ZIMBABWE

I. INTRODUCTION

1. The Legal Framework

1.1. The Constitution

Zimbabwe is an independent republic and has a population of about 12 million people, which comprise 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 Rights[3]) which recognise 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

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[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 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. 1.1.

High Courts[6] hear certain criminal and civil appeals from inferior courts, have unlimited jurisdiction in civil disputes, and try grave criminal cases as courts of first instance. The Supreme Court[7] 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] 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.[9]

1.2. Incorporation and Status of International Law in Domestic Law

Zimbabwe has ratified or acceded to the following relevant international treaties[10]:

- 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 Convention against Torture[11] nor the statute of the International Criminal Court.[12] There are a number of other specific Commonwealth declarations and principles applicable to Zimbabwe.[13] In addition it is a signatory to

[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.

[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] Section 79B of the Constitution.

[10] United Nations Human Rights – Treaty Bodies Database; (http://www.unhchr.ch/tbs/doc.nsf) last visited on 31/3/2003.

[11] 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).

[12] The Rome Statute of the International Criminal Court, 1998, located at http://www.un.org/law/icc

[13] For example The Harare Commonwealth Declaration, sighed 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.az/ancdocs/commonwealth/Harare.html. See also The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, located at:

the African 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."[14] 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 law[15] 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.[16]

2. Practice of Torture: Context, Occurrence, Responses

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). In addition to being a member of the Commonwealth (albeit under suspension from the councils of the latter organisation since March 2002), 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 EU.

[14] 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).

[15] 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).

[16] 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 and 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 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.

2.1. 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.[17] Numerous commentators then and since,[18] as well as human rights reports at the time, have catalogued the cruelty meted out by the Smith security forces on civilians.[19]

The time since independence in 1980 can be divided into a number of fairly distinct periods:

(a) <u>1980-1982</u>
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.[20] On coming to power with an absolute majority, Mugabe

[17] 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.

[18] 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.

[19] 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.

[20] 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).

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,[21] along with almost all of the repressive security laws inherited from the previous regime.

(b) 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*.[22] 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.[23] Thousands of unarmed civilians died, were physically tortured (torture included rape and the phenomenon of mass beatings), or suffered loss of property, most as a result of the actions of the government forces and some at the hands of dissidents.[24]

(c) 1988-1998

This was the longest period of relative peace[25] 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, lead to the lifting of the 25 year old state of emergency in July 1990. Torture

[21] 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.

[22] 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.

[23] 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.

[24] 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.

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

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.[26] This campaign for radical change in the *de facto* one-party State culminated in the launch of the Movement for Democratic Change (MDC).[27] 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.

(d) <u>1998- 2003</u>

The current period of widespread 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 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.[28] In 1999 tension between the government and the growing constitutional reform movement increased rapidly, and Zanu-PF tried to seize the initiative by appointing a government Constitutional Commission[29] 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,[30] the MDC won nearly half the seats in Parliament. It

[26] 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 nearly 23 years.

[27] The MDC was launched in September 1999.

[28] The events were documented by human rights groups: see *A Consolidated Report on the Food Riots,19-23 January1998,* 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.*

[29] 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.

[30] 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*

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 2001[31] in preparation for the Presidential election set for March 2002. The result has been an ever-increasing level of state-sponsored violence, and torture is now endemic. The period has also seen the fraudulent re-election of Mugabe, the destruction of the rule of law and the independence of the judiciary, and economic collapse.[32]

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.[33]

2.2. Domestic Responses

During UDI, virtually anything done in defence of the Smith regime was lawful.[34] 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:

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).

[31] 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.

[32] 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.

[33] 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 five years up to 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.

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

nobody would be held accountable for anything done in the past, including atrocities, torture and other human rights crimes, whether committed by those who had fought to maintain white-minority rule or by those who had fought to attain black-majority rule.[35] 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.[36] 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.[37]

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,[38] most of the repressive security laws were retained,[39] 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*.[40] With the signing of the 1987 Unity Accord, the pattern set at independence was repeated: amnesties for the dissidents[41] and the security forces[42] meant nobody was held accountable.

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[35] Most atrocities had been committed by both white and black personnel in the Rhodesian forces, 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.

[36] 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."

[37] 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.

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

[39] 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].*

[40] 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.

[41] General Notice 257A of 1988.

[42] General Notice 424A of 1990.

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* 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.[43] The role of civil society, as it strove to develop a culture of human rights, was tolerated and occasionally supported by some government leaders.[44] The judiciary maintained its independence and spoke out against torture,[45] 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.[46] However, the State regularly resorted to amending the Constitution to reverse the gains which had been achieved through the courts.[47] 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.[48] 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 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

[43] 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.

[44] "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.

[45] 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).

[46] 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; *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.

[47] 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, since the MDC almost won the election the government has been unable to amend the Declaration of Rights as it can no longer garner the required level of votes in Parliament.

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

the office established, but the Ombudsman was specifically precluded from making any investigations relating to the police, army and prison services.[49] 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.[50] 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.[51]

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.[52] 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.

2.3. 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'.[53] 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, 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

[49] Section 8.

[50] 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].

[51] 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.

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

[53] 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.

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.[54] 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.[55]

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.[56] Although Africa as a whole and the major African powers of South Africa and Nigeria in particular have so far failed to do anything effective, the United States, the European Union, Norway, and the 'old' Commonwealth countries (Canada, Australia and New Zealand) have become more and more outspoken,[57] as

[54] 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.

[55] 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.

[56] 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: 44Days 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.

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

have some organs of the United Nations.[58] Certain limited but specific political steps have been taken to pressurise the Mugabe regime to stop flouting basic international human rights norms.[59]

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."[60] 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 judgments[61] 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 OF TORTURE

1. The 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

[58] 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.

[59] 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. For an example of a recent devastatingly accurate summary of the current economic, social, political and legal crisis in Zimbabwe, with emphasis on the current 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).

[60] Section 15(1) of the Constitution.

[61] *S v Ncube & Ors 1987* (2) ZLR 246 (S); *S v A Juvenile* 1989 (2) ZLR 344 (S); *CCJP V Attorney-General* 1993 (1) ZLR 242 (S).

are assault,[62] assault with intent to do grievous bodily harm,[63] rape,[64] administering poison or other noxious substance,[65] murder[66] and attempted murder.

The applicable sentences are largely at the discretion of the sentencing judge or magistrate.[67] Murder carries a mandatory death sentence unless extenuating circumstances are found,[68] 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 circumstances.[69] 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.[70] Alleged crimes committed against civilians are also subject to the normal judicial process.

2. The Criminal Procedural Law

2.1. Immunities

Immunities, indemnities, amnesties, clemencies and pardons lie at the heart of the country's failure to deal with gross human rights abuses committed by public officials, and have done so for decades.[71]

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[62] 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.

[63] 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.

[64] Rape consists in intentional unlawful sexual intercourse with a woman without her consent: Hunt and Milton loc. sit. 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.

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

[66] 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.

[67] 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.

[68] 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.

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

[70] 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.

[71] 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."

(a) UDI 1965 – 1980

The key piece of legislation used by the minority Smith 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."[72] Given that "terrorism"[73] 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.[74]

(b) 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 would see the gross human rights violators of the past brought to trial in Zimbabwe.[75] 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.[76] To avoid any doubt this was followed three months later with a general pardon in the form of another amnesty.[77] The Indemnity and Compensation Act of 1975 was repealed shortly after independence,[78] but its job was complete: nobody who had done anything in the war was held accountable.

(c) 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,[79] the government used this to issue the

[72] 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 prosecuted for human rights abuses.

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

[74] As can be seen from footnote 73 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.

[75] 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.'

[76] 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.

[77] 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.

[78] 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. It is now *Chapter 11:16* of the Revised Statutes. For the role of the new Act see below: V. Government Reparations Measures.

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

Emergency Powers (Security Forces Indemnity) Regulations 1982 (SI 487/1982), as amended by SI 159/1983.[80] 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.[81] Later, the amnesty was extended to include all members of the security forces who had committed human rights violations,[82] and all army and any other state personnel who were serving prison sentences for crimes committed during the civil war were released.[83]

(d) 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

[80] 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.

[81] 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.

[82] 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.

[83] 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.

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.[84]

(e) 1998-2003

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 three 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,[85] which amnesty was also intended to influence the outcome of the MDC election petitions.[86]

2.2. 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.

2.3. Criminal Investigations

Complaints about torture can be lodged with the police,[87] 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

[84] General Notice 424A of 1990; Clemency Order No. 1 of 1995

[85] 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.

[86] 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 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.

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

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.[88]

In Zimbabwe law, after a complaint has been lodged with the police, they should investigate.[89] 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 officers[90] (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.[91] At the initial remand the suspect can be released on bail or remanded in custody.

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.[92] 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.[93] 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

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[88] Section 113(5) of the Criminal Procedure and Evidence Act [*Chapter 9:07].*

[89] 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).

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

[91] 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.

[92] 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.

[93] 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.

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 possible[94] and a careful note must be made of its appearance.[95] The police must then, where practicable, cause the corpse to be examined by a doctor[96] 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.'[97] 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.[98] 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 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.[99] 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.

2.4. 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.[100] 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.

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

[95] 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."

[96] Section 4.

[97] Section 5.

[98] Section 6.

[99] Section 13.

[100] 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.

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.[101] 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.[102] Murder without extenuating circumstances carries the death penalty. The President has the Constitutional power to grant pardons.[103] All accused persons are entitled to be legally represented by a lawyer of their own choice and at their own expense.[104]

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.[105]

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

3. The Practice

3.1. Investigations and Prosecution of Torture before Independence

[101] 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.

[102] Juveniles may also be given corporal punishment: see above footnotes 47 and 48, and Section 353 of the Criminal Procedure and Evidence Act *[Chapter 9:07].*

[103] See above III. 2.1.

[104] 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 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.

[105] 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.

The extent of torture during UDI has been dealt with above.[106] 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.[107] Violence and racism were inherent in the system.[108] 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 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.

3.2. Investigations and Prosecution for Torture since 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,[109] and after a few more years the same process had been all but completed in the magisterial and prosecuting services.[110] 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

[106] See above I.2.1. and I.2.2.

[107] 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.

[108] "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. sit) 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."

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

[110] Before independence the vast majority of magistrates and prosecutors were white, and 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 35,000 still in Zimbabwe.

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."[111] 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*[112] and *S v Harrington.*[113] 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.[114]

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.[115] 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.[116]

3.3. Investigations of Present Torture (1998-2003)

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.[117] 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

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[111] 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).

[112] 1983 (2) ZLR 144 (H).

[113] 1988 (2) ZLR 344 (S).

[114] 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).

[115] *Breaking the Silence* (supra) at pp. 70-71. Malunga, for example, suffered severe beatings to his feet. 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.

[116] 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.

[117] See above I.2.

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.[118] This set the pattern for the present period.

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.[119] 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.[120] 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,[121] but the police have made no serious effort to do so. It is now more than four 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.[122]

Since losing the Constitutional Referendum at the beginning of 2000,[123] Zanu-PF has been at the forefront on an ever-worsening human rights situation in Zimbabwe and

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[118] 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.

[119] 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.

[120] Legal Forum (supra), p. 15.

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

[122] One of the complainants, Mark Chavanduka , died in October 2002.

[123] 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 (Karoi), 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.

up to the time of this report there is no sign of a either a decline in human rights violations or any attempt being made by the State to investigate and prosecute offenders.[124] On the contrary, the police[125] are now as much to blame for the systematic use of torture as other Zanu-PF agencies such as the CIO,[126] army, youth militias, war veterans and party groups, and there is no realistic likelihood of the perpetrators investigating and prosecuting themselves.

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

1.1. 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

[124] 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.

[125] January 2003 saw a new wave of abuse with the electric shock torture of prominent MDC MP Job Sikhala along with the same brutal treatment being given to leading human rights lawyer Gabriel Shumba. These men, and others whose cases were widely reported inside Zimbabwe and abroad, were tortured after being arrested by the police. 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 recent abuses.

[126] 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 three 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.

Supreme Court, sitting as the Constitutional Court, is unlikely to find such damages to be "appropriate".[127]

1.2. Civil Law

The common law in Zimbabwe is Roman-Dutch, and this is recognised in Section 89 of the Constitution.[128] A torture survivor can bring a claim in delict[129] for damages under the common law, seeking monetary compensation for the harm suffered. Another remedy is to seek an interdict[130] 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

[127] 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.

[128] 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 fraudently 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-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.

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

[130] 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.

broadly following sums awarded in previous similar cases. Punitive damages may also be awarded in order to deter would-be-offenders.[131]

Where a plaintiff has suffered actual pecuniary damages such as a loss of earnings or medical expenses then the claim is under the Aquilian action, whether the harm was caused intentionally or negligently.[132] 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 delicts of its employees.[133] 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.[134] 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

[131] 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.

[132] 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.

[133] 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.

[134] 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].*

issue will be joined for trial with the parties disclosing any relevant documents,[135] 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 statutes[136] 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.[137] A criminal conviction of 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.[138] 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.[139] 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,[140] 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.[141] 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.[142]

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[135] This stage is known as 'discovery'. See also below footnote 152 and Anton Pillar orders.

[136] 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.

[137] 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, Wagenndrift 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 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.

[138] 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.

[139] 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.

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

[141] Prescription Act *[Chapter 8:11].*

[142] 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.

1.3. 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.[143] 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.[144] 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 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.[145] An award will not be made unless the injured party or the prosecutor acting on the injured party's instructions applies for it,[146] and the court must ensure that 'where appropriate and practicable' the injured party is acquainted with the right to apply for a compensation award.[147] 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.[148] 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,[149] and debarring the injured person from bringing civil proceedings against the convicted person arising from the same injuries.[150] 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.[151]

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,[152] except where an award has been made for

[143] Section 363.

[144] Section 366.

[145] 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.

[146] Section 368 (1).

[147] Section 368 (2).

[148] Section 370.

[149] 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.

[150] Section 374.

[151] Section 375.

[152] Section 358 (3) (b).

compensation under Part XIX of the Act.[153] 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 Banana[154] in 1998, and upheld on appeal.[155] 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 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]*.[156]

2. The Practice

During UDI, legislation effectively prevented victims of human rights abuses from bringing civil claims arising from "the suppression of terrorism,"[157] as well as making perpetrators immune from prosecution. The Lancaster House settlement confirmed that position as far as the pre-independence period was concerned.[158] 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.[159] 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

[153] 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.

[154] 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.

[155] 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).

[156] 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.

[157] The Indemnity and Compensation Act 45 of 1975: see above fn 74 and 76 and accompanying text.

[158] See III 2.1. for details of the British Governor's two Amnesty Ordinances which were later made into Acts of Parliament.

[159] *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.

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 a tractor belonging to one of the CIO agents was attached by the deputy sheriff.[160]

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.[161] Despite this ruling, very few claims for damages arising from the period were ever brought.[162]

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 years to actually pay and this is highly prejudicial in the light of the fact that inflation is now running at over 200% per annum. 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. Zimbabwe is in the midst of a general economic crisis, and lawyers, which 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 offered, although it is beyond the capacity of NGOs to deal with the sheer volume of cases. Additionally, NGOs that try to deal with such cases are under direct threat and attack from the State. 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 Zanu-PF State, 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 the State may claim that the perpetrators were acting unilaterally without authorisation and not in the course of their employment by the State.

V. GOVERNMENT REPARATION MEASURES

[160] Ibid. at pp. 68-69.

[161] *Granger v Minister of State* 1984 (2) ZLR 92 (S).

[162] The reason for this has already been given above, namely fear of retribution. See fn 159.

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".[163] The Act defined 'injury' so as to include both physical and mental incapacity or physical injury.[164] 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.[165]

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.[166] The Report was published in May 1998 and showed that there had indeed been corruption on a 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.[167] 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 billion[168] 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.[169] Only a tiny minority of genuine civilian

[163] Section 2 (1).

[164] Ibid.

[165] 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.

[166] 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 Chidyausiku, the then Judge President of the High Court.

[167] 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.

[168] At the current parallel rate in Zimbabwe, this is about US$1.4 million.

[169] Page 9 of the Report.

victims had received compensation, and the bulk of the money had gone in inflated claims to ex-Zanla soldiers, often for very minor injuries.[170]

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 general[171].

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution of Acts of Torture Committed in Third Countries

1.1. The Law

1.1.1. 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 first additional Protocol to these Conventions, no matter where such acts have been committed.[172]

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

[170] 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.

[171] 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.

[172] 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."

jurisdiction is treason, and the courts have jurisdiction to try treason committed against the State of Zimbabwe anywhere in the world.[173] 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.[174] The Privileges and Immunities Act *[Chapter 3:03]* provides diplomatic and consular immunity *ratione personae* to diplomatic and consular personnel.[175]

1.1.2. 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.[176]

Under Part I, the Minister of Home Affairs[177] 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.[178] The double-criminality rule does *not* apply, and the agreement may relate to "any offences whatsoever, whether or not they are offences in both Zimbabwe and the foreign country concerned."[179] The extradition of persons in connection with purely political crimes is *not* prohibited.[180] 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.[181] Extraditions under Part II are based largely on the Commonwealth Scheme Relating to the Rendition of Fugitive

[173] 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. 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.

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

[175] The Act incorporates the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963.

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

[177] The administration of the Act is assigned to him in terms of Section 2.

[178] Section 3.

[179] Section 3 (2) (a).

[180] Ibid.

[181] Sections 14 (2) (b) and Section 15 (b) and (c).

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. 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.

1.2. 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.'

2. Claiming Reparation for Acts of Torture Committed in Third Countries

2.1. The Law

2.1.1. 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.[182] Where 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.[183]

2.1.2. 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.[184]

2.2. Practice

[182] 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).

[183] 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.

[184] *Barker McCormac v Government of Kenya* 1983 (2) ZLR 72 (S).

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.