Silence* (supra) at p. 69, where reference is also made to serious charges against one Abednico Sibibndi having been dismissed on the grounds that he had been treated "quite outrageously". This was by no means an isolated case. Probably the only time when there was a chance of a torturer being prosecuted was if he went too far and the victim died, but even then a prosecution would be the exception rather than the norm. Furthermore, even in political cases relatively few victims died in police custody as such, although thousands were killed in the rural areas during *Gukurahundi*. Even when justice had been allowed to take its course, Mugabe would sometimes intervene. One of the most flagrant examples involved two CIO attempted murderers, Kanengoni and Chivamba, who shot and seriously injured an opposition candidate, Patrick Kombayi, prior to the 1990 election. They were tried and convicted in the High Court and sentenced to prison, but the day the Supreme Court rejected their appeals, they were pardoned by Mugabe. Despite a public outcry, no reason was ever given.

¹²⁶ *S v Michael* S-59-98; *S v Kiefe* S-60-98. The sentences were reduced because of the "highly mitigatory features" of the case: both men and their families had also suffered torture under Mengistu's rule in Ethiopia and it was not disputed at their trial that they were the victims of a brutal dictatorship that "killed thousands of people in order to break their will and wipe out any resistance" to Mengistu. Mengistu still has safe-haven in Zimbabwe to this day, nearly 15 years after fleeing Addis Ababa.

C. The Present (1998-2005)

Victims of torture regularly come before the courts in high-profile cases. Human rights NGOs (national and international) are specifically documenting and recording nationwide details of violations, and comprehensive reports are released.¹²⁷ These reports are widely publicised in the independent media, and pro-democracy journalists also play a direct role in exposing horrific cases of abuses. In the face of this overwhelming evidence, Zanu-PF has done nothing to prevent the violations, as it is both directly and indirectly responsible for them. All that it does is to deny them, despite a huge body of reliable evidence to substantiate the allegations, and to blame the opposition MDC for the violence.

Following the January 1998 food riots, local NGOs called upon the Government to set up an independent inquiry into the abuses which had taken place. There was no Government response at all, and the UN Human Rights Committee recommendations too were ignored.¹²⁸ This set the pattern for the present period.

Some selected torture cases which reached the public domain during the period under review are as follows:

The torture of Chavunduka and Choto

January 1999 saw dramatic court and public confrontations with the Government over torture, following an independent newspaper story that army officers had allegedly been arrested after a coup plot.¹²⁹ As a consequence of the report (which the State branded as lies), two local black journalists, Mark Chavunduka and Raymond Choto, were unlawfully detained by the military (who have no jurisdiction over civilians) and severely tortured. Despite urgently obtained court orders for their release, they were held for more than a week during which time they were beaten with fists and wooden planks and subjected to electric shock and water immersion torture, amongst other forms of gross ill-treatment. The episode led to unprecedented public protests, including from the judiciary who addressed an open letter to Mugabe calling upon him to restore the rule of law, and a peaceful human rights march on Parliament led by lawyers in court regalia. Mugabe's response was to threaten the judges and to justify the treatment given to the journalists, while the marchers on Parliament were stopped by the riot squad with dogs, tear-gas and batons. An urgent meeting of human rights NGOs with the Attorney-General (Patrick Chinamasa, later made Minister of Justice, a position he still occupies) drew his assurance that he would direct the Commissioner of Police to investigate.¹³⁰ He later reneged on this assurance and accused civil society of having a political agenda. Eventually, after the journalists made an application to the Supreme Court, judges ordered the police to investigate the torture,¹³¹ but the police have

¹²⁷ See above I.2.

¹²⁸ The UN Committee specifically recommended an impartial inquiry, action against officers found to have committed abuses, and the payment of compensation to victims: see *A Consolidated Report on the Food Riots* (supra), p.5.

¹²⁹ See *Legal Forum*, (Harare), Vol 11, No 1, (March 1999), which covered the whole incident in depth, and recorded the grave concerns over the torture expressed nationally and internationally by human rights and lawyers groups at the time.

¹³⁰ *Legal Forum* (supra), p. 15.

¹³¹ *Chavanduka & Anor v Commissioner of Police & Anor* 2000 (1) ZLR 418 (S).

made no serious effort to do so. It is now more than six years since the event and no identification parade has been held, no arrests have been made nor has a single perpetrator ever appeared in court.¹³² In February 2005 a Zimbabwe internet news service based in South Africa reported that the Zimbabwe Government had paid Choto and the late Chavunduka's estate a combined total of Z\$24 million (about US\$3000 at the time) civil damages for the torture and unlawful detention.¹³³

The torture of Blanchard, Dixon and Pettijohn

In March 1999 three American nationals were arrested at Harare International Airport on their way to Switzerland. The men, Gary Blanchard, John Dixon and Joseph Pettijohn, were subsequently charged with various statutory offences relating to the illegal possession of firearms. Before trial the men brought an urgent application in the Supreme Court not only stating that they had been severely tortured after their arrest, but that the conditions in which they were being held in a maximum security prison pending trial constituted cruel, inhuman or degrading treatment. Amongst other things it emerged that the men were held in solitary confinement, stripped naked each night and shackled in leg irons to their beds where the lights in their cells were kept on 24 hours a day. This had gone on for about five weeks. The then Chief Justice Anthony Gubbay found against the State which did not deny the allegations, and ordered a halt to the various forms of ill-treatment. As a mark of the court's disapproval legal costs were awarded to the men on the higher scale. The court also noted that stripping and keeping a prisoner naked from late afternoon until early morning was in contempt of a Supreme Court ruling several years earlier outlawing the practice, and was aggravated by the use of leg-irons.¹³⁴

Far worse was to emerge at the men's trial in September 1999. In the days after their arrest they were brutally tortured by police officers of the Criminal Investigation Department, which torture included electric shocks to their genitals and beatings to the soles of their feet. Full details had been given to a magistrate at their first court appearance in March, and their lawyers also sent a detailed report to Attorney General Patrick Chinamasa. At the trial, both State and private doctors gave evidence consistent with what the men had said had happened to them, including blows to the soles of their feet with a blunt instrument. The trial judge concluded that the police had indeed severely tortured the men, and noted that although one Detective Inspector Matema had said the State had been investigating the complaints " *the only conclusion this court can come to is either nothing is being done about the complaints or if something is being done, clearly incompetence seems to be the situation, because it does not take four months to come up with a completed investigation about this, in which it has been alleged some twenty different persons were involved.*"¹³⁵

While convicting the men, and following the Supreme Court decisions in *S v Michael* and *S v Kinfe*, the trial judge took into account the torture and sentenced each of them to an effective 12 months in prison, back-dated six months to the time of their arrest. Thus after a further six months they were released and deported. The State

¹³² One of the complainants, Mark Chavanduka, died in October 2002.

¹³³ Zimbabwe Online (SA) 21 February 2005.

¹³⁴ *Blanchard and Others v Minister of Justice* 1999 (2) ZLR 24 (S); 1999 (4) SA 1108 (ZS).

¹³⁵ *S v Blanchard and Others* 1999 (2) ZLR 168 (H).

appealed against the sentences as being too lenient. In 2001, after they had already been deported, the appeal was heard and the new Chief Justice Godfrey Chidyausiku ruled that they ought to have served five years in jail.¹³⁶ The case is significant in that the trial court specifically recorded the failure of the State to properly investigate detailed complaints of torture. Attorney General Chinamasa was soon promoted to Minister of Justice. No steps have ever been taken against the torturers.

The torture of Masera, Zulu, Moyo, Sibanda, Mpofu, Dulini-Ncube

One week before the June 2000 parliamentary elections, war veterans kidnapped MDC polling agent Patrick Nabanyama from his home in Bulawayo. He was never seen again but no body has ever been found. The alleged kidnappers were arrested and charged with murder in 2001. One of the accused was Cain Nkala, a war veteran leader in Bulawayo, and shortly before the trial was due to begin it appeared that he was going to reveal which senior Zanu-PF leaders had ordered Nabanyama's disappearance. In November 2001 Nkala himself was kidnapped from his home in circumstances very similar to the disappearance of Nabanyama, and within days several MDC members were arrested and charged. On State television Vice President Msika said MP David Coltart was behind the war veteran's kidnapping; Nkala's body was found in a shallow grave a few days later, and the Government announced that this was as a result of information from some of the arrested MDC members, who were shown on State television indicating the whereabouts of the corpse. The next day a Zanu-PF mob led by former political leader Dumiso Dabengwa and escorted by the police marched through the streets of Bulawayo. The MDC offices were burnt down, and according to press reports¹³⁷ the mob stopped the fire brigade from attending the blaze; in turn MDC supporters retaliated, setting fire to a Zanu-PF building and fighting with riot police.

MDC members charged with Nkala's murder were kept in custody under appalling conditions for many months. The trial of six of them began in February 2003: Sonny Masera, Army Zulu, Remember Moyo, Kethani Sibanda, Sazini Mpofu and Dulini-Ncube, an MDC MP. Dulini-Ncube was apparently denied treatment for his diabetes whilst in custody and later had to have an eye surgically removed. The other arrested war veterans were tried and acquitted of Nabanyama's murder, on the basis that they had indeed kidnapped him but then handed him over to Nkala. Nkala was dead, Nabanyama's body had never been found, and there was no evidence to link them to the latter's death. They were never subsequently charged with kidnapping, despite their admissions.

At the Nkala murder trial the six accused MDC men maintained that the police extracted the evidence against them under torture, and a trial-within-a-trial was held to determine the admissibility of this evidence. The police denied that any of the men had been ill treated in any way. In March 2004 the trial judge ruled that the evidence was indeed inadmissible. In her 60-page judgment she meticulously analysed the evidence of police officers involved in the case, contrasting their stories with that of the accused and each other, and including examinations of

¹³⁶ *S v Blanchard and Others* 2001 (2) ZLR (S).

¹³⁷ See ZWNEWS report 6 March 2004, a feature article apparently compiled from various press reports at the time of these dramatic events.

written statements and confessions, police diaries and logs, video evidence and other exhibits, all of which had emerged in the trial-within-a-trial. She found the police had deliberately made false entries in their records, altered written statements, lied to the court, been evasive in their evidence, and had fundamentally violated the most basic human rights of the men on trial.

In uncompromising language she threw out the incriminating statements, indications and even video recordings with the concluding comment: *"The evidence of the State witnesses who are police officers is fraught with conflict and inconsistencies. The witnesses conducted themselves in a shameless fashion and displayed utter contempt for the due administration of justice to the extent that they were prepared to indulge in what can only be described as works of fiction...The magnitude of their complicity was such as to put paid [sic] to this court attaching any weight to the truth or accuracy of their statements."*¹³⁸ As a result, the evidence of the accused was accepted, some of which included the accounts below.¹³⁹

Remember Moyo was hit by a rifle-butt, pushed out of the back of a moving police vehicle while shackled in leg-irons and handcuffs, had his head banged against a car wheel, was held on the ground on his back with his legs-spread eagled while Detective Superintendent Matira took running jumps landing on his genitals with booted feet; he bled from his nose and ears, lost consciousness and was so badly injured he could hardly walk; later he was further assaulted in a cell, kept stripped naked, shackled and beaten by more policemen, a former MDC member Ian Sibanda and war veterans including Jabulani Sibanda, then chairman of the Bulawayo War Veterans Association.

Khetani Sibanda was kidnapped by persons unknown, blindfolded and taken to an unknown house where he was detained, assaulted and threatened by men who later revealed themselves as CIO; he was forced to adopt a story implicating other MDC members in Nkala's murder with the express purpose of discrediting the MDC; he was forced to repeat all the details and learn them by heart, his resistance broken by repeated assaults and threats of harm to his relatives, particularly his parents; this went on for three days; at night he was taken to the burial site as part of this fabrication; at one point D/Supt Matira pulled out a firearm and threatened to shoot him; at another stage he was taken to Ncema dam near Esigodoni and told that if he didn't co-operate he would be fed to the crocodiles; he was deprived of food, water and sleep. Sibanda was one of those who had been shown on State television "indicating" the place where Nkala's body had been found.

Sazini Mpofo was with his girlfriend when arrested and they were both assaulted by being kicked and punched; he was driven around Bulawayo for many hours while being assaulted in and out of the vehicle, and at the police station; all the time he was being forced to implicate others; he was also assaulted before being taken on "indications." He too was shown on State television "revealing" where the dead man had been placed.

None of the torturers have been prosecuted, nor any of the police officers disciplined.

¹³⁸ *The State v Sonny Nicholas Masera and Five Others*, HH 50-2004, 2 March 2004, judgement of Mrs Justice Sandra Mungwira.

¹³⁹ *Ibid.*

The torture of Shumba and Sikhala

January 2003 saw the alleged torture of an MDC MP Job Sikhala and his lawyer Gabriel Shumba. This received wide international condemnation as it was seen as a direct attack both on the parliamentary opposition as well as on civil society, Shumba being a human rights defender working for the leading human rights coalition in the country, the Zimbabwe Human Rights NGO Forum.

Both men and three others were arrested while Shumba was advising his client, the MP who had faced constant police harassment over many months since the June 2000 parliamentary elections. A combination of State forces were apparently involved in the arrest and subsequent torture, including CIO, military personnel and uniformed and plain-clothed police, who were said to have stormed the room in which they were consulting, armed with assault rifles, tear-gas grenades and dogs. Over a three-day period both Sikhala and Shumba were separately moved from place to place, deprived of all food and severely tortured.

Shumba was apparently tortured by a group of about fifteen men: he was periodically kicked with booted feet and slapped about his head from the time of arrest, and tightly hooded so that breathing was extremely difficult; he was threatened with dogs and taken hooded to what was believed to be the CIO underground torture chambers at Goromonzi where he could hear the sounds of screaming in another room, and thrown against the wall before being stripped naked and hands and feet shackled together in the foetal position; he was then assaulted all over his naked body with fists, booted feet and thick planks and hung upside down and beaten on the bare soles of his feet with wooden, rubber and metal truncheons; he was given severe electric shocks to the feet, ears, tongue and genitals, and threatened with acid, crucifixion and needles thrust into the urethra; he was covered in some unknown chemical substance; having lost control of his bodily functions he was forced to drink his own urine and lick up his blood and vomit; his torturers urinated on him, took photographs of him being tortured, and threatened him with death.

Sikhala was also said to have been severely tortured. The men were apparently forced to confess to false allegations, including the burning of a Zanu-PF vehicle and a plot to violently overthrow the Government. Medical examinations after their release were consistent with their allegations, and when they appeared in court the evidence of torture was so clear that all charges were dropped immediately. Shumba later fled to South Africa where he is still working on Zimbabwe human rights issues.¹⁴⁰

None of the allegations of torture have been investigated. Shumba has taken his case to the African Commission on Human and Peoples' Rights where it is expected to be heard late in 2005.

¹⁴⁰ Testimony to United States Congress House Committee on International Relations 10 March 2004; Amnesty International Report 26 June 2003; Lawyers Committee for Human Rights Alert 17 January 2003; Zimbabwe Human Rights NGO Forum, Political Violence Report, January 2003.

The torture of Sibanda, Luphahla, Botomani and Gama

In September 2004 four Bulawayo youths were kidnapped and allegedly severely tortured. The youngsters, Mandlenkosi Sibanda, Mandlenkosi Luphahla, Tisunge Botomani and Nkosilathi Gama, were all members of the ruling Zanu-PF party, and were apparently tortured at Magnet House, the headquarters of the Central Intelligence Organisation (CIO) in Matabeleland, in front of Bulawayo CIO boss Innocent Chibaya. They were said to have been kidnapped from their homes in the high-density suburb of Emganwini and tortured for over four hours. They were apparently beaten all over their bodies with clubs, belts and electric cables, sustaining broken bones and serious injuries to their genitals.

The newspaper which broke the story and which generally supports Zanu-PF, said the youths were targeted as a result of intra-party struggles surrounding a notorious war veteran leader, Jabulani Sibanda. The youths named the CIO agents and said that CIO boss Chibaya had witnessed the torture. As a result of the publicity Vice President Msika was reported to have ordered an investigation into CIO boss Chibaya as well as the police chief in Bulawayo, Charles Mufandaizwe. Later that month the same paper said that two of the CIO persons said to be responsible, Sylvester Chibango and Medicine Furusa, had been charged and convicted of common assault and fined the equivalent of US\$8 each.¹⁴¹

The torture of Chiyangwa, Karidza, Matambanadzo, Dzvairo, and Marchi

The period since December 2004 has seen dramatic internal Zanu-PF feuding following the party congress earlier that month. State agents apparently kidnapped Zanu-PF MP Phillip Chiyangwa on 15 December 2004 as part of an alleged spy-ring selling State secrets to South Africa; others arrested around the same time were banker Tendai Matambanadzo, Zanu-PF diplomat Godfrey Dzvairo, Zanu-PF functionary Itai Marchi, and Zanu-PF's deputy-Director for security Kenny Karidza.¹⁴² A South African who allegedly set up the spy-ring and who was arrested inside Zimbabwe has not been charged, but there have been appearances of the five Zimbabweans, and three have already been jailed for breaching the Official Secrets Act: Matambanadzo, Dzvairo and Marchi. Karidza is still on trial while Chiyangwa was finally released in late February 2005. Most court proceedings have been shrouded in secrecy but serious torture allegations have emerged.

Chiyangwa testified that he was kidnapped in the car park of a Harare hotel, a black hood thrown over his head, and driven by a long and circuitous route to an underground location where he was detained in solitary confinement in a completely dark vermin-infested cell for two weeks, with no toilet facilities; here he was interrogated for hours on end, threatened and intimidated until he had a mild stroke, but was denied medical attention; his condition was later confirmed by a Government and private doctor who recommended hospitalisation, but this was refused; he was denied legal representation until brought to court on 30 December 2004.

¹⁴¹ Zimbabwe Financial Gazette 7 and 14 October 2004; Zimbabwe Independent 19 November 2004; Zimbabwe Human Rights NGO Forum, Political Violence Report, September 2004.

¹⁴² Diplomat Erasmus Moyo was said to have been recalled from the embassy in Geneva but he apparently escaped between the departure lounge and takeoff, and his current whereabouts are unknown.

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Karidza, whose trial for spying began on 27 January 2005, was not brought to court sooner as there were reports that he had been so badly tortured that the CIO did not want him seen in public until he had somewhat recovered. More than a month after his arrest sources said he was still unable to walk or talk properly, his legs were badly swollen and he was unable to eat. It appears that the case has developed into a 'trial within a trial' with the accused objecting to the admissibility of certain evidence proffered against him.¹⁴³

On 8 February 2005 the remaining three men were jailed after a secret trial in which they tried to withdraw guilty pleas made earlier. Their allegations that confessions had been made under duress were rejected. Dzvairo was sentenced to six years, while Marchi and Matambanadzo got five years each.

In summary, and particularly since losing the Constitutional Referendum at the beginning of 2000,¹⁴⁴ Zanu-PF has been at the forefront on an ever-worsening human rights situation in Zimbabwe and up to the time of this report there is no sign of either a decline in human rights violations or any attempt being made by the State to investigate and prosecute offenders.¹⁴⁵ On the contrary, the police¹⁴⁶ are now as much to blame for the systematic use of torture as other Zanu-PF agencies such as the CIO,¹⁴⁷ army, youth militias, war veterans and party groups, and there is no realistic likelihood of the perpetrators investigating and prosecuting themselves.

¹⁴³ News24.com 3 May 2005, http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1698840,00.html

¹⁴⁴ Following its near defeat in the June 2000 general Parliamentary election and the MDC's launch of 37 election petitions, the Government turned its attention to physically attacking witnesses in the petition cases. Witnesses are known to have been attacked in the constituencies of Chiredzi, Buhera North, Hurungwe (Karozi), Chinoyi, Kariba, Chikomba, Makoni and Mount Darwin: see *Politically Motivated Violence in Zimbabwe 2000-2001*, Zimbabwe Human Rights NGO Forum, Harare, August 2001, pp.37-41. At the same time it extended and intensified its violent grip over the country in preparation for the Presidential election. Throughout 2001 and in the build-up to the Presidential poll in March 2002 the pattern continued, as it has for a further year since the fraudulent re-election of Mugabe. More recently the Government has taken to manipulating food supplies, using drought relief resources to starve people into supporting it: see *Zimbabwe: Voting for Food: Rural and District Council and Insiza Elections*, Physicians for Human Rights, Denmark, 2002.

¹⁴⁵ There have been numerous reports of victims who have tried to report an abuse to the police, only to be detained and further abused by the police themselves. Another development is torture by irregulars who when they are 'finished' hand the victim to the police who then arrest and charge the victim with a spurious offence. Very occasionally in a 'non-political' case torturers are properly prosecuted, but this is the exception rather than the norm. The real significance of such cases is how seldom they occur, given how widespread torture in fact is. One recent example is *S v Reza and Another* HH - 2- 04 (Chinhengo and Makakarau JJ) where the appellants were two policemen who had been convicted of assault with intent to cause grievous bodily harm, after assaulting a suspect with a sjambok (a hard leather whip) on the soles of his feet. The appeal judges held that the appellants' act fell within the realm of torture as defined in international law, finding that in other jurisdictions the beating of a person's feet with a wooden stick or metal bar which makes no lesions and leaves no permanent and recognisable marks is regarded as torture. They ruled that in Zimbabwe it should be so regarded as well, being inclined to the view that a motive such as the extraction of a confession was a necessary element of torture, and that was the appellants' motive in this case.

¹⁴⁶ During March 2003 and leading up to two Parliamentary by-elections in Harare, as well as after a two-day peaceful general strike in protest against the Government, a fresh wave of Zanu-PF violence was unleashed, resulting in hundreds of civilians being beaten-up and tortured. The police were heavily involved in these abuses.

¹⁴⁷ A notorious example of a failure to prosecute is that of CIO officer Mwale who was directly implicated in the brutal political murders of two MDC members (Mr Chiminya and Ms Mabika) in 2000. A High Court judge called on the Attorney General to investigate, but five years later Mwale is still free and openly engaging in regular acts of political violence in the east of the country. Thus although his whereabouts are known, and although there are frequent reports of his latest crimes, he is clearly above the law and continues to operate with the blessing of the Zanu-PF Government.

IV. CLAIMING REPARATION FOR TORTURE

IV.1. Available Remedies

A. The Constitution

In terms of Section 24(1) of the Constitution, "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress." Subsection (2) allows for the referral of proceedings before the High Court or inferior courts to the Supreme Court where a question has arisen of a contravention of the Declaration of Rights. Subsection (3) provides that if no such referral is made then no application to the Supreme Court can be made in terms of subsection (1), although this will not preclude the question being raised on appeal.

Section 24(4) provides the Supreme Court with original jurisdiction to determine such applications or questions and to "make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights," with the proviso that it "may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of this Constitution or under any other law."

The Supreme Court therefore has a discretionary power to provide appropriate relief where it finds there has been a contravention of the Declaration of Rights, but claims for damages need to be brought in the High Court or inferior courts. It has not been asked to rule whether it can award constitutional damages on the grounds of a violation of a plaintiff's fundamental rights. Should such an issue come before it the Supreme Court, sitting as the Constitutional Court, is unlikely to find such damages to be "appropriate".¹⁴⁸

B. Civil Law

The common law in Zimbabwe is Roman-Dutch, and this is recognised in Section 89 of the Constitution.¹⁴⁹ A torture survivor can bring a claim in delict¹⁵⁰ for damages

¹⁴⁸ It is significant that the Constitutional Court in South Africa, with that country's more liberal Constitution, has declined to award such damages: see *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC). For an analysis of Section 24 see *Enforcement of Rights contained in the Declaration of Rights*, Greg Linington, Legal Forum, (Harare), Vol 11, No 3, (Sept 1999), pp. 147-159.

¹⁴⁹ Section 89: "Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered...shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law." The white settlers of the British South Africa Company (BSAP) hoisted the British flag in what is today Zimbabwe in 1890. The BSAP had a Royal Charter from Queen Victoria to exercise powers necessary for the purposes of government and the preservation of public order. They came from the Cape of Good Hope in South Africa, the BSAP having received a concession from King Lobenguela the previous year to exploit the minerals of his territory. The terms of the concession were fraudulently obtained. In 1891 by way of an Order-in-Council the area was proclaimed a Crown Protectorate, effectively under the administration of the BSAP, subject to the supervision of a High Commissioner based in Cape Town and the final authority of the Colonial Secretary. Thus Cape (Roman-

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under the common law, seeking monetary compensation for the harm suffered. Another remedy is to seek an interdict¹⁵¹ to protect one's rights.

There are two main causes of action in delict: the *actio iniuriarum* which is a general remedy where there has been a wilful infringement of a person's bodily integrity, reputation or dignity, and the *actio legis aquiliae* (the 'Aquilian action') which applies to claims for actual patrimonial or pecuniary loss. Where there has been an intentional, wrongful and unlawful assault (such as torture or rape) causing physical and/or psychological harm, a claim lies under the *actio iniuriarum*. Here a plaintiff can claim 'sentimental damages' without having to prove actual financial (patrimonial or pecuniary) loss, that is, money is claimed as compensatory damages for the pain and suffering as well as mental trauma inflicted. A claim can also be made for the *contumelia* or insult to the person's dignity. The amount of compensation sought must be specifically claimed, and the sum awarded lies in the court's discretion broadly following sums awarded in previous similar cases. Punitive damages may also be awarded in order to deter would-be-offenders.¹⁵²

Where a plaintiff has suffered actual pecuniary damages such as a loss of earnings or medical expenses then the claim are under the Aquilian action, whether the harm was caused intentionally or negligently.¹⁵³ The court can award these damages for the past financial loss as well as future prospective amounts. If the plaintiff is seeking both sentimental and pecuniary damages arising from the same incident then although these are claimed separately, they are brought in the same proceedings. In the case of an assault or torture this would be the usual position: a claim under both delictual actions.

The principle of vicarious liability is well established in Zimbabwe law, in terms of which an employer is jointly and severally liable for the delictual acts of his employees. Under the State Liabilities Act [*Chapter 8:14*] the State is liable for the

Dutch) law was brought to the country. It is for this reason that there are many similarities between the modern common law of Zimbabwe and South Africa, although there are isolated but important differences. The influence of South African decisions on Zimbabwe law has always been much stronger than vice versa. There are a great many statutory differences between the two systems, but even here there is much overlap. Finally of course their Constitutions are very different, including the provisions relating to fundamental rights.

¹⁵⁰ This bears the same meaning as 'tort' in other jurisdictions, and is a wrongful act of commission or omission causing harm to another person.

¹⁵¹ This bears the same meaning as an 'injunction' in other jurisdictions, and is a court order (often obtained urgently) compelling somebody to do something or to refrain from doing something. The usual procedure is to apply for an urgent provisional order, restraining the respondent from doing whatever it is alleged constitutes an infringement of the applicant's rights. As the victim is unlikely to be able to make the application himself it can be done by a relative, friend or lawyer who can aver to a well-founded apprehension that the person is suffering or is about to suffer a serious breach of his rights, and that there is no other reasonable remedy available. If the court (or judge in chambers, as this is the common procedure) is satisfied that a *prima facie* case has been made, a provisional order will be issued, granting the relief sought and calling on the respondent to show cause within a specified time why the order should not be made final; in the meanwhile the provisional order stands, prohibiting the alleged unlawful conduct. If the respondent doesn't file any papers in reply then in due course the order will be made final. If opposing papers are filed the matter is argued before the court which will then make a decision either to grant a final interdict or to discharge the provisional order when the applicant has not proved his case on a balance of probabilities. At that stage the costs too will be determined, and as usual will almost invariably follow the cause. The detailed procedure for interdicts and provisional orders is laid down in the Rules of the High Court, and by well-established judicial precedent.

¹⁵² See *Minister of Home Affairs & Anor v Bangajena* S-13-2000 (this refers to the Supreme Court printed judgement), a case of unlawful arrest and imprisonment, where it was held that even where there has been no pecuniary loss the court will not award a contemptuous figure for the infringement of fundamental rights.

¹⁵³ A unique remedy where the delict has been caused by a domestic animal is the *actio de pauperie* under which the owner is liable whether or not there was intention or negligence, that is, there is absolute liability.

delicts of its employees.¹⁵⁴ The principles of vicarious liability will apply, unless the employee is adjudged to have been “on a frolic of his own” at the time when the harm was inflicted, and had deviated so far from his job that he could no longer be said to have been going about his employer’s affairs. Thus, where a State employee such as a soldier or a policeman is on duty and carrying out tasks of maintaining law and order or investigating an alleged offence, then acts of ill-treatment and torture will fall within the scope of his employment for the purposes of civil vicarious liability.

A legal action commences with the torture survivor (or the dependents of a deceased victim) issuing a summons with a declaration, setting out the particulars of claim and quantum of damages sought. This is served by a court official on the perpetrator and/or the responsible agency. Depending on the amount of the claim, these papers can be issued out of the Magistrates Court and served by the messenger of court, or out of the High Court and served by the deputy-sheriff. As the Magistrates Court has limited jurisdiction, any substantial claim would be made in the High Court which has unlimited civil jurisdiction. The Rules of the High Court specify the ministers and other officials on whom the papers have to be served, depending on the State agency concerned, and also when service has to be made on the office of the Attorney General. These Rules have to be read in conjunction with the State Liabilities Act [*Chapter 8:14*] which further specifies the inclusion of details of the identity of the individual State employees where known. Furthermore, in certain instances and before a summons is served, the plaintiff has to give notice to the State of his intention to bring the action.¹⁵⁵ After service, the defendants are required to enter an appearance to defend or else default judgment can be granted, although the plaintiff will still have to lead evidence of the damages claimed. After an appearance to defend is entered, the defendant is required to serve an answer to the claim, and the plaintiff may reply. Normally that will close the pleadings, and issue will be joined for trial with the parties disclosing any relevant documents,¹⁵⁶ which would include medical records and photographs. Before the trial itself, a pre-trial conference is held at which the parties must provide each other with a list of witnesses they intend to call, and a summary of evidence, but not detailed affidavits.

Various statutes¹⁵⁷ and regulations as well as the common law govern pre-trial and trial proceedings. The proceedings are adversarial, and the general rule is that the onus on proving any allegation is on the party making it. The overall onus is on the plaintiff to prove his case (including the amount of money claimed as damages) on a balance of probabilities, a lesser standard than in criminal trials. One means of obtaining evidence is an ‘Anton Pillar’ order procedure.¹⁵⁸ A criminal conviction of

¹⁵⁴ Section 2. For a general discussion of the law in Zimbabwe see *Vicarious Liability and Course of Employment*, Geoff Feltoe, *The Zimbabwe Law Review*, Volume 6, 1988, pp. 169-175.

¹⁵⁵ See for example Section 70 of the Police Act [*Chapter 11:10*], as read with Section 6 of the State Liabilities Act [*Chapter 8:14*].

¹⁵⁶ This stage is known as ‘discovery’. See also below footnote 152 and Anton Pillar orders.

¹⁵⁷ The High Court Act [*Chapter 7:06*] and the Rules, and the Civil Evidence Act [*Chapter 8:01*]. See also the Magistrates Court Act [*Chapter 7:10*] and Rules for civil trials in the inferior courts.

¹⁵⁸ See on the recognition of Anton Pillar orders in Zimbabwe, *Cooper v Leslie & Ors* HH-151-99, and the leading South African case of *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam & Anor* 1995 (4) SA 1 (A). The procedure originated in recent English law and found its way to Zimbabwe via South Africa, on the basis of the growth of modern Roman-Dutch law. It is akin to a search warrant, whereby the applicant and his lawyers are authorised to enter the respondent’s premises and inspect and remove documents or other items. No prior notice is given to the respondent, and the purpose of the order is to preserve, pending litigation, evidence in the possession of the respondent. The court has a discretion as to whether to grant such an order, the requirements

the defendant arising from the torture is not necessary before a civil action can be brought, but it would certainly strengthen the plaintiff's claim.¹⁵⁹ The legal costs of the trial generally follow the cause which means that although the court has a discretion, it will almost invariably award costs to the successful party, although usually not all costs will be recoverable.¹⁶⁰ There is an automatic right of appeal from the High Court to the Supreme Court. A judgment creditor can proceed to collect payment through a writ of execution served by the deputy sheriff. In the case of an order against the State, the successful plaintiff cannot attach State property,¹⁶¹ but a failure to pay can result in the minister responsible being held in contempt of court.

Civil claims for damages normally prescribe within three years from the date when the cause of action arose.¹⁶² Prescription is interrupted by the service of the process in which the claim is made. Claims against the police have to be brought within eight months of the cause of action arising.¹⁶³

C. Criminal Law

The Criminal Procedure and Evidence Act [Chapter 9:07] contains a number of provisions which are relevant to torture survivors seeking compensation for personal injuries. The first mechanism is laid down in Sections 361-375 of Part XIX (Compensation and Restitution) of the Act. It provides that a court which has convicted a person of an offence may forthwith award compensation to any person who has suffered personal injury as a direct result of the offence.¹⁶⁴ However, a court will not provide compensation in respect of any personal injury where the amount of the compensation due is not readily quantifiable, or where the full extent of the convicted person's liability to pay the compensation is not readily ascertainable, or unless the court is satisfied that the convicted person will suffer no prejudice as a result of the claim for compensation.¹⁶⁵ This precludes the award of damages under the *actio iniuriarum*, which, being sentimental damages, are by definition not readily quantifiable, while actual pecuniary loss under the Aquilian action does not present the same problem. On the other hand the restriction

being threefold: the applicant must have a cause of action which he intends to pursue against the respondent; the respondent must have in his possession specific and specified documents or things which would constitute vital evidence in support of the applicant's cause of action; finally, there must be a real and well-founded apprehension that this evidence may be hidden or destroyed by the time the case comes to the stage of discovery or trial.

¹⁵⁹ In terms of Section 4 of the Criminal Procedure and Evidence Act [Chapter 9:07] neither a conviction nor an acquittal following on prosecution is a bar to a civil action for damages by any person who claims to have suffered any injury from the commission of the alleged offence. As to whether the evidence of a conviction can be produced in a civil trial, the former rule from the English case of *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35 (CA) that it could not, because it was not relevant, was removed by statute: Section 31 of the Civil Evidence Act [Chapter 8:01]. So where it is relevant in civil proceedings to prove that a person committed a criminal offence, the fact that he has been convicted of that offence by any court in Zimbabwe or by a military court in Zimbabwe or elsewhere is admissible in evidence for the purpose of such proof. The production of a certified copy of the court record is *prima facie* proof in the civil proceedings that he was convicted.

¹⁶⁰ Costs will normally be awarded on a party and party scale. The higher legal practitioner and client scale can be awarded as a mark of the court's strong disapproval of some aspect of the losing party's behaviour.

¹⁶¹ Section 5 of the State Liabilities Act [Chapter 8:14].

¹⁶² Prescription Act [Chapter 8:11].

¹⁶³ Section 70 of the Police Act [Chapter 11:10]. In *Stambolie v Commissioner of Police* 1989 (3) ZLR 287 (S) it was argued unsuccessfully that the shorter than usual three-year prescription period was unconstitutional.

¹⁶⁴ Section 363.

¹⁶⁵ Section 366.

regarding “the full extent of the convicted person’s liability” can also cause a difficulty even if the compensation claim is only for pecuniary loss, such as medical expenses, because the convicted person could argue, for example, that some of the treatment was not necessary or could have been obtained more cheaply.¹⁶⁶ An award will not be made unless the injured party or the prosecutor acting on the injured party’s instructions applies for it,¹⁶⁷ and the court must ensure that ‘where appropriate and practicable’ the injured party is acquainted with the right to apply for a compensation award.¹⁶⁸ If an award is made, the beneficiary can be made to provide security to repay the compensation in case the conviction is reversed on appeal or review.¹⁶⁹ An award has the same effect as a civil judgment, giving rise to the right to proceed with a writ of execution against the convicted person’s property,¹⁷⁰ and debarring the injured person from bringing civil proceedings against the convicted person arising from the same injuries.¹⁷¹ If an award is not sought, or is sought but is refused, the injured party is not precluded from seeking a civil remedy against the convicted person.¹⁷²

The second mechanism arises from Section 358 (3) of the Act in terms of which a criminal court may postpone or suspend all or part of a sentence (except for murder, conspiracy to murder or any offence where there is a laid down minimum sentence) on listed specified terms, including the payment of compensation for damage or pecuniary loss caused by the offence,¹⁷³ except where an award has been made for compensation under Part XIX of the Act.¹⁷⁴ This seldom used power to suspend part of a sentence on condition of payment of compensation was exercised in the dramatic case of the prosecution, conviction and sentencing of Zimbabwe’s ex-President, the Reverend Canaan Sodino Banana¹⁷⁵ in 1998, and upheld on appeal.¹⁷⁶ Banana was convicted in the High Court on two counts of sodomy and several others involving sexual offences between himself and other men (only one of the encounters was consensual). He was sentenced to a period of imprisonment, a portion of which was suspended on condition that he paid a lump sum as compensation to one of the complainants. He appealed against conviction and sentence, and the Supreme Court held that the discretion reposing in a trial court in relation to the conditions on which a sentence may be suspended are very

¹⁶⁶ Section 369 gives the courts authority to call further documentary or verbal evidence to determine whether or not to award compensation, but in practice they are very reluctant to risk converting criminal proceedings into full-blown ‘civil hearings’ to determine damages, for obvious reasons.

¹⁶⁷ Section 368 (1).

¹⁶⁸ Section 368 (2).

¹⁶⁹ Section 370.

¹⁷⁰ Section 372. Section 373 gives the court the right to make the award out of monies taken from the convicted person on or after his arrest, or produced during the trial, or known to be in his bank account.

¹⁷¹ Section 374.

¹⁷² Section 375.

¹⁷³ Section 358 (3) (b).

¹⁷⁴ Section 358 (3) (c) also provides that another specified term is ‘the rendering of some specified benefit or service to any person injured or aggrieved by the offence,’ with the proviso that this will only apply if the injured or aggrieved person has consented thereto.

¹⁷⁵ Banana became the country’s first President at independence in 1980, at that time a largely ceremonial post under the Lancaster House Constitution. Mugabe was the first Prime Minister. In 1987 the Constitution was amended and Mugabe became the first executive President, the position of Prime Minister being at the same time abolished : see above footnote 26. Banana retired from active politics on a generous State pension, and died in 2003.

¹⁷⁶ The criminal trial is reported at *S v Banana* 1998 (2) ZLR 533 (H), and the appeal case at *S v Banana* 2000 (1) ZLR 607 (S).

wide-ranging and a matter for the court's discretion. Where the court's discretion has been used imaginatively and creatively an appeal court will be loathe to interfere, and it ruled that the suspension of a portion of the sentence on condition of payment to the (main) complainant of a lump sum as compensation for sexual assaults perpetrated on him was within the parameters of Section 358 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07].¹⁷⁷

IV.2. The Practice

During UDI, legislation effectively prevented victims of human rights abuses from bringing civil claims arising from "the suppression of terrorism,"¹⁷⁸ as well as making perpetrators immune from prosecution. The Lancaster House settlement confirmed that position as far as the pre-independence period was concerned.¹⁷⁹ Even where victims were aware of their possible legal redress, and this applied to the *Gukurahundi* in the 1980s as well as the armed struggle of the 1970s, their fear of further retribution was an over-riding factor in deterring them from suing Government agencies.¹⁸⁰ Sometimes civil actions were brought against the Government. In December 1981, an elderly white MP, Wally Stuttaford, was detained and tortured, accused of conspiring with Joshua Nkomo to overthrow Mugabe. In papers only released in 1996, the details of his brutal treatment were revealed for the first time, as the civil trial he had instituted years before had been held *in camera* "for security reasons". What also emerged was that he had been awarded substantial damages, but Mugabe had refused to pay at the time, saying it was "a waste of money". Stuttaford revived the case in 1996 (on the basis of a judgment only prescribing after thirty years under Zimbabwe law), and the matter was settled out of court after the deputy sheriff attached a tractor belonging to one of the CIO agents.¹⁸¹

The indemnity Regulations promulgated in July 1982, which were based squarely on the repealed UDI statute, sought to give Mugabe's security forces the same indemnity from both criminal and civil proceedings that Smith's security forces had enjoyed. However, in 1984, the Supreme Court held that the good faith provision of the Regulations was unconstitutional, ruling that an objective test for the reasonableness of an officer's belief that he was in good faith had to be applied, not the subjective test set out in the Regulations.¹⁸² Despite this ruling, very few claims for damages arising from the period were ever brought.¹⁸³

¹⁷⁷ The Supreme Court sat as a full five-bench court to hear the appeal, as a number of Constitutional issues had been raised, including the question of whether consensual sodomy was still a crime in Zimbabwe. It ruled 3-2 that it was. All 5 judges agreed that the trial court had used its discretion correctly in terms of Section 358 (3) of the Criminal Procedure and Evidence Act (Chapter 9:07). It did however set aside part of the trial court's compensation order. The trial court had required Banana to pay money to the dependents of a man who the main complainant had murdered (in addition to paying the main complainant himself), the murder having been provoked by the deceased mocking the main complainant as being 'Banana's wife.' The Supreme Court ruled that this went beyond the ambit of the Section, and that only the main complainant himself was entitled to compensation.

¹⁷⁸ The Indemnity and Compensation Act 45 of 1975: see above p. 15.

¹⁷⁹ See III 2.A. for details of the British Governor's two Amnesty Ordinances which were later made into Acts of Parliament.

¹⁸⁰ *Breaking the Silence* (supra) at p. 26. Thus PF-Zapu leaders in the 1980s who were well aware of their rights under the law and the Declaration of Rights, were being persecuted and were in hiding. To seek legal redress would have exposed their lives to real threats. In addition, ordinary persons faced harsh economic restraints making lawyers often beyond their means.

¹⁸¹ *Ibid.* at pp. 68-69.

¹⁸² *Granger v Minister of State* 1984 (2) ZLR 92 (S); 1984 (4) SA 908 (ZS). The case involved a lawyer, Mr Granger, who had been taking photographs of a motor accident scene, but was accused of photographing a vehicle belonging

Some damages claims have been brought against the State for human rights abuses committed after the end of the *Gukurahundi*, including during the recent period of gross violations which commenced in 1998. No official statistics are available of the number of awards which have been made, or the amounts which the State has been ordered to pay. Human rights organisations have taken on a considerable number of claims on behalf of victims, and some of these cases have been settled out of court and others are still pending. Sometimes when an award has been ordered, the State has taken months, even years¹⁸⁴ to actually pay and this is highly prejudicial in the light of the fact that there is still three-digit inflation.¹⁸⁵ With the collapse of the rule of law and the independence of the judiciary, it has become increasingly difficult to obtain effective relief through the civil courts.

There have been numerous national and international reports documenting the collapse of the rule of law in Zimbabwe.¹⁸⁶ The latest and one of the most comprehensive is that published in December 2004 by five Common Law Bars to the International Council of Advocates and Barristers, which summarised its investigations saying "we have concluded that the Zimbabwean justice system has ceased to possess those features which enable a justice system to be characterised as independent and impartial. The legal culture has been subverted for political ends."¹⁸⁷

In Zimbabwe's ongoing economic crisis lawyers, who at the best of times are beyond the reach of the majority, are now an undreamed of luxury for many who are struggling to find enough money to even buy food. In the circumstances, the NGOs are the only entities through which hope of reparations can sometimes be sought, although it is beyond the capacity of NGOs to deal with the sheer volume of cases. Additionally, NGOs and individuals that try to deal with such cases are under direct threat from the State. In December 2004 legislation was passed which was specifically aimed at forcing the closure or at least obstructing the operations of non-governmental organisations engaged in human rights activities by denying them access to foreign funding. The main target of this legislation is organisations that have been critical of the Government's record on human rights and democratic

to the intelligence service. He was arrested and assaulted, and sued for damages for unlawful arrest. The State sought to justify its actions under the state of emergency and the indemnity regulations. The Supreme Court held that the indemnity contravened the rights set out in Section 13 (5) of the Constitution for a person unlawfully arrested and detained to claim compensation – the provisions of Constitution allowing measures to be taken during an emergency did not entitle the executive to grant that form of indemnity. Mr Granger was never actually paid his compensation, and eventually set-off his claim against taxes that were due by him. This was not challenged by the State, in contrast to the decision in *Commissioner of Taxes v First Merchant Bank Ltd* 1997 (1) ZLR 350 (SC); 1998 (1) SA 27 (ZS).

¹⁸³ The reason for this has already been given above, namely fear of retribution. See fn 180.

¹⁸⁴ See the case of Chavunduka and Choto at page 24 above; tortured in 1999, the authorities apparently paid compensation six years later.

¹⁸⁵ The *official* inflation rate peaked at over 600% per annum in 2003; since then it has declined to an *official* rate of around 140%. However, some reports put the actual rate far higher.

¹⁸⁶ The destruction of the independence of the judiciary and the rule of law is comprehensively analysed in *Justice in Zimbabwe*, Legal Resources Foundation, Harare, 2002. See also the earlier report of the Research Unit of the Zimbabwe Human Rights NGO Forum, *Enforcing The Rule of Law in Zimbabwe*, Special Reports 3, (Harare), September 2001. For an international perspective see *Report of the Zimbabwe Mission 2001*, International Bar Association, London, April 2001.

¹⁸⁷ *The State of Justice in Zimbabwe*, The Bar Council, London, December 2004, www.barcouncil.org.uk

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governance.¹⁸⁸ Since the March 2005 election matters have not improved for human rights defenders.¹⁸⁹

The administration of justice too has all but collapsed with massive backlogs of trials, rampant corruption at many levels, and general inefficiency. For every damages case successfully litigated, there are hundreds which have no realistic prospect of ever seeing anything recovered from the Government, which has resolutely turned its back on justice in pursuit of remaining in power at whatever the cost. A further difficulty, arising from the current use which is being made of irregulars to commit abuses, is that it is impossible to bring actions against individuals whose identities are not known; furthermore, it may be difficult to found State liability as it will be difficult for the claimants to positively prove the connection between the perpetrators and the State.

Finally, it is worth noting that in August 2003 a three-day symposium on *Civil Society and Justice in Zimbabwe*¹⁹⁰ took place in Johannesburg, South Africa, bringing together representatives of a large number of Zimbabwe civil society groups with their South African colleagues and other experts from abroad. The symposium sought to foster discussion and debate by Zimbabwean civil society organisations concerning issues of transitional justice and resolution of the multi-layered Zimbabwe crisis, as the two main political parties appeared to be on the verge of serious negotiations. Numerous papers were delivered and presentations made, including relevant international justice mechanisms and case studies of transitional justice experiences in other countries.

Open discussions and debate took place, and despite the wide range of organisations and interests that were represented, there was consensus on the need to move beyond the rhetoric of human rights and to find practical ways of dealing with the reality of Zimbabwe: past, present and future. The right of victims of human rights violations was central to the discussions. Indeed, the primary purpose of the symposium was to highlight the serious concern that the rights and needs of such victims would once again be sidelined, as has happened in Zimbabwe before. Unless the well-documented culture of impunity is resolutely challenged, the abuses are destined to be repeated.¹⁹¹

The formal documents agreed at the close of the symposium consisted of a Declaration¹⁹² and a Summary¹⁹³ of the basic issues needing attention. The latter

¹⁸⁸ The Non Governmental Organisations Act is awaiting Mugabe's signature. However, it has been reported that he has returned it to parliament for further review.

¹⁸⁹ For a recent analysis of the dangers facing human rights lawyers and others in Zimbabwe see *Zimbabwe: Human rights defenders under siege*, Amnesty International, 10 May 2005.

¹⁹⁰ See the Johannesburg Declaration and the Summary of the Johannesburg symposium, reported in *Themba Lesizwe (2004), Civil Society and Justice in Zimbabwe, Proceedings of a symposium held in Johannesburg, 11-13 August 2003, PRETORIA: THEMBA LESIZWE*. Full details of the symposium can be found at <http://www.santsep.co.za/satc/zim2003.htm>

¹⁹¹ REDRESS has published a detailed analysis of the Johannesburg symposium, along with specific comments on steps to be considered to ensure the provision of adequate reparations for Zimbabwe torture survivors: see *Zimbabwe: From Impunity to Accountability: Are Reparations Possible for Victims of Gross and Systematic Human Rights Violations?* March 2004. <http://www.redress.org/publications/Beyond%20impunityA5.pdf>

¹⁹² See Appendix II.

¹⁹³ See Appendix III.

document contained an outline of the mechanisms requiring implementation if justice in Zimbabwe is to become a reality. These two documents, together with the papers presented and the resource material subsequently published,¹⁹⁴ were to be used in the ongoing campaign inside Zimbabwe to insist that the needs of victims are fully met in transition and afterwards. A key element which emerged at the symposium was the call for the setting up of an effective and independent Truth, Justice and Reconciliation Commission.

V. GOVERNMENT REPARATION MEASURES

As a result of the amnesties which flowed from the 1979 Lancaster House settlement, it was not possible for any war victims, whether they were ex-combatants on either side of the civil war, or civilians who had been caught in the middle, to launch civil actions against the newly-independent State of Zimbabwe (or indeed against any individuals) for any damages arising from the liberation war. Under UDI, a compensation mechanism was established for persons who suffered losses as a result of what was at the time called "acts of terrorism" as defined in the Victims of Terrorism (Compensation) Act [Chapter 340 of 1974]. This Act was intended to and did benefit mainly supporters of the white minority regime whose property had been damaged; it did not benefit ordinary black peasants who had been attacked by the government security forces or who might have been targeted by Zanla or Zipra.

Shortly after independence, the 1974 Act was repealed by the War Victims Compensation Act [Chapter 11:16]. The preamble to the new Act stated that it was "to provide for the payment of compensation in respect of injuries to or the death of persons caused by the war," and 'the war' was defined as "the armed conflict which occurred in Zimbabwe and in neighbouring countries between 1 January 1962 and 29 February 1980, in connection with the bringing about of, or resistance to, political and social change in Zimbabwe".¹⁹⁵ The Act defined 'injury' so as to include both physical and mental incapacity or physical injury.¹⁹⁶ It was made clear at the time and subsequently that the Act should apply to civilians and ex-combatants, but it has been criticised as having serious shortcomings both in its content and in its application as far as civilian torture survivors are concerned: there is no provision for rehabilitation, nor does the schedule of injuries attached to the Act reflect the types of injuries likely to occur as a result of torture.¹⁹⁷

There are no reliable statistics as to how many civilians have ever actually benefited from the Act, but its application in practice became the centre of a huge corruption scandal in 1997, following persistent stories in the independent press that the fund set up under the Act was being looted by leading Zanu-PF ex-combatants. Mugabe appointed a Commission of Inquiry to investigate the conduct of officials responsible for the assessment and payment of compensation under it.¹⁹⁸ The Report was published in May 1998 and showed that there had indeed been corruption on a

¹⁹⁴ See fn. 190 above.

¹⁹⁵ Section 2 (1).

¹⁹⁶ Ibid.

¹⁹⁷ See *Compensation for Gross Human Rights Violations: Torture and the War Victims Compensation Act*, A.P. Reeler, Legal Forum, (Harare), Vol 10, No 2, (June 1998), pp. 6-21.

¹⁹⁸ Proclamation 2 of 1997 as contained in SI 156A of 1997 under the Commissions of Inquiry Act [Chapter 10:07]. The Commission was chaired by Judge Chidyaisiku, the then Judge President of the High Court.

massive scale, and although many top Zanu-PF were involved, the Report was cast in such a way as to put most of the blame on the chaotic system of assessments and payments rather than on criminal activity.¹⁹⁹ What did emerge was that between 1980 and 1997, about 52,400 persons had claimed compensation under the Act, and a total of Z\$1.4 billion²⁰⁰ had been paid to successful claimants; however, the Report also found that over 95 % of the claimants were ex-combatants, rather than civilians who had been caught up in the war.²⁰¹ Only a tiny minority of genuine civilian victims had received compensation, and the bulk of the money had gone in inflated claims to ex-Zanla soldiers, often for very minor injuries.²⁰²

The other aspect of the War Victims Compensation Act [*Chapter 11:06*] is that it does not apply to any victims of the *Gukurahundi*. Human Rights NGOs have repeatedly called for the Act to be amended to cater for the gross violations which took place during the post independent 1982-1988 low-intensity civil war, but the Government has refused to do so. There is therefore no Government reparation scheme for victims of human rights abuses committed after 1980, or for victims of crime in general²⁰³.

VI. REMEDIES FOR TORTURE IN THIRD COUNTRIES

VI.1. Prosecution of Acts of Torture Committed in 3rd Countries

A. The Criminal Law

Zimbabwe has not acceded to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, neither has it acceded to the Rome Statute of the International Criminal Court, 1998. It has therefore not enacted any implementing legislation relating to those treaties regarding international human rights crimes committed outside of the country. However, in 2000 Parliament passed the Genocide Act [*Chapter 9: 20*] giving legal effect in Zimbabwe to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Act and the Convention defines genocide as "an act committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group," and provides penalties under the country's laws for killing people, which are the same as for common law murder, and for any other act of genocide, which is life imprisonment. Jurisdiction may also be exercised pursuant to the Geneva Conventions Act [*Chapter 11:06*] as amended over any person regardless of nationality in relation to grave breaches of the four 1949 Geneva Conventions or the

¹⁹⁹ Many persons regarded the Report's findings as exonerating the top Zanu-PF officials by blaming a handful of civil servants. A few beneficiaries were prosecuted and others were called upon to re-fund monies received, but the whole affair was soon overtaken by the general crisis which gripped the country.

²⁰⁰ At the current parallel rate in Zimbabwe, this is about US\$1.4 million.

²⁰¹ Page 9 of the Report.

²⁰² For example the Commissioner of Police, Augustine Chihuri, had received Z\$138,645 for 'toe dermatitis of right and left feet': p.3 of Annexure I to the Report.

²⁰³ See *Breaking the Silence* (supra) at p. 190, where reference is made to payments which the Government made in 1994 and 1996 arising from only two of the many people who had gone missing during the *Gukurahundi*. The two cases are examined in the context of the law of prescription (statutes of limitations), and the government's official response to the 52nd session of the UN Commission on Human Rights; see also above fn. 55.

first additional Protocol to these Conventions, no matter where such acts have been committed.²⁰⁴

As the exercise of criminal jurisdiction, Zimbabwe is traditionally based on the principle of territoriality, and it is unlikely that its courts will exercise universal jurisdiction for international crimes by virtue of the general criminal law. The only common-law crime which is the exception to the rule against extraterritorial jurisdiction is treason, and the courts have jurisdiction to try treason committed against the State of Zimbabwe anywhere in the world.²⁰⁵ A number of statutes also provide for crimes committed outside of the country to be tried in Zimbabwe, none of which concerns human rights violations.²⁰⁶ The Privileges and Immunities Act [Chapter 3:03] provides diplomatic and consular immunity *ratione personae* to diplomatic and consular personnel.²⁰⁷

B. Extradition Law

The Extradition Act [Chapter 9:08] provides for extradition to and from Zimbabwe on two bases: firstly, extradition in term of agreements entered into between the Zimbabwe government and the governments of foreign States; secondly, extradition to and from designated countries. The Act is divided into three parts: Part I deals with extradition in terms of extradition agreements, Part II with extradition to and from designated countries, and Part III with issues such as bail, legal representation and evidence at extradition hearings before Magistrates Courts under the Act.²⁰⁸

Under Part I, the Minister of Home Affairs²⁰⁹ can enter agreements with other countries, and it is not necessary for the agreement to be on the basis of reciprocity, but it must be in accordance with Zimbabwe's international treaty obligations.²¹⁰ The double-criminality rule does *not* apply, and the agreement may relate to "any offences whatsoever, whether or not they are offences in both

²⁰⁴ Section 3(1) of the Act provides that: "Any person, whatever his nationality who, whether in or outside Zimbabwe, commits any such grave breach of a scheduled Convention or of the First Protocol as is referred to in- (a) article 50 of the Convention set out in the First Schedule; or (b) article 51 of the Convention set out in the Second Schedule; or (c) article 130 of the Convention set out in the Third Schedule; or (d) article 147 of the Convention set out in the Fourth Schedule; or (e) paragraph 4 of Article 11 or paragraph 2, 3 or 4 of Article 85 of the First Protocol, shall be guilty of an offence."

²⁰⁵ In early 2003, MDC leader Morgan Tsvangirai and two others began standing trial on allegations of treason committed abroad. They are accused of having plotted in London to have Mugabe assassinated. They were acquitted in 2004. (At the time of going to print he was still facing a further charge of treason following an allegation that he had incited the overthrow of the Government at a political rally). In an unusual case involving theft by a Zimbabwean diplomat from its embassy in Belgium, the Supreme Court confirmed that Zimbabwe had jurisdiction to try the offence on the basis of the 'harmful effect' doctrine: *S v Mharapara* 1985 (2) ZLR 211 (S). In regard to an accused wanted for an alleged offence in Zimbabwe who has been brought unlawfully into the country, the Supreme Court ruled that Zimbabwe courts do not have jurisdiction: see *S v Behan* 1991 (2) ZLR 98 (S). In that case the accused had been effectively kidnapped in Botswana (which borders on Zimbabwe) by Zimbabwe security agents and forcibly brought into the country to face charges relating to apartheid South African attacks on Zimbabwe. In declining jurisdiction, the Supreme Court refused to follow a line of contrary South African and Rhodesian cases.

²⁰⁶ For example under Section 3 (1) the Aircraft (Offences) Act [Chapter 9:01], and Section 45 (1) of the Defence Act [Chapter 11:02].

²⁰⁷ The Act incorporates the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963.

²⁰⁸ See generally on extradition *Criminal Procedure in Zimbabwe*, John Reid Rowland, Legal Resources Foundation, Legal Publications Unit, Harare, 1997.

²⁰⁹ The administration of the Act is assigned to him in terms of Section 2.

²¹⁰ Section 3.

Zimbabwe and the foreign country concerned.”²¹¹ The extradition of persons in connection with purely political crimes is *not* prohibited.²¹² Under Part II, the Minister of Home Affairs in consultation with the Minister of Foreign Affairs may publish an order in the Government Gazette designating any foreign country, and can either make the order with conditions, in which case the provisions of the Act are modified, or if no conditions are made, then the provisions of the Act stand. Unlike extradition under Part I, extradition under Part II *is* subject to the double-criminality rule *and* to the rule that political offences are non-extraditable.²¹³ Extraditions under Part II were based largely on the Commonwealth Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth, agreed upon at the Commonwealth Law Ministers Meeting held in London in 1966, as subsequently reviewed, especially at the Harare Commonwealth Law Ministers Meeting in 1986. Since Zimbabwe left the Commonwealth the precise legal arrangement is not clear. Generally, extradition proceedings are initiated by a request from the foreign state, which can lead to a hearing in the Magistrates Court to decide whether a warrant of arrest should be issued, or, if the person is in custody, whether bail should be granted. The final decision, however, rests with the Minister as to whether the person whose extradition is being sought is surrendered to the foreign state or not.²¹⁴

C. Practice

Zimbabwe has not been called upon to exercise universal jurisdiction, although the Ethiopian government apparently requested the extradition of Mengistu Haile Mariam, the former ruler of Ethiopia to stand trial in that country for crimes against humanity. Mengistu fled to Zimbabwe in May 1991 when his government was overthrown, and he has been living in luxury in Harare ever since. To date Zimbabwe has provided a safe haven for the ex-dictator who ruled Ethiopia from 1974-1991, during which period tens of thousands of his countrymen were imprisoned, tortured or killed as ‘counter-revolutionaries.’

VI.2. Claiming Reparation for Torture Committed in 3rd Countries

A. Legal Action Against Individual Perpetrators

The general rule is that the High Court has unlimited civil jurisdiction over all persons within Zimbabwe where the cause of action arose in the country.²¹⁵ Where

²¹¹ Section 3 (2) (a).

²¹² Ibid.

²¹³ Sections 14 (2) (b) and Section 15 (b) and (c).

²¹⁴ Adrian de Borboun SC in his paper *Litigation – human rights in Zimbabwe: Past, present and future* (above, fn. 21) at p. 113 draws attention to an incident after Independence as follows: “The very first case that was heard by the Supreme Court under the [Lancaster House] Constitution of Zimbabwe got the whole subject of human rights off to a bad start. A man named Mandirwhe had been arrested by State security officers and surrendered to officials in Mozambique without any formal extradition proceedings. He in fact spent twenty-one months in all in custody in Mozambique. A writ of habeas corpus was sought, and the trial judge referred to the Supreme Court asking it to determine what measures should be taken to secure the enforcement of the Declaration of Rights with regard to Mandirwhe. The Supreme court declined to exercise its jurisdiction on the grounds that the High Court could still make an effective order without having any constitutional order determined.” See *Mandirwhe v Minister of State* 1986 (1) ZLR 1 (A);1981 (1) SA 750 (ZA)

²¹⁵ Civil jurisdiction is governed by the common law as modified by High Court Act (Chapter 7:06). The civil jurisdiction of the Magistrates Court is governed by the Magistrates Court Act (Chapter 7:10).

the defendant is a resident (an *incola*) and the plaintiff is a non-resident (a *perigrinus*) the defendant can apply for an order that the plaintiff furnishes security for costs. Where the plaintiff is a resident and the defendant is not, and the cause of action arose within Zimbabwe, the High Court will have jurisdiction if there has been an attachment of the defendant's property or person to found jurisdiction. If both parties are non-residents (*perigrini*) there would need to be an additional jurisdictional fact as well.²¹⁶

B. Legal Action Against a Foreign State

The general rule is that foreign States are immune from the jurisdiction of Zimbabwe courts, but this is restrictive or partial immunity and not absolute immunity, that is, it does not apply to commercial matters or where the immunity has been waived.²¹⁷

C. Practice

No case is known in which a claim has been brought in Zimbabwe against an individual or a foreign State for damages in relation to torture or ill treatment committed outside of the country.

VII. CONCLUSION

For the last few years Zimbabwe civil society and international NGOs have played a central role in documenting and publicising nationally and internationally the ongoing gross and systematic human rights violations. They have also analysed the reasons for the violations and the fundamental structural and other weaknesses in the legal system, the body politic and the institutions of Government and administration generally, and they have proposed solutions and reforms. The current crisis itself in part grew out of civil society's efforts to galvanize Zimbabweans into challenging Zanu-PF's abuse of the Constitution.²¹⁸

While the current political impasse continues there appears to be little prospect of breaking the cycle of human rights violations, and even when it is eventually broken, there will be an urgent need for radical reforms in many areas. One institution which requires specific attention is the Zimbabwe Republic Police (ZRP). More will be needed than rebuilding the professionalism and reversing the 'Zanunisation' of the ZRP. The fact is that the ZRP, as did the pre-Independence police force from which it developed, has always routinely resorted to brutality and torture to a greater or lesser extent in the course of ordinary policing, and not only during the maintenance of 'law and order' at critical political stages in the country's history, such as at present. Until and unless this problem is acknowledged and resolutely challenged, the scourge of torture and other violations at the hands of

²¹⁶ In delict it might be that medical expenses were incurred in Zimbabwe, or future loss of earnings, even though the cause of action arose outside of the country. As to which system of private international law (choice of law) would be applied it would probably be *lex loci delicti*. CF Forsyth, *Private International Law*, 3rd Ed., Juta & Co 1996, p. 316.

²¹⁷ *Barker McCormac v Government of Kenya* 1983 (2) ZLR 72 (S).

²¹⁸ From the mid-90s civil society organisations began to work with the Zimbabwe Congress of Trade Unions (ZCTU) to campaign for a new Constitution which would entrench human rights and curtail presidential power. Out of this alliance grew the National Constitutional Assembly (NCA), to oppose the Government's Constitutional Referendum, and later the MDC itself.

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state officials will continue. In this Zimbabwe is not unique. Other countries have faced this issue of how to police the police, and how to safeguard those in custody from unlawful abuse.

One of the basic problems is the inherent difficulty in relying on any institution to monitor itself, and the tendency in a service organisation (be it the police, the army or the prison service) to close ranks and to cover-up violations. But this tendency is not restricted to service organizations, and is particularly prevalent in hierarchical bodies where it is difficult for junior ranks to challenge the conduct of their seniors without themselves being victimized, along with a culture of patronage and the avoidance of responsibility which leads seniors to condone or even encourage the criminal behaviour of their juniors. In addition to extensive efforts to properly train police officers not only in policing skills but in human rights norms, what is needed is an *independent* authority to investigate and deal with allegations of unlawful activity, including torture and 'police brutality.' Any such organ, as with a Truth, Justice and Reconciliation Commission, will only be effective if it is genuinely independent, properly staffed and adequately financed. Creating such a body on paper and through legislation is one thing, but making it work is another, and requires the political will and support of the Government of the day.

As with the ZRP, so with the Zimbabwe Prison Service and the treatment of prisoners generally. The jails are the scenes of on-going serious human rights abuses.²¹⁹ There are appalling conditions of gross overcrowding, lack of proper food, medical care and hygiene, and overall neglect, which singly and combined constitute cruel, inhuman and degrading treatment. Part of the reason lies in Zimbabwe's catastrophic economic decline and endemic corruption: prisoners are entirely marginalized and at the mercy of their custodians, and in the current political climate they are subject to even greater degrees of brutality, extortion and abuse than 'normal.' Even at the best of times Zimbabwe's prisons barely comply with minimum international standards. In the past some local NGOs have attempted to work with the authorities to inculcate prison officers with at least a basic understanding of human rights norms, as well as trying to inform prisoners of their (theoretical) legal rights. These modest attempts have long since been abandoned given Zanu-PF's concerted and consistent attacks on all aspects of civil society, and the bridges will have to be re-built. However, more needs to be done, and again an *independent* authority should be established to concentrate on protecting prisoners from gross ill treatment.

A Human Rights Commission (HRC) could be an important instrument to protect citizens against future violations, and was proposed in the 1999 draft Constitution prepared by the National Constitutional Assembly (NCA). Once more, whether a HRC will actually achieve the worthy aims which it undoubtedly ought to will depend

²¹⁹ See for example the report posted on the ZWNEWS website on 6 February 2004: <http://www.zwnews.com/issuefull.cfm?ArticleID=8581> Under the heading "Overcrowding leads to prison crisis," it chronicled how jails designed for 16,600 have overshot that figure by more than 8,000 according to justice ministry officials. Prisoners take turns to sleep. The sheer number of deaths from infectious diseases has lead prison authorities to introduce a daily five-minute programme on national radio appealing for relatives to collect the bodies of the deceased. Critical food shortages mean inmates get maize porridge seasoned with salt for breakfast, and boiled cabbage for lunch and supper. The brutality of prison officers was revealed in a recent report presented to the justice ministry by a parliamentary committee. The large number of MDC leaders arrested and detained for various lengths of time in recent years has also revealed eye-witness accounts of appalling conditions for those awaiting trial, or who are incarcerated pending bail hearings.

not only on the clarity and width of its remit but on the commitment of the Government to genuinely support such an organ. Creating such a body (and other human rights organs) through legislation should not be particularly irksome or even controversial, but if they then become sinecures for political cronies, they will be nothing but a waste of money. This is what has happened with the office of the Ombudsman which, if it is not abolished altogether, needs to be entirely overhauled. In addition, to be effective and impartial such institutions must have the political and financial support and cooperation of the Government without political interference from it. In a democracy these independent bodies are accountable to parliament and not to the executive.

The future protection of human rights and in particular the implementation of effective remedies for victims of violations, will necessitate the creation of new bodies as well as the strengthening and rebuilding of existing machinery. The country's economic collapse, widespread corruption, emigration of skilled officials, public service demoralization, and the abandonment of the rule of law, have all gravely undermined the administration of justice in recent years. This has created tremendous practical problems which will need to be tackled in parallel with the introduction of new innovative mechanisms such as a HRC, police complaints body and so on. The role of civil society should be to participate vigorously in all the necessary processes of assessment and consultation preceding the creation of these, and to keep them firmly on the agenda. A lot can be learned from regional and international developments in regard to institutional safeguards to help prevent the recurrence of human rights violations.

Some scholars in the field of reparation for victims of gross and systematic human rights violations have argued that judicial fora and the law ought not to necessarily dominate discussions for reparation in the context of political transition. The widely-used term 'transitional justice' is so clearly part of actual political processes that reparation can be considered partly as a matter of politics,²²⁰ and calls are made for a more socio-political approach to the problem of finding measures to deal with large numbers of victims – measures which other countries have found do not simply or easily fit into traditional court procedures. Dealing with past abuses undoubtedly requires multi-faceted, combined, holistic or hybrid solutions, some of which this paper has sought to examine. While recognizing, therefore, that law reform in itself is only *part* of what will be needed, it should still be of particular concern to civil society. An obvious issue is the startling lack of confluence between aspects of Zimbabwe's domestic law and developments in the international arena. To a considerable extent this specialized topic calls for input from both local and outside experts.

A stark example is that one of the most widespread of human rights abuses, namely torture, is not even a criminal offence *per se* in Zimbabwe. For years civil society has been calling upon the Zanu-PF Government to sign and ratify the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and its refusal to do so for over two decades speaks volumes on the nature of the Mugabe regime in general and its successive Ministers of Justice in particular. Civil society must make it an urgent priority for Government not only to make Zimbabwe a party to the Convention but thereafter to speedily bring domestic

²²⁰ A helpful publication which develops these ideas is the *Expert Seminar on Reparation for Victims of Gross and Systematic Human Rights Violations in the Context of Political Transitions* (Universiteit Antwerpen and Katholieke Universiteit Leuven, 2002).

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legislation into line with it. Torture must be made a specific statutory crime in Zimbabwe with appropriately severe punishment for convicted perpetrators, and the numerous other legislative and administrative reforms required under the Convention must be implemented.

This is but one of a number of fundamental international human rights treaties, and their Optional Protocols, which the present Government has completely and deliberately ignored since Independence in 1980. Even where treaties have been entered into their monitoring and reporting requirements which the Government is obligated to comply with have more often than not been neglected, distorted or dealt with years too late.

It is also apparent how limited the 'traditional' remedy of civil damages is to the problems arising from gross and systematic violations. This is not to say of course that individual civil proceedings are irrelevant – their potential must be included in any reparation programme – but even at the best of times it is a slow and expensive route. When one is dealing with large numbers of victims and many perpetrators, all the 'ordinary' hazards of litigation are multiplied a hundredfold, including the problems caused by statutes of limitations or prescription. Judicially-based compensation is important, but inherently problematic. In periods of economic chaos and hyper-inflation such as presently being suffered in Zimbabwe the claiming and payment of civil damages can become an almost meaningless exercise. Another issue which has been mentioned already and which relates to the weakness of litigation damages is the difficulty in suing perpetrators when the state has taken deliberate steps to disguise its identity.

Zimbabwe human rights defenders face a dangerous and difficult task in challenging and criticising the Zimbabwe Government over its human rights record. Many have been, and continue to be, intimidated and persecuted, including imprisonment, assault and torture. It says much for their courage and resilience that they continue to document, defend and heal to the best of their abilities, and remain steadfast in their pursuit of justice and peace.

Annex II

*Executive Summary of the Report of the
Fact-finding Mission to Zimbabwe^s
24th to 28th June 2002*

INTRODUCTION

Following widespread reports of human rights violations in Zimbabwe, the African Commission on Human and Peoples' Rights (African Commission) at its 29th Ordinary Session held in Tripoli from 23rd April to 7th May 2001 decided to undertake a fact-finding mission to the Republic of Zimbabwe from 24th to 28th June 2002.

The stated purpose of the Mission was to gather information on the state of human rights in Zimbabwe. In order to do so, the Mission sought to meet with representatives of the Government of the Republic of Zimbabwe, law-enforcement agencies, the judiciary, political parties and with organised civil society organisations especially those engaged in human rights advocacy. The method of the fact-finding team was to listen and observe the situation in the country from various angles, listen to statements and testimony of the many actors in the country and conduct dialogue with government and other public agencies.

FINDINGS

1. The Mission observed that Zimbabwean society is highly polarised. It is a divided society with deeply entrenched positions. The land question is not in itself the cause of division. It appears that at heart is a society in search of the means for change and divided about how best to achieve change after two decades of dominance by a political party that carried the hopes and aspirations of the people of Zimbabwe through the liberation struggle into independence.
2. There is no doubt that from the perspective of the fact-finding team, the land question is critical and that Zimbabweans, sooner or later, needed to address it. The team has consistently maintained that from a human rights perspective, land reform has to be the prerogative of the government of Zimbabwe. The Mission noted that Article 14 of the African Charter states "The right to property shall be guaranteed. *It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws*". It appears to the Mission that the Government of Zimbabwe has managed to bring this policy matter under the legal and constitutional system of the country. It now means that land reform and land distribution can now take place in a lawful and orderly fashion.
3. There was enough evidence placed before the Mission to suggest that, at the very least during the period under review, human rights violations occurred in Zimbabwe. The Mission was presented with testimony from witnesses who were victims of political violence and others victims of torture while in police custody. There was evidence that the system of arbitrary arrests took place. Especially alarming was the arrest of the President of the Law Society of Zimbabwe and journalists including Peta Thorncroft, Geoffrey Nyarota, among many others, the arrests and torture of opposition members of parliament and human rights lawyers like Gabriel Shumba.
4. There were allegations that the human rights violations that occurred were in many instances at the hands of ZANU PF party activists. The Mission is however not able to find definitively that this was part of an orchestrated policy of the government of the Republic of Zimbabwe. There were enough assurances from the Head of State, Cabinet Ministers and the leadership of the ruling party that there has never been any plan or policy of violence, disruption or any form of human rights violations, orchestrated by the State. There was also an acknowledgement that excesses did occur.

5. The Mission is prepared and able to rule, that the Government cannot wash its hands from responsibility for all these happenings. It is evident that a highly charged atmosphere has been prevailing, many land activists undertook their illegal actions in the expectation that government was understanding and that police would not act against them – many of them, the War Veterans, purported to act as party veterans and activists. Some of the political leaders denounced the opposition activists and expressed understanding for some of the actions of ZANU (PF) loyalists. Government did not act soon enough and firmly enough against those guilty of gross criminal acts. By its statements and political rhetoric, and by its failure at critical moments to uphold the rule of law, the government failed to chart a path that signalled a commitment to the rule of law.
6. There has been a flurry of new legislation and the revival of the old laws used under the Smith Rhodesian regime to control, manipulate public opinion and that limited civil liberties. Among these, the Mission's attention was drawn to the Public Order and Security Act, 2002 and the Access to Information and Protection of Privacy Act, 2002. These have been used to require registration of journalists and for prosecution of journalists for publishing "false information". All these, of course, would have a "chilling effect" on freedom of expression and introduce a cloud of fear in media circles. The Private Voluntary Organisations Act has been revived to legislate for the registration of NGOs and for the disclosure of their activities and funding sources.
7. There is no institution in Zimbabwe, except the Office of the Attorney General, entrusted with the responsibility of oversight over unlawful actions of the police, or to receive complaints against the police. The Office of the Ombudsman is an independent institution whose mandate was recently extended to include human rights protection and promotion. It was evident to the Mission that the office was inadequately provided for such a task and that the prevailing mindset especially of the Ombudsman herself was not one which engendered the confidence of the public. The Office was only about the time we visited, publishing an annual report five years after it was due. The Ombudsman claimed that her office had not received any reports of human rights violations. That did not surprise the Mission seeing that in her press statement following our visit, and without undertaking any investigations into allegations levelled against them, the Ombudsman was defensive of allegations against the youth militia. If the Office of the Ombudsman is to serve effectively as an office that carries the trust of the public, it will have to be independent and the Ombudsman will have to earn the trust of the public. Its mandate will have to be extended, its independence guaranteed and accountability structures clarified.
8. The Mission was privileged to meet with the Chief Justice and the President of the High Court. The Mission Team also met with the Attorney General and Senior Officers in his office. The Mission was struck by the observation that the judiciary had been tainted and even under the new dispensation bears the distrust that comes from the prevailing political conditions. The Mission was pleased to note that the Chief Justice was conscious of the responsibility to rebuild public trust. In that regard, he advised that a code of conduct for the judiciary was under consideration. The Office of the Attorney General has an important role to play in the defence and protection of human rights. In order to discharge that task effectively, the Office of the Attorney General must be able to enforce its orders and that the orders of the courts must be obeyed by the police and ultimately that the professional judgement of the Attorney General must be respected.

9. The Mission noted with appreciation the dynamic and diverse civil society formations in Zimbabwe. Civil society is very engaged in the developmental issues in society and enjoys a critical relationship with government. The Mission sincerely believes that civil society is essential for the upholding of a responsible society and for holding government accountable. A healthy though critical relationship between government and civil society is essential for good governance and democracy.

RECOMMENDATIONS

In the light of the above findings, the African Commission offers the following recommendations :-

On National Dialogue and Reconciliation

Further to the observations about the breakdown in trust between government and some civil society organisations especially those engaged in human rights advocacy, and noting the fact that Zimbabwe is a divided society, and noting further, however, that there is insignificant fundamental policy difference in relation to issues like land and national identity, Zimbabwe needs assistance to withdraw from the precipice. The country is in need of mediators and reconcilers who are dedicated to promoting dialogue and better understanding. Religious organisations are best placed to serve this function and the media needs to be freed from the shackles of control to voice opinions and reflect societal beliefs freely.

Creating an Environment Conducive to Democracy and Human Rights

The African Commission believes that as a mark of goodwill, government should abide by the judgements of the Supreme Court and repeal sections of the Access to Information Act calculated to freeze the free expression of public opinion. The Public Order Act must also be reviewed. Legislation that inhibits public participation by NGOs in public education, human rights counselling must be reviewed. The Private Voluntary Organisations Act should be repealed.

Independent National Institutions

Government is urged to establish independent and credible national institutions that monitor and prevent human rights violations, corruptions and maladministration. The Office of the Ombudsman should be reviewed and legislation which accords it the powers envisaged by the Paris Principles adopted. An independent office to receive and investigate complaints against the police should be considered unless the Ombudsman is given additional powers to investigate complaints against the police. Also important is an Independent Electoral Commission. Suspicions are rife that the Electoral Supervisory Commission has been severely compromised. Legislation granting it greater autonomy would add to its prestige and generate public confidence.

The Independence of the Judiciary

The judiciary has been under pressure in recent times. It appears that their conditions of service do not protect them from political pressure; appointments to the bench could be done in such a way that they could be insulated from the stigma of political patronage. Security at Magistrates' and High Court should ensure the protection of presiding officers. The independence of the judiciary should be assured in practice and judicial orders must be obeyed. Government and the media have a responsibility to ensure the high regard and esteem due to members of the judiciary by refraining from political

attacks or the use of inciting language against judges and magistrates. A Code of Conduct for Judges could be adopted and administered by the judges themselves. The African Commission commends to the Government of the Republic of Zimbabwe for serious consideration and application of the *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* adopted by the African Commission at its 33rd Ordinary Session in Niamey, Niger in May 2003.

A Professional Police Service

Every effort must be made to avoid any further politicisation of the police service. The police service must attract all Zimbabweans from whatever political persuasion or none to give service to the country with pride. The police should never be at the service of any political party but must at all times seek to abide by the values of the Constitution and enforce the law without any fear or favour. Recruitment to the service, conditions of service and in-service training must ensure the highest standards of professionalism in the service. Equally, there should be an independent mechanism for receiving complaints about police conduct. Activities of units within the ZRP like the law and order unit which seems to operate under political instructions and without accountability to the ZRP command structures should be disbanded. There were also reports that elements of the CIO were engaged in activities contrary to international practice of intelligence organisations. These should be brought under control. The activities of the youth militia trained in the youth camps have been brought to our attention. Reports suggest that these youth serve as party militia engaged in political violence. The African Commission proposes that these youth camps be closed down and training centres be established under the ordinary education and employment system of the country. The African Commission commends for study and implementation the *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (otherwise known as The Robben Island Guidelines) adopted by the African Commission at its 32nd Ordinary Session held in Banjul, The Gambia in October 2002.

The Media

A robust and critical media is essential for democracy. The government has expressed outrage at some unethical practices by journalists, and the Access to Information Act was passed in order to deal with some of these practices. The Media and Ethics Commission that has been established could do a great deal to advance journalistic practices, and assist with the professionalisation of media practitioners. The Media and Ethics Commission suffers from the mistrust on the part of those with whom it is intended to work. The Zimbabwe Union of Journalists could have a consultative status in the Media and Ethics Commission. Efforts should be made to create a climate conducive to freedom of expression in Zimbabwe. The POSA and Access to Information Act should be amended to meet international standards for freedom of expression. Any legislation that requires registration of journalists, or any mechanism that regulates access to broadcast media by an authority that is not independent and accountable to the public, creates a system of control and political patronage. The African Commission commends the consideration and application of the *Declaration on the Principles on Freedom of Expression in Africa* adopted by the 32nd Ordinary Session of the African Commission in Banjul, October 2002.

Reporting Obligations to the African Commission

The African Commission notes that the Republic of Zimbabwe now has three overdue reports in order to fulfil its obligations in terms of Article 62 of the African Charter. Article 1 of the African Charter states that State Parties to the Charter shall "recognise the rights, duties and freedoms enshrined in the Charter and *shall undertake to adopt*

legislative or other measures to give effect to them. Article 62 of the African Charter provides that each State Party shall undertake to submit every two years "a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter." The African Commission therefore reminds the Government of the Republic of Zimbabwe of this obligation and urges the government to take urgent steps to meet its reporting obligations. More pertinently, the African Commission hereby invites the Government of the Republic of Zimbabwe to report on the extent to which these recommendations have been considered and implemented.

APPENDIX II

Declaration of the Johannesburg Symposium 11 - 13 August 2003

Preamble

Mindful that a political solution is urgently required to overcome the crisis in Zimbabwe, and in the understanding that there is or may soon be dialogue between the major political parties in Zimbabwe, a number of Zimbabwean civic leaders convened a symposium to enable civic society leaders to have a forum at which to discuss issues of human rights and justice in Zimbabwe.

The Zimbabwean participants resolved to make representations to the negotiating political parties with recommendations on issues of human rights and justice that they desire should form part of any political settlement reached by the political parties.

1. The recommendations are as follows:
2. That human rights abuses of the past - both during the colonial and post-colonial eras - must be redressed;
3. That mechanisms be put in place to guarantee that human rights abuses never again occur in Zimbabwe;
4. That blanket amnesties for human rights abusers should not be allowed, and specifically that there should be no further general amnesty for human rights abusers;
5. That the necessary institutions be set up to deal with past and present human rights abuses, and that such institutions be empowered not only to investigate and seek the truth, but also to recommend criminal prosecution, provide for redress and reparations for victims, and lead to healing of the nation. Such institutions must encourage and sensitively deal with the special needs of victims. This is particularly important in dealing with women and children as victims;
6. That the Constitution guarantees future respect for human rights and set up a justice system and other institutions to give effect to such guarantee;
7. That the government must enable Zimbabweans to take advantage of the protection and remedies offered by international human rights instruments;
8. That there should be an investigation into corruption and asset stripping, and the repossession of all assets misappropriate from state and private enterprise, or acquired through corruption and other illegal means.

In the short term, we make the following demands on the Zimbabwean Government:

1. That there be an immediate end to political violence and intimidation, an immediate disbanding of the militia, and an immediate return to non-partisan police, army and intelligence services and non-selective application of the law;
2. That there be an immediate repeal of all repressive legislation and unjust laws such as the Public Order and Security Act, the Access to Information and Protection of Privacy Act and the Broadcasting Services Act and charges brought before the repeal of these laws should be withdrawn and sentences previously imposed be annulled;
3. That there be an immediate opening up of political space, including the immediate and complete overhaul of electoral laws and institutions to enable all elections to be held under free and fair conditions;
4. That the economic and humanitarian crisis in Zimbabwe must be immediately addressed.

We also call upon the United Nations to immediately send a Special Rapporteur to Zimbabwe to assess the human rights environment.

We also call upon the African Commission on Human and People's Rights to immediately release the report of the findings of its mission to Zimbabwe.

APPENDIX III



11-13 AUGUST 2003

Summary

Civil Society and Justice in Zimbabwe: A Symposium

The symposium

A symposium was held from 11-13 August 2003 in Johannesburg. Its theme was Civil Society and Justice in Zimbabwe.

This symposium brought together leaders from 74 civil society organizations in Zimbabwe, colleagues from civic organizations in South Africa and a number of experts from other jurisdictions.

The main purpose of the symposium was to explore how best to achieve justice in the broadest possible sense for the many victims of past and present human rights abuse in Zimbabwe.

The symposium noted that civil society organizations are non-partisan and are independent of any particular political party. Their main functions are to bring about a culture of human rights, justice and social and economic improvement and to promote and advance the interests of marginalized and victimized people.

In this document persons affected by human rights abuses are referred to as victims or survivors.

The process

The Zimbabwean participants of this symposium compiled this document and agreed upon the recommendations contained in it.

The Zimbabwean participants recognized they had initiated a process aimed at achieving justice for victims. They undertook to engage in wider consultation within their own organizations, other civic bodies not represented at the symposium and the general public. They will then incorporate these views into a final action plan. The civic organizations that endorse this plan, and agree to

participate in its implementation, will present the plan to the political parties and other actors, and demand that that it will be fully taken into account in all deliberations relating to political transition. These civic organizations will monitor the political discussions pertaining to political transition to ensure that the needs of victims are fully met in the transitional and post-transitional periods.

Preamble

1. Mindful that a political solution is urgently required in order to overcome the serious and rapidly worsening crisis in Zimbabwe that has resulted in such widespread suffering;
2. Requiring that the Zimbabwean people and civil society organizations be given a full opportunity to make an input into the process taking place to bring about transition to a new political order to influence the human rights content of any settlement that may be reached, not the political outcome of the negotiations.
3. Recalling the United Nations General Assembly resolution 53-144 of 9 December 1998 which outlines the rights and responsibilities of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms.
4. Emphasising the important role that individuals, civil society organizations and groups play in the promotion and protection of human rights and fundamental freedoms.
5. Fully accepting that historical social and economic imbalances must be remedied in order to achieve social and economic justice in Zimbabwe;
6. Insisting that strategies must be pursued that will cater for the needs of victims of violence and that the victims will be consulted about their needs and what the victims perceived as being the most appropriate mechanisms for satisfying their needs;
7. Understanding that lasting peace can only be achieved where human rights abusers are held accountable and meaningful steps are taken to try to heal the grievous wounds the violators inflicted on their victims and the society;
8. Recognising that it is imperative to preserve and fully and accurately record the past history of human rights violations.

Based on these general considerations, the Zimbabwean participants resolved as follows:

The abuses in the past

Throughout colonial occupation, black Zimbabweans were oppressed by the regime and denied all civil and political rights. They were deprived of their land, and socially and economically marginalized. From 1960 until 1980, they suffered even more widespread and systematic gross human rights violations. These violations, and the subsequent impunities, created the foundations for the human rights abuses experienced in subsequent decades.

In the 1980s, large-scale human rights violations occurred in the southern and western regions of Zimbabwe during military operations ordered by the government. These again were widespread, systematic and planned.

From 2000 onwards, there have been increasing levels of violence resulting in pervasive human rights abuses. All available evidence indicates that the government has engaged in a widespread, systematic, and planned campaign of organized violence and torture to suppress normal democratic activities, and to unlawfully influence electoral process. The government has also created, and the law enforcement agencies have vigorously applied, highly repressive legislation. These measures were directed at ensuring that the government retained power rather than overcoming resistance to achieving equitable land redistribution and correcting historical iniquities.

The human rights abuses, and the social and economic injustices suffered by the people are not merely the product of colonial injustices, but also the product of misgovernance, massive corruption, and asset stripping by state officials, persons within the private business sector, and others.

Accountability

The delegates noted that, during the pre- and post-independence periods, there have been successive amnesties and Presidential pardons for many of the persons who committed gross human rights violations. The failure to punish these violators, and to hold them accountable, created a culture of impunity and the potential for the reemergence of violence and abuse of human rights. The culture of impunity can only be ended if perpetrators of human rights abuses are held accountable for their abuses.

The participants noted and acknowledged that, under international law and international humanitarian law, gross human rights violations should never be ignored or be the subject of an amnesty.

Mechanisms for addressing the needs of victims

Victims of all past human rights abuses have the right to redress and to be consulted about the nature of the mechanisms that will be established to address their needs.

The mechanisms that are established must be victim-centred, and must be capable of addressing the needs of victims in a meaningful way.

Prior to the establishment of these mechanisms, there must be an extensive process of consultation with the victims and the broader community about the mechanisms and the sorts of persons who should be made responsible for operating them. Civic organizations and the churches should assist in this process.

The main mechanism for dealing with past human rights abuses will be a Truth, Justice, and Reconciliation Commission. This Commission will have the following functions:

Regarding the human rights abuses prior to 1960, the Commission's main functions will be:

- to investigate human rights abuses that occurred prior to 1960 and compile a full and accurate record of these abuses;
- to determine the social and economic effects of these abuses;
- to establish the extent to which these historical abuses continue presently to negatively impact upon the rights of Zimbabweans;
- to make appropriate recommendations about remedial steps to address the needs of victims of these abuses and present injustices emanating from past injustices;
- to refer cases involving gross human rights violations to the Attorney-General for possible criminal prosecution.

Regarding the human rights abuses subsequent to 1960, the main functions of the Commission will be:

- to take steps to ensure the protection and preservation of evidence of human rights abuses;
- to investigate human rights abuses that have occurred between 1960 and the date upon which this Commission commences its operations, including violations during a transitional period, and compile a full and accurate record of these abuses using available documentation, victim statements, and testimony from perpetrators;
- to require persons accused of human rights violations, but who deny that they committed such violations, to appear before the Commission so that these cases can be fairly investigated and findings can be made;
- to require persons who admit to having committed human rights violations over this period to appear before the Commission, make full and accurate admissions about their involvement;
- to recommend that those found to have committed gross human rights abuses should be removed from any positions of power and authority that would allow them to commit further human rights abuses in the future;
- to recommend that the remedial steps needed in order to provide reparations to victims should encompass the basic rights framework outlined by the Economic and Social Council of the United Nations; namely, the right to know, the right to justice, the right to non-recurrence, and the rights to restitution, compensation and rehabilitation;
- to explore the desirability of facilitating genuine community reconciliation;
- to facilitate processes of community-driven exhumation, reburial and memorialisation.

To be effective this Commission must be independent, credible, efficient, adequately resourced, accessible and victim-friendly.

Civic organizations should monitor and support the operations of this Commission.

Victims appearing before this Commission must be treated with sensitivity and respect and be given protection against reprisals.

There is need for a proper gender balance on this Commission and particular attention must be paid to the special needs of women and children victims.

The government formed after the transition must commit itself to co-operate with and to support the activities of this Commission, and must give an unequivocal undertaking to implement its recommendations wherever possible.

The participants called for the conducting of a comprehensive people driven constitutional reform exercise that will lay emphasis on the protection of all human rights and the establishment of a number of Commissions to protect and promote these human rights.

There should be special Commissions to deal with land, gender issues and economic crimes such as corruption, asset stripping and debts incurred by previous governments in connection with human rights abuses.

The mandate of the Commission on economic crimes should include:

- referral of cases to the Attorney-General for possible prosecution;
- in conjunction with other appropriate state agencies, taking of vigorous steps to recover misappropriated state assets;
- imposition of financial penalties upon those who were financial beneficiaries of human rights abuses.

A substantial portion of the assets recovered by this process should be devoted to compensating individuals and communities harmed by past human rights abuses.

All these Commissions must be given an explicit mandate to recommend measures aimed at redressing socio-economic injustices of the colonial and post-colonial periods.

The new Government must immediately establish a reparations fund to compensate victims of human rights abuses. Concerted efforts must be made to tap all possible sources of local and international finance for this fund, including assets recovered by the Economic Crime Commission. If financially feasible, full compensation should be paid to those who suffered the greatest harm as a result of grave human rights abuses, and some more limited compensation should be paid to other victims. The fund should also be used to establish local development projects in areas particular badly affected by past human rights abuses.

All victims must be provided with free and proper health care and social support to deal with the lifetime disability that can arise from violations of their human rights.

Future human rights abuses

The decades of conflict and abuses human rights abuses have badly weakened the institutions that should provide protection against human rights abuses and provide remedies for those harmed by human rights abuses.

A culture of respect for human rights will need to be re-established in Zimbabwe Existing institutions will need to be strengthened and other institutions established institutionalize this new

culture. The justice delivery system should be re-designed a way that will allow for accessible remedies for victims of human rights abuse.

The law enforcement agencies and prison service will need to be overhauled so they once again become professional, politically neutral forces that respect the human rights of all Zimbabweans and enforce the law on a fair and impartial basis. Officers who planned and instigated or perpetrated particularly serious human rights abuses should be removed from law enforcement agencies and all law enforcement officers must be made to undergo thorough re-training focused on the protection of human rights.

Civic organizations should monitor law enforcement agencies to ensure that they do not commit human rights abuses and, when they do, to assist injured parties to obtain redress.

All militias and other irregular para-military forces must be immediately disbanded. There must be rehabilitation programmes to reintegrate members of these forces back into normal society.

The independence and impartiality of the judicial system and of the prosecution service has been undermined and public confidence in this system will need to be restored.

There must be effective constitutional mechanisms to ensure that judicial appointments are made on the basis of professional competence and suitability and that there is no political interference in the judicial process.

The human rights protections contained in the Constitution must be strengthened and made to conform to international standards on human rights.

A Constitutional Court should be established to ensure the enforcement of human rights and credible, politically neutral and competent judges should be appointed to this court.

A number of Commissions should be established to ensure the observance of human rights and provide accessible means of redress to those harmed by human rights abuse. These should include a Human Rights Commission, a Commission on Gender Rights, a Commission of Economic Crimes, and a Land Commission.

International remedies for victims

The new government should take steps to facilitate access by Zimbabweans for human rights abuses.

The new government should try to make full and effective use of the Rome Statute of the International Criminal Court.

It should enable all Zimbabweans to rights and protections of all regional and international rights instruments by becoming a State Party to such treaties as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the International Covenant on Civil and Political Rights. It should also make a declaration under Article 14 of the Convention for the Elimination of All Forms of Racial Discrimination. The provisions of all of these treaties must be incorporated into domestic law.

Conclusions

Over many years innumerable Zimbabweans have fallen victim to human rights abuses. All Zimbabweans earnestly look forward to a new era in which there is peace and stability that will allow for equitable economic growth and development and in which the fundamental rights of all Zimbabweans are respected.

As is stated in the preamble to the United Nations Universal Declaration of Rights "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."