

Tackling Politically Motivated Sexual Violence: A case study of violence against women in Zimbabwe

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By

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DEDICATION

This is to God

My Father and my Best friend.

It is a tribute to my loving family and warm friends.

And in more ways than one, this is for Maphefo.

Whose love for me knows no limits, a never-ending source of inspiration.

Uyi Xawe lama Xawe Mama!

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LIST OF ABBREVIATIONS

AI	Amnesty International
AIDS	Acquired Immune Deficiency Syndrome
DRC	Democratic Republic of the Congo
GA	General Assembly
GPA	Global Political Agreement
GNU	Government of National Unity
HIV	Human Immuno-deficiency Virus
HRW	Human Rights Watch
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICC	International Criminal Court
MDC	Movement for Democratic Change
RAU	Research and Advocacy Unit
SADC	Southern African Development Community
UN	United Nations
UNSC	United Nations Security Council
ZANU-PF	Zimbabwe African Union Patriotic Front

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CHAPTER ONE

Introduction

1.1 Background to the study

In 2007, the world watched in horror as elections in Kenya soured and turned violent; images showed thousands of people fleeing their homes, gruesome injuries, deaths and harrowing accounts of sexual violence were recorded.¹ In 2008 similar outbursts of violence occurred, this time as a result of pre and post-election violence in Zimbabwe.² The most recent reports of political violence were in 2010 in Cote d'Ivoire.³ Similarly, as in the case of Kenya and Zimbabwe, political violence in Cote d'Ivoire resulted in numerous deaths, widespread injury and substantial damage to property.

Political violence has and continues to be a major source of human rights violations in Africa.⁴ It is also contrary to norms of international criminal law. Apart from the aforementioned, numerous other African states have endured destructive and brutal periods of organised and widespread political violence. These eruptions of violence almost always result in death, sexual violations, injury and destruction to property.⁵ Sexually motivated political violence is an increasingly prevalent form of political violence which is often directed against women and children due to their vulnerable position in society.⁶ Tackling sexually motivated violence is an extremely challenging task: Not only is sexual violence a taboo subject in many African communities⁷ but, often no redress is available to victims as state officials and/or state institutions are implicated.⁸

Firstly, political violence has been found to occur in environments where political lobbying is conducted based on ethnic lines. This was seen during the Kenyan national elections held in 2007.⁹ The post-election violence in Kenya claimed over 1100 lives, more than 3500 people suffered injuries and approximately 500 000 people were internally displaced.¹⁰ Secondly, political violence has also occurred where the election process is widely

¹ The Commission of Inquiry (CIQ) into post-election violence in Kenya 'Final report' (2008) 345; The Independent Review Commission (IRC) of Kenya 'Final report' (2008) 3.

² Human Rights Watch (HRW) 'Perpetual fear: Impunity and cycles of violence in Zimbabwe' (2009) 20; C Forster-Towne & Sutherland 'Sexual violence as a weapon of war: Political rape and the Zimbabwean crisis' (2010) 3 available at <http://www.consultancyafrica.com> (accessed 11 September 2012).

³ S Strauss 'Its sheer horror here: Patterns of violence during the first for months of Cote d'Ivoire's post-electoral crisis' (2011) 110 *Journal of African Affairs* 481; United Nations Human Rights Council (UNHRC) 'Report of the High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire' (2011) 15.

⁴ United States Institute of Peace (USIP) 'Piecebrief' (2010) 2; International Peace Institute (IPI) 'Report of the Panel of the Wise' (2010) 13.

⁵ USIP (n 4 above) 2; http://www.spice.stanford.edu/docs/social_conflict_and_political_violence_in_africa (accessed 18 September 2012).

⁶ Amnesty International Report on the Democratic Republic of Congo (AI DRC) 'Mass rape: Time for remedies' (2004) 15; A Lyth 'The development of legal protection against sexual violence in armed conflicts: Advantages and disadvantages' (2001) 3 available at <http://kvinnatillkvinna.se> (accessed 18 September 2012).

⁷ 7th Global Conference on Violence and the Contexts of Hostility (GCVCH) 'Rape as a weapon of war and its long-term effects on victims and society' (1998) 3; AI DRC (n 6 above) 12.

⁸ GCVCH (n 7 above) 3; Human Rights Watch (HRW) 'Turning pebbles: Evading accountability for post-election violence in Kenya' (2011) 3.

⁹ <http://www.npr.org/templates/story/story.php?storyId=17764981> (accessed 19 September 2012); USIP (n 4 above) 1.

¹⁰ CIQ (n 1 above) 334.

distrusted and election results are widely seen as not being credible and voters considered the results to be rigged. This was seen pre and post the Zimbabwe national elections held during 2008¹¹ Political violence in Zimbabwe claimed over 200 lives, over 5000 people were beaten and tortured and over 36 000 people became internally displaced.¹² A more extreme case is that of Cote d'Ivoire, where political violence reportedly cost the lives of over 1000 people and approximately 1 000 000 people were internally displaced.¹³

Politically motivated sexual violence remains unabated in several African countries and is used both during armed conflict and peace time.¹⁴ Since 1993 in the Democratic Republic of the Congo (DRC), the number of rape cases is estimated to be between 400 000 and 2 000 000.¹⁵ Both the government forces and the rebels have been accused of perpetrating the acts of sexual violence.¹⁶ A comprehensive volume of literature has been written on this topic focussing especially on countries engaged in conflict such as the DRC, Sierra Leone, Liberia, Rwanda, and Uganda.¹⁷ Yet, an aspect of politically motivated sexual violence that has not been sufficiently addressed concerns the use of sexual violence as a political tool during peace time. The purpose of this research is to fill this gap in the literature.

In fact this high prevalence may be related to existing difficulties when it comes to tackling politically motivated sexual violence. The solution requires a functional criminal justice system, political will and considerable State resources. As is the case in many parts of the African continent, the state lacks political will to ensure accountability, resources may be scarce or state institutions have lost legitimacy due to their involvement in perpetrating the acts of political violence.¹⁸ This situation creates the need for a hybrid tribunal or for transitional justice to be put in place to address the politically motivated sexual violence which occurred.¹⁹ This study outlines the causes of politically motivated sexual violence; the legal developments thus far and considers what appropriate steps may be taken in order to both deter it and foster accountability.

1.2 Definition of terms

1.2.1 Politically motivated sexual violence

This describes violence that is sexual in nature which is increasingly used by countries not engaged in armed conflict to further a political purpose, by causing terror and humiliation amongst political dissenters.²⁰

¹¹ <http://www.mahalo.com/zimbabwe-election-2008> (accessed 19 September 2012); IPI (n 4 above) 70.

¹² Human Rights Watch (HRW Bullets) 'Bullets for each of you: State sponsored violence since Zimbabwe's March 29 elections' (2008) 5; Research and Advocacy Unit (RAU Fighting)'Fighting for a new constitution: Human rights violations experienced by female members of the National Constitutional Assembly' (2009)1.

¹³ Strauss (n 3 above) 481.

¹⁴<http://www.ke.boell.org/web247-218.html> (accessed 24 June 2012).

¹⁵ <http://www.nytimes.com/2011/05/12/world/africa/12congo.html> (accessed 19 September 2012); A Peterman et al 'Estimates and determinants of sexual violence against women in the Democratic Republic of Congo' (2011) 101 *American Journal of Public Health* 1060.

¹⁶ International Centre for Human Rights and Democratic Development (ICHRDD) 'Ending the indifference: Sexual violence during the 1993–2003 armed conflict in the Democratic Republic of the Congo' (2011) 38.

¹⁷N Romaniuk 'Rape warfare: Sexual violence as a systematic weapon of war' (2010) 9 *American Journal of Science and Research* 23; <http://www.unicef.org> (accessed 19 August 2012).

¹⁸ HRW Turning pebbles (n 8 above) 3.

¹⁹ HRW Perpetual Fear (n 2 above) 38.

²⁰Research and Advocacy Unit and Zimbabwe Association of Doctors for Human Rights (RAU Hiding place) 'No hiding place: Politically motivated rape of women in Zimbabwe' (2010) 3; <http://www.thewip.net> (accessed 24 June 2012).

1.2.2 Transitional Justice

Is an approach premised on the belief that the demand for criminal justice is not an absolute, but must instead be balanced with the need for peace, democracy, equitable development and the rule of law. It further recognises that in the context of transition very unique practical limitations exist and therefore embodies a State's attempts to achieve both justice and reconciliation while simultaneously repairing the fragmented social and institutional fabric.²¹

1.2.3 Peace time

Is a concept that relates to the prevalence of peace and the continued absence of an armed conflict. It describes a situation of peace as being free from conflict and violence. The legal regime regulating peace time is international human rights law.²²

1.2.4 Armed conflict

An armed conflict is a state of war and the absence of peace. It occurs where there is a resort to protracted violence between governmental authorities and organized armed groups.²³ The legal regime regulating a period of armed conflict is international humanitarian law.²⁴

1.3 Statement of the research problem

Sexual violence is strongly condemned under human rights law as it is recognised amongst others things, as a violation of the right to dignity, equality and bodily integrity.²⁵ Sexual violence is criminally sanctionable and warrants imprisonment or other suitable sentencing. Under customary international law states are therefore equally under an obligation to prosecute perpetrators of sexual violence and ensure that they are held accountable.²⁶ Sexual violence is strongly opposed because it significantly diminishes an individual's quality of life, often results in physical injuries, psychological trauma and stigma.²⁷ Yet, it remains highly prevalent in many societies. In addition to this high prevalence, numerous challenges exist to effectively combating politically motivated sexual violence and serious improvements must still be made.

This research study will investigate the use of sexually motivated violence in peace time, by exploring the link between politically motivated sexual violence and the election process. This will be achieved by critically analysing the reasons why politically motivated sexual violence is used and discuss the various manifestations it

²¹ Zimbabwe Human Rights NGO Forum (ZHR TJ) 'Exploring transitional justice options in contemporary Zimbabwe' (2006) 1; Unpublished: AP Mazimhaka 'Much to be done: Towards an effective transitional justice model for dealing with conflict-related crimes of sexual and gender-based violence' Unpublished LLM thesis, University of Cape Town, 2002 30.

²² H Krieger 'A conflict of norms: The relationship between humanitarian law and human rights law in the ICRC customary law study' (2006) 11 *Journal of Conflict and Security* 66.

²³ *Prosecutor v Tadic*, Case No: IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction (2 October 1995) 70; Balendra 'Defining armed conflict' (2008)1 *Cordoza Law Review* 468.

²⁴ Geneva Conventions 1949 I to IV article 3; International Law Commission 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law: Report of the Study Group of the International Law Commission' (2006) 48.

²⁵ International Covenant of Civil and Political Rights art 9, 10 & 14; Preamble to the Universal Declaration of Human Rights.

²⁶ Aspen Institute (Asl) 'Trying the violators of human rights: the dilemma of transitional democracy governments' (1989) 4; D Orentlicher 'Settling accounts: the duty to prosecute human rights violations of a prior regime' (1991) 100 *Yale Law Journal* 2537.

²⁷ C Chinkin 'Rape and sexual; abuse in International law' (1994) 5 *European Journal of International law* 326; Wing & Merchan 'Rape, ethnicity, and culture: Spirit injury from Bosnia to Black America' (1993) 25 *Columbia Human Rights Law Review* 1.

takes in general with particular attention to Zimbabwe. Zimbabwe was selected as an area of focus because high levels of politically motivated sexual violence were recorded during and after the 2008 elections.²⁸ It will be beneficial to study Zimbabwe because despite wide criticism of the government's failure to prosecute perpetrators of political violence, the use of Transitional Justice was not explored even after Zimbabwe experienced political violence.²⁹ Instead, considerable use was made of presidential clemency. Despite official complaints being laid the police have failed to investigate, alleged perpetrators still roam freely and impunity prevails.³⁰ In light of developments in international criminal law this study will outline both the rights of the individual and the obligations of the State, before concluding with recommendations as to how to deter politically motivated sexual violence and to achieve accountability.

1.4 Research Questions

The research questions will be the following:

1. What causes political sexual violence and in which manner has it been used to promote a political purpose?
2. What is the position of international criminal law on political sexual violence?
3. What led to the perpetration of political sexual violence in Zimbabwe?
4. How can political sexual violence be properly addressed, both in terms of deterrence and accountability?

1.5 Literature Review

Politically motivated sexual violence is an undeniable reality in Africa affecting millions of people and causing untold grief and unnecessary suffering. It manifests itself in numerous ways and occurs in varying contexts. Despite its high prevalence contributions regarding politically motivated sexual violence during peace time are limited. Numerous studies have been conducted highlighting the occurrence of sexual violence or the use of sexual violence during armed conflict. The literature review will briefly discuss the contributions made by several authors who have produced some of the leading works on the issue.

Acclaimed feminist author Du Toit argues that sexual violence specifically rape is a political issue. She argues that rape concerns the violent abuse of power in a sexual way and concludes that since politics is about who yields power over whom; rape is about men yielding power over women.³¹

Authors like Tickner, Steans and Neier argue that sexual violence and especially rape has become a modern weapon of war.³² This view is supported by both the United Nations Security Council (UNSC) and General

²⁸Raftopoulos & Mlambo *Becoming Zimbabwe: A History from the Pre-colonial Period To 2008* (2008)201.

²⁹ Institute for democracy in Africa (IDIA) 'Defining violation: Political violence or crimes against humanity?' (2008)6.

³⁰ HRW Perpetual Fear (n 2 above) 20; Forster-Towne (n 2 above) 3.

³¹ L du Toit 'A phenomenology of rape: Forging a new vocabulary for action' in A Gouws (ed) *Unthinking citizenship: Feminist debates in contemporary South Africa* (2005) 3.

Assembly (GA) who consider the use of rape as a strategy of war to be detrimental, as it directly interferes with attempts to re-establish international peace and security.³³ Infact, UNSC Resolution 1820 declares that sexual violence is so grave; it can constitute a war crime; a constitutive act of genocide, and a crime against humanity.³⁴

Other scholars such as Forster-Towne submit that sexual violence used during armed conflict is a form of torture, although she admits that it is very challenging to prove that an act of sexual violence also constitutes an act of torture.³⁵ Scarry also agrees that sexual violence constitutes torture but she provides no legal basis for this assertion as her study is phenomenological in nature.³⁶

Sellers prefer to focus both on rapes during armed conflict and on the use of rape as a tool during genocide. She submits that “the sexualised terror of the Rwandan genocide was a grave violation and belongs in the same classification as the Nazi Germany gas chambers and Cambodia’s killing fields. She also critiques determinations made by the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY) relating to sexual violence.³⁷

Bergoffen focuses on sexual violence as used during a genocidal war however she does not address politically motivated sexual violence during peacetime.³⁸ However Reeler writes that a link does exist between politically motivated violence against women and the election period. He concludes that human rights violations against women are more prevalent during election time.³⁹

Dugard also submits that torture and sexual violence have been found to be crimes against humanity. He explains that at Nuremburg, the Tribunal limited the scope of crimes against humanity to those crimes that had taken place during the scope of an armed conflict. However post Nuremburg these crimes are capable of occurring even in peacetime.⁴⁰

Although McGlyn and Munro address rape from both international and regional perspectives they both maintain the war-peace dichotomy and do not inquire about the use of politically motivated sexual violence in peacetime.⁴¹ Mazowiecki (Reporter for the United Nations Human Rights Commission) writes that rape is used in varying contexts. It is a tool utilised during war, it is instrumental during ethnic cleansing and is also used to debase and shame the cultural group.⁴²

³² J Tickner *Gendering world politics* (2001) 6; J Steans *Gender and international relations* (2006) 9; A Neier *War crimes: Brutality, genocide, terror and the struggle for justice* (1998) 11.

³³ UNSC Res. 1820 para 1.

³⁴ (as above) 4.

³⁵ C Forster-Towne ‘Exploring the plausibility of linking notions of terrorism and sexual violence by using the Great Lakes region as a case study’ (2011) 25.

³⁶ E Scarry *The body in pain: The making and unmaking of the world* (1985) 7.

³⁷ P Sellers ‘The appeal of sexual violence: Akayesu/Gacumbitsi cases’ in E Delport (ed) *Gender-based violence in Africa: Perspectives from the continent*.

³⁸ D Bergoffen *Contesting the politics of Genocidal Rape: Affirming the dignity of the vulnerable body* (2011) 19.

³⁹ P Reeler ‘Zimbabwean women and their participation in elections’ (2011) 2.

⁴⁰ J Dugard *International law: A South African perspective* (2011) 179; A Cassesse et al *The International Criminal Court: A commentary* (2002) 73.

⁴¹ C McGlyn & V Munro *Rethinking Rape* (2010) 21.

⁴² T Mazowiecki ‘Report on the situation of human rights in the territory of the former Yugoslavia’ (1993) 85.

From a human rights perspective, rape has been found to be a form of torture by the UN Special Rapporteur on torture, various international human rights treaty bodies and prominent human rights scholars.⁴³

Gagro opines that the prohibition against sexual violence is centred in the right to dignity inherent in every person. The added consideration of gender based violence originates from the universal acknowledgment that against women should be treated with special regard.⁴⁴

1.7 Significance of the study

This study aims to shed light on an issue that despite being highly prevalent in Africa is often neglected. The use of politically motivated sexual violence is closely tied to elections. Elections are a regular feature in most states and there is threat of re-occurrence and extreme violence with every election.

The aim of this study is to illustrate that sexual violence is not only perpetrated during armed conflict but is also used as a political tool during peace time. The study further postulates that although international criminal law has developed in favour of prosecuting sexual violence. However it is evident that there are no appropriate measures in place to ensure that these legal provisions are domestically implemented. Therefore in the absence of political will adequate steps must be taken by regional bodies and the international community to counter politically motivated violence.

1.8 Research Methodology

The work mainly utilises an analytical approach, however a descriptive approach is used where necessary to further explain and elucidate the overall study. The study commences through an analysis of the relevant literature relevant. It further establishes the high frequency of politically motivated sexual violence in Africa especially during and after election process. A descriptive approach is used to discuss the aims, manifestations and effects of politically motivated sexual violence. An analytical approach is used to examine the provisions of international criminal law on the subject. The findings are directly applied in the case study of Zimbabwe.

This research is based on information sourced using desktop, internet and library based research. The secondary sources used are books, studies, journal articles, news reports and research reports. In addition to this the researcher relies on the founding Statutes of the ICTR, ICTY, jurisprudence of the ad hoc Tribunals and the Rome Statute of the International Criminal Court (ICC).

1.9 Scope and Limitations

This work is focussed on politically motivated sexual violence occurring within peace time. The research will primarily focus on Africa. The case study on Zimbabwe will focus solely on political violence occurring in 2008 as perpetrated against females. The work is primarily concerned with accountability and justice and on this basis is limited to international criminal law.

⁴³ Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (3 July 2001) para 8.

⁴⁴ This has been particularly evident from the jurisprudence of the ICTY and the ICTR.

1.10 Overview of the Chapters

This study has five chapters addressing the research questions sought to be answered. This chapter comprises of background, definition of terms, statement of the research problem, research questions, literature review and the significance of the study. It also comprises research methodology, scope and limitations and includes an overview of the chapters.

Chapter two will outline the reasons why politically motivated sexual violence is used, the various manifestations thereof and the effects it has on survivors.

Chapter three assesses how politically motivated sexual violence is perceived and addressed in terms of international criminal law. This will be achieved through outlining the rights of the individual and the duties of the state.

Chapter four will critically discuss the use of politically motivated sexual violence in Zimbabwe. It will focus on pre and post-election violence that occurred in Zimbabwe during 2008. By focussing on the pre and post 2008 elections. The study will also focus on the failure of the Zimbabwean government to bring justice to victims of violations and hold perpetrators accountable. Finally concluding how to provide justice and redress for Zimbabwean survivors of politically motivated sexual violence.

Chapter five will provide overall findings and recommendations on deterring politically motivated sexual violence and fostering accountability.

CHAPTER TWO

Deconstructing politically motivated sexual violence: its aims, manifestations and effects

2.1 Introduction

This chapter focuses on accurately describing politically motivated sexual violence; why it is used (aims) how it is used (manifestations) and the consequences borne by survivors (effects).⁴⁵ It is necessary to thoroughly traverse this topic because chapter three will analyse the legal regime regulating politically motivated sexual violence. This will be done in light of recent developments in international criminal law.

2.1.1 Deconstructing 'politically motivated sexual violence'

Sexual violence is where violence comprising of a sexual element is committed. It is typically perpetrated against women, and encompasses rape, forced pregnancy, torture, prostitution, sexual mutilation and sexual slavery.⁴⁶ Politically motivated sexual violence is violence that is sexual in nature which is increasingly used by countries not engaged in armed conflict to further a political purpose. It operates by causing terror and humiliation amongst political dissenters.⁴⁷ It is also linked to the increase in the spread of Human Immuno deficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) amid turbulent regions in Africa.

There is a direct link between politically motivated sexual violence and a grossly dissatisfied electorate. In the past 5 years politically motivated sexual violence has been witnessed in Kenya, Zimbabwe and Cote d'Ivoire.⁴⁸ In all three, cases the violence occurred soon after a hotly contested national election.⁴⁹ Although other forms of political violence featured, a common trait was the repeated use politically motivated sexual violence. The vast majority of the violations are borne by females.

There is a higher propensity for political violence where political parties promote themselves based on their ethnicity. This is a common practise in many African states and was found to have significantly contributed to the 2007 post-election violence in Kenya.⁵⁰ Political violence has also occurred where the election process is generally accepted as being flawed and where the results are widely considered to be fixed or rigged. This was seen during the 2008 elections in Zimbabwe⁵¹ and the 2010 elections in Cote d'Ivoire.⁵²

⁴⁵ Here I rely on Chinkin who intentionally uses the term survivor in order to acknowledge the outstanding bravery, fortitude and initiative shown by females who have endured rape. Chinkin refers us to Minow 'Surviving Victim Talk' (1993) 40 *University of California Law Review* 1411 for reasons to desist from using the term victim.

⁴⁶ ICHRDD (n 16 above) 12.

⁴⁷ RAU Hiding place (n 20 above) 3; <http://www.thewip.net> (accessed 24 June 2012).

⁴⁸ IPI (n 4 above) 70; Strauss (n 3 above) 481.

⁴⁹ USPI (n 4 above) 1.

⁵⁰ <http://www.npr.org/templates/story/story.php?storyId=17764981> (accessed 19 September 2012); USPI (n 4 above) 1.

⁵¹ <http://www.mahalo.com/zimbabwe-election-2008> (accessed 19 September 2012); IPI (n 4 above) 70.

⁵² Strauss (n 3 above) 481.

Research indicates that between 19 - 25 % of all elections in Africa end in violence.⁵³ Once political violence occurs in a country it often re-occurs at a later election date⁵⁴ often increasing and surpassing the magnitude of violence and destruction as previously experienced.⁵⁵ It is submitted that more outbursts of violence will continue if concrete steps are not taken to rectify the situation especially in African states where electoral institutions are weak and politics is ethnically charged.

2.2 Background

The term politically motivated sexual violence is relatively new to international law⁵⁶ and there is a lack of clarity regarding its significance.⁵⁷ Rape as a form of sexual violence has been recognised as an act of genocide, war crime and a crime against humanity.⁵⁸ The global community is more familiar with concepts such as 'genocide through sexual violence'⁵⁹ and 'sexual violence as a war crime'.⁶⁰ Although all three concepts are sexual violations, they are dissimilar in a number of crucial ways.

2.2.1 Genocide through sexual violence

Genocide is defined as:⁶¹

an act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The acts are limited to: a) killing members of the group;⁶² (b) causing serious bodily or mental harm to members of the group;⁶³(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;⁶⁴ (d) imposing measures intended to prevent births within the group;⁶⁵ (e) forcibly transferring children of the group to another group.

Genocide through sexual violence was witnessed during the conflict in the former Yugoslavian where sexual violence was used as a form of ethnic cleansing. Genocide was found to have occurred because on the basis of article 6(b) of the Rome Statute, as serious bodily or mental harm was caused by Bosnian Serb forces to Bosnian Muslims. Muslim women were raped and held as sexual slaves by Bosnian Serb soldiers.⁶⁶ The women were raped and impregnated in order to destroy the ethnic community. The ethnic community would shun and

⁵³ USPI (n 4 above) 1.

⁵⁴ Kenya experienced post-election violence in 1992 and 2007, Cote d'Ivoire in 2000 and 2010 and Zimbabwe as early as early as 2000.

⁵⁵ In Kenya, Zimbabwe and Cote d'Ivoire the violence and destruction during recent elections were the worst that had ever been witnessed.

⁵⁶ It is submitted that the term has not yet crystallised and has not become universally recognised term.

⁵⁷ IDIA (n 29 above) 2; United Nations High Commissioner for Human Rights 'Report from OHCHR Fact-finding Mission to Kenya' (2008) 13.

⁵⁸ UNSC Res. 1820 para 4; D Mitchell 'The prohibition of rape in international humanitarian law as a norm of *Jus Cogens*: Clarifying the doctrine' (2004) 15 *Duke Journal of Comparative and International Law* 235.

⁵⁹ *Prosecutor v Jean Paul Akayesu*, Case No: ICTR-96-4-T, Judgement (2 September 1998) ; *Prosecutor v Alfred Musema*, Case No: ICTR-96-13-T , Judgement (27 January 2000) ; *Prosecutor v Laurent Semanza*, Case No: ICTR-97-20-T, Judgement (15 May 2003) ; *Prosecutor v Gacumbitsi* , Case No: ICTR-2001-64-A ,Judgement (7 July 2006).

⁶⁰ E Trabiucchi 'Rape warfare and international humanitarian law' (2008) 6 *Journal of the Sociology of self-knowledge* 39; Physicians for Human Rights (PHR)'*Rape as a Weapon of War: Accountability for Sexual Violence in Conflict*' (2008) 1.

⁶¹ Rome Statute art 6(e).

⁶² Convention on the Prevention and Punishment of the Crime of Genocide; Rome Statute art 6(a). The Rome Statute is the legal basis for the International Criminal Court and confers it with its jurisdictional mandate.

⁶³ Rome Statute art 6(b).

⁶⁴ Rome Statute art 6(c).

⁶⁵ Rome Statute art 6(d).

⁶⁶ *Prosecutor v. Kunarac, Kovac, Vukovic*, Case No: IT-96-23&23/1, Judgement (22 February 2001); *Prosecutor v. Krstić*, Case No: IT-98-33, Judgement (2 August 2001).

excommunicate a Muslim women impregnated by a Bosnian Serb.⁶⁷ The women were also kept captive until it was too late for them to abort the foetus.⁶⁸

2.2.2 Sexual violence as a war crime

The Rome Statute defines war crimes “as grave breaches of the Geneva Conventions of 12 August 1949 as well as other serious violations of laws and customs applicable in an international armed conflict.”⁶⁹ A war crime is a crime that was perpetrated within the context of armed conflict or a related scope.⁷⁰ Article 8 includes ‘wilfully causing great suffering or serious injury to body or health’⁷¹ and expressly mentions rape or any other form of sexual violence as examples of war crimes.⁷²

An example of sexual violence as a war crime is the DRC. The DRC has been named ‘rape capital of the world’ due to its legacy of mass rape.⁷³ The conflict in the DRC occurred from the 1990’s to mid-2000,⁷⁴ during this time all the parties to the armed conflict committed acts of sexual violence against the civilian population. Government forces, national and foreign, in addition to numerous rebel groups raped females and held them as sexual slaves. Females were also severely tortured and sexual mutilation was rife.⁷⁵ This occurred often as reprisals against the civil population and as a routine part of the battle strategy.⁷⁶

Unlike ‘genocide through sexual violence’ the aim of politically motivated sexual violence is not to destroy in whole or in part a group but is meant to inflict pain and cause suffering towards the political opponent. Politically motivated sexual violence is also distinguishable from ‘sexual violence as a war crime’ because it need not necessarily occur within the scope of an armed conflict but is often directly related to a political event for example elections. However the distinction is not to suggest that it is any less a violation or that it should be afforded any less opportunities in respect to obtaining redress.

⁶⁷ J McHenry ‘The prosecution of rape under international law’ (2002) 35 *Vanderbilt Journal of Transitional Law* 1271; Human Rights Watch (HRW Foca) ‘A closed dark place: Past and present human rights abuses in Foca’ (1998)1.

⁶⁸ Chinkin (n 27 above) 333.

⁶⁹ Rome Statute art 8(2)(a).

⁷⁰ ICHRDD (n 16 above) 12.

⁷¹ Rome Statute art 8(2)(a)(iii).

⁷² Rome Statute art 8(2)(b)(xxii).

⁷³ J Kippenberg ‘Democratic Republic of the Congo—The legacy of mass rape: Prosecuting sexual violence in the Congo war,’ unpublished report cited in Cherie Booth & Max Du Plessis ‘The international criminal court and victims of sexual violence’ (2005) 18 *South African Journal of Criminal Justice* 242.

⁷⁴ AIDS Free World (AFW Background) ‘Background paper: An analysis of domestic and International laws relating to rape and sexual violence in the Democratic Republic of the Congo’ (2009) 4; ‘Eight years of darkness’ *The Guardian* 31 January 2005 1.

⁷⁵ ICHRDD (n 16 above) 14.

⁷⁶ ICHRDD (n 16 above) 7; United Nations Office of the High Commissioner (UNOHC) ‘Report of the mapping exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003’ (2010)15.

2.3 Features of politically motivated sexual violence

As with other forms of sexual violence, politically motivated sexual violence manifests itself differently in varying contexts. However irrespective of the situation, the perpetrator employs it with a specific aim in mind and the effects are detrimental towards the survivor of the sexual violence and the family of the survivor. This section discusses the aims, manifestations and effects of the violence

2.3.1 Intended Target

Prior to commencing this section of the work it must be clarified that politically motivated sexual violence is very much a gendered crime. Although males are survivors of rapes, sexual violence disproportionately affects females. It is submitted that females are not sexually violated merely for the sexual gratification of men. Females are also not sexually violated merely because they do not have the physical strength to resist the sexual advances of men. It is submitted that women are sexually violated due to the roles females play in the community and in society at large.

In a recent study on politically motivated sexual violence, women submitted the following as reasons why females are usually the intended target of sexual violations:

- I. 45 % of the women remarked that women experienced different consequences, as compared to men, after sexual violence;
- II. 18 % opined that women were more vulnerable because the possibility of being raped was a reality for women;
- III. 15% submitted that women were not physically as strong as men and would struggle to repel a sexual attack and
- IV. 8% believed that politically motivated sexual violence was directed against women in an effort to punish and send a message to their husbands.⁷⁷

Another study on politically motivated sexual violence asked a different group of women why females were targeted and sexually violated. The reasons they provided were largely similar to the views of the above study group. They added that women were intended targets:

- I. Women are responsible for a variety of things while men are relieved from shouldering obligations in society;
- II. The perpetrators of politically motivated sexual violence are usually men;
- III. During times of instability a man is able to flee and go into hiding, a woman must take care of her children and property and is unable to flee and
- IV. A woman plays a key role in society and is central to the family unit. She is often sexually violated as a result of the political activities of her family members.⁷⁸

⁷⁷ African Democracy Institute (ADI) & International Center for Transitional Justice 'Preying on the weaker sex: Political violence against women in Zimbabwe' (2010) 3.

2.4 Aims

Some of the main reasons for using politically motivated sexual violence possibly include:

2.4.1 Intimidate political opponents

Politically motivated sexual violence is applied as a psychological weapon against political opponents. It creates an atmosphere where fear and volatility prevail which serves to disgrace political opponents and weaken their political beliefs.⁷⁹ “In Zimbabwe, the rape of female opposition party supporters and their families has proven to be terrifyingly effective in spreading terror and fear.”⁸⁰ Politically motivated sexual violence aims to scare political dissidents into silence or into passivity.

2.4.2 Demean the community

Rape has been universally recognised and accepted as a means used to humiliate and disintegrate communities, especially because of the harmful effects that sexual violations bring about in a community.⁸¹ It leads to the disintegration of the family unit and impacts the entire community. In certain instances, the survivor is excluded from the community and faces stigma.

2.4.3 Emasculate political opponents

Due to the role she plays in life, a woman is often regarded as being the property of the man in her life (her father, uncle, and husband) .Therefore the rape of a woman is not a personal attack against her but is an attack against her male possessor. It brings shame and guilt to her male possessor who failed to protect and safe-guard his property. Ultimately political rape is a forum where one man attacks another man by raping a female.⁸² Therefore females are sexually violated in an effort to emasculate males and make them feel incapable.

2.5 Manifestations

Sexual violence is commonly understood to be a form of violence intentionally directed against a person’s most intimate sphere and which aims to demonstrate power and superiority by humiliating and debasing the person.⁸³ Below follows a brief discussion of the various manifestations of sexual violations which have been experienced by survivors of politically motivated sexual violence.

Rape is the invasion of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body by force, threat of force, coercion, taking advantage of a coercive environment or against a person incapable of giving genuine consent.⁸⁴

⁷⁸ Research and Advocacy Unit & Institute for Democracy in Africa et al (RAU Tough) ‘When the going gets tough the man gets going: Zimbabwean women’s views on politics, governance, political violence and transitional justice’ (2010)7.

⁷⁹ Forster-Towne (n 35 above) 34.

⁸⁰ Forster-Towne (n 2 above) 1; PHR (n 60 above) 2.

⁸¹ Forster-Towne (n 35 above) 34; UN Resolution 1820.

⁸² GCVCH (n 7 above) 2; Forster-Towne (n 2 above) 2.

⁸³ N Musoke ‘Responses to sexual crimes in armed conflict and post-conflict situations’ available at www.isis.or.ug (accessed 10 October 2012).

⁸⁴ Rome Statute Elements of Crimes art 7(1)(g), art 8(2)(b)(xxii) & art 8(2)(e)(vi); Amnesty International (AI) ‘Rape and sexual violence : Human rights law and standards in the International Criminal Court’ (2011) 12.

Mutilation involves the cutting and severing of genital organs for non-medical reasons. The process ranges from a partial to complete cutting, the removal of genitalia. This can include forced circumcision⁸⁵ and the insertion of foreign objects (bottles and sticks) into the genitals.⁸⁶

Sexual slavery occurs where a person is confined against their will. The individual is then also forced to engage in sexual activities against their will. This includes having sex with the captor at his/her volition.⁸⁷

Other Inhumane acts is a term used to describe an act that causes great suffering or serious injury to body or to mental or physical health and is as serious as other crimes such as torture, rape, and slavery, forced pregnancy and enforced sterilization.⁸⁸

2.6 Effects

The detrimental effects of sexual violence on the survivor are numerous and whilst others are brief some may last for up to several years or forever. This section addresses the various consequences of sexual violence particularly those prevalent in situations of political violence.

2.6.1 Social consequences

Exclusion from community life

A female may be ousted from her community because she signifies the failure of her community to ensure her safety. In certain instances, she is blamed for her rape and this leads to feelings of shame and further ostracisation. The husband may separate from her because he feels he failed to protect her and holds himself personally responsible for her ordeal. The husband may also fear that she has contracted HIV/AIDS.⁸⁹ Women, who have endured acts of sexual violence, often resort to abortion and infanticide from fear of giving birth to the perpetrators child.⁹⁰

2.6.2 Socio-economic consequences

Poverty

A woman who has been excluded from her community, as result of being sexually assaulted faces several challenges in providing for herself. These challenges hamper her ability to fend for herself. She has been excluded from society, family and the economy.

A woman who relied on agricultural produce to feed herself and her family loses her source her income when she is outcast by her community. Women fear going out into the fields in case they are sexually violated again.

⁸⁵ Forster-Towne (n 35 above) 38; CIQ (n 1 above) 258.

⁸⁶ RAU Hiding place (n 20 above) 2.

⁸⁷ Forster-Towne (n 35 above 39); ICHRDD (n 16 above) 14.

⁸⁸ ICHRDD (n 16 above) 14.

⁸⁹ Forster-Towne (n 35 above) 45.

⁹⁰ GCVCH (n 7 above) 5.

Another factor that causes poverty is that often when a woman is sexually violated, the perpetrator steals her possessions. Some of which were necessary to for her means of attaining income.⁹¹.

2.6.3 Physical and Health and related consequences

Physical injury

The physical effects of sexual violence are often visible and shocking. They include bruising, bleeding, and the tearing of certain parts of the body.⁹² Many acts of sexual violence are committed in such a brute-fashion that they bring about grave injuries which demand extensive and long-term treatment. Survivors endure internal and external bleeding, excruciating pain, and discharge and if extreme force was used a broken pelvis and internal scarring is to be expected.⁹³

HIV/AIDS

The combination of sexual violence and HIV/AIDS has been coined a 'Disastrous formula'. This is because sexual violence grossly accelerates the spread of HIV/AIDS and it can swiftly affect an entire community or region. Due to resource constraints there is no Post Exposure Prophylaxis (PEP) or test kit and people infected by the virus often are unaware of their HIV status. They then go back to their communities and unknowingly infect their sexual partners.⁹⁴

In certain cases women are expelled from their communities because she contracted HIV/AIDS as result of her rape or sexual violation. The result is that she is left alone to fend for herself and her children without the assistance of her community, family and friends. The rate of HIV amongst women is higher as compared to men. This disproportionately affects women of a childbearing age and often leaves very young children with no parents.⁹⁵ It also creates a situation where children look after their own siblings in the absence of their parents who died from HIV/AIDS.

Sexually Transmitted Infections

The spread of STI's is increased through sexually motivated violence. In certain regions the more common STI's include syphilis and gonorrhoea. Other opportunistic infections such as Tuberculosis (TB,) skin irritations and gynaecological conditions set in if a STI remains untreated. Furthermore the damage done to the genital tissue during rape (especially in cases of gang rape) greatly adds to the victim's ability to be infected by an STI. It is difficult to treat the infections due to a lack of available and affordable healthcare.⁹⁶

⁹¹ Forster-Towne (n 35 above) 46.

⁹² Forster-Towne (n 35 above) 47; PHR (n 60 above) 2.

⁹³ AI DRC (n 6 above) 26; GCVCH (n 7 above) 5.

⁹⁴ Forster-Towne (n 35 above) 47; AI (n 84 above) 12.

⁹⁵ AI DRC (n 6 above) 28.

⁹⁶ Treatment for TB varies from between 6 and 12 months. The most important thing being that the drug regiment is strictly adhered to. In this regard the WHO has recommended the DOTS (Directly Observed Treatment Short course) programme, which requires that observation by health personnel is provided for.

2.6.4 Psychological consequences

Stress-disorders

Survivors often suffer from a range of conditions including depression, post-traumatic stress disorder, anxiety disorders and eating disorders.⁹⁷ The nature of these conditions is that it affects an individual's ability to take care of themselves and to work/look after their families etc. This is often compounded by feelings of shock, intense fear, loss of self-esteem, shame and self-blame. Often the incident is ingrained on the survivor's mind and the memory is frequently repeated involuntarily; this happens through nightmares and flashbacks. Such effects may last up to several years.⁹⁸

2.7 Conclusion

Politically motivated sexual violence has proven to be a useful tool in attacking one's political opponents. It successfully humiliates political dissidents and creates a political environment where fear is used to quell the opposition. It is a prevalent occurrence in numerous African states because it is intrinsically linked to the election process. Politically motivated sexual violence takes various manifestations, all of which are brutal and shocking. This is indicative of the intention of the perpetrator to cause untold pain and suffering to the intended target. This chapter has revealed that not only is it a harrowing ordeal for a female to experience but that the survivor must bear the consequences of the sexual attack. Some of these effects are long-term and are arduous to bear.

It is submitted that the use of sexual violence against women during periods of political violence is not random and spontaneous. Women are particularly selected as victims because they are 'an easy target'. Due to the social position played by women, women are sexually violated because it is an effected tool in quenching opposition. Perpetrators rape women in order to send out a conclusive message that political dissent will not be tolerated. It is equally important that the election process in all states is free and fair because tainted elections result in political violence. Political violence gives rise to politically motivated sexual violence. This chapter has highlighted the harrowing consequences that women face, living in the aftermath of sexual violence. In light of this impunity must be done away with.

Due to the heroic efforts of civil society and key influential figures, the international community is aware of the occurrence and the effects of politically motivated sexual violence. This chapter proposes that the time is right for adequate measures to be taken to remedy this problem. It is necessary to free the countless women trapped under its yoke and who still live in the aftermath of sexual violence.

⁹⁷ Forster-Towne (n 35 above) 49; Trabiucchi (n 60 above) 46.

⁹⁸ AI DRC (n 6 above) 28; PHR (n 60 above) 3.

CHAPTER THREE

Politically Motivated Sexual Violence: A legal perspective

3.1 Introduction

Sexual violence is an offence under international criminal law and perpetrators may be prosecuted and held individually liable.⁹⁹ Infact UNSC Resolution 1820 expressly states that “rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide”.¹⁰⁰ Where sexual violence is perpetrated as part of a widespread or systematic attack directed against any civilian population, it qualifies as a crime against humanity.¹⁰¹ The objective of this chapter III is to determine whether politically motivated sexual violence qualifies as a crime against humanity. This will be achieved by tracing the historical development of the term ‘crime against humanity’ and identifying the elements that must be met for it to exist. This chapter will specifically focus on sexual violence as a crime against humanity. It will further investigate instances when sexual violence qualifies as an act of torture and is consequently a crime against humanity. This assessment will be made by focussing on the Rome Statute and the jurisprudence of the Special Court for Sierra Leone and the ad hoc Tribunals, the ICTR and the ICTY.

Violence against women is a complex and multi-layered concept involving power dynamics and gender stereotypes. According to the Beijing Declaration and Platform for Action 1999 it encompasses: “physical, sexual and psychological violence occurring within the community, including rape, sexual abuse, and sexual harassment. Physical, sexual and psychological violence perpetrated or condoned by the state”.¹⁰²

3.1.2 International criminal law

International criminal law comprises those aspects of international law that deal with crimes which have an international component or feature.¹⁰³ It is best expressed by the Preamble to the Rome Statute which states ‘The most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’.¹⁰⁴

International crimes are those offences that jeopardise the overall peace and orderliness of the entire international community.¹⁰⁵ All states have a vested interest in thwarting the occurrence of such crimes and are generally willing to devote considerable resources for that purpose.

⁹⁹ Sellers (n 37 above); *Akayesu* (n 59 above) 19.

¹⁰⁰ SCR 1820 para 4.

¹⁰¹ Rome Statute art 7(1g); United Nations Research Institute for Social Development ‘Your justice is too slow : will the ICTR fail Rwanda rape victims ?’ (2005) 10.

¹⁰² United Nations report on the Fourth World Conference for Women, Beijing 4-15 September 1995, available at <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf> (accessed 28 September 2012).

¹⁰³ A Aust *Handbook of International Law* (2005) 263.

¹⁰⁴ Preamble to the Rome Statute.

¹⁰⁵ Dugard (n 40 above) 157.

The organ tasked by the international community to prosecute international crime is the ICC.¹⁰⁶ As opposed to the ad hoc Tribunals the ICC is a permanent court and was created with the intention to try individuals responsible for the most heinous offences of universal concern. In July 1998 160 states agreed to the formation of the ICC and it was established in terms of the Rome Statute¹⁰⁷. The Rome Statute came into force on the 1 July 2002¹⁰⁸ and the 19 judges were officially sworn in on 11 March 2003.¹⁰⁹ The seat of the Court is at The Hague, in the Netherlands¹¹⁰ and the current prosecutor is Fatou Bensouda from the Gambia.¹¹¹

The Rome Statute is the founding document of the ICC and it functions in conjunction with the Elements of the crimes as a supplement.¹¹² Currently it has 121 state party ratifications and is steadily being domesticated into the national laws of states.¹¹³ The Rome Statute further confers jurisdiction on the ICC to hear cases relating to genocide, war crimes and crimes against humanity.¹¹⁴

3.2. Crimes against humanity

The idea of a crime against humanity held no weight until the twentieth century.¹¹⁵ However over time it became inevitable for states to acknowledge the need to agree upon certain global norms that complied both with law and humanity.¹¹⁶ The term “crimes against humanity” was initially used by France, the United Kingdom and Russia to express their disapproval of the cruelties committed by Turkish forces directed their Greek and Armenian citizenry in 1915 (during World War I).¹¹⁷ Unfortunately no prosecutions ever took place and the massacres went unpunished but the term was brought up once again at Nuremburg post-World War II.¹¹⁸ The term ‘crimes against humanity’ was later used at the Nuremburg and Tokyo Tribunals to successfully prosecute individuals for crimes that offended humaneness and were consequently the concern of the international community.¹¹⁹ Jurisprudence from Nuremburg strongly indicates that crimes against peace pertain to the execution of acts of aggression by state authorities.¹²⁰ Post- Nuremburg, in 1961 the Supreme Court of Israel convicted Eichmann in terms of a Israeli law of 1951 for war crimes, crimes against the Jewish people and crimes against humanity.¹²¹ This was possible because Israel's municipal law reflected the existing position under international law.¹²² This was indicative of a progression in the understanding of what constituted crimes against humanity. It also served to

¹⁰⁶ Dugard (n 40 above) 175; E Martin (ed) *Oxford Dictionary of Law* (2003) 260.

¹⁰⁷ Martin (n 106 above) 260.

¹⁰⁸ Rome Statute: Introductory text; <http://www.un.org/law/icc/> (accessed 20 September 2012).

¹⁰⁹ n 40 above 174; <http://www.icc-cpi.int/iccdocs/PIDS/publications/JudgesENG.pdf> (19 September 2012)

¹¹⁰ n 40 above 175; Martin (n 106 above)260.

¹¹¹ <http://www.icc-cpi.int/Menu/ICC/> (accessed 21 October 2012).

¹¹² Rome Statute art 9.

¹¹³ <http://www.icc-cpi.int/Menu/ICC/> (accessed 21 September 2012).

¹¹⁴ Rome Statute art 5-8.

¹¹⁵ McHenry (n 67 above) 1275.

¹¹⁶ Geoffrey Robertson *The struggle for global justice* (1999) 12.

¹¹⁷ Treaty of Sevres 1920 (UK Treaty Series); V Adrian ‘Genocide as a problem of national and international law: The World War I Armenian case and its contemporary legal ramifications’ (1989) 14 *Yale Journal of International Law* 221.

¹¹⁸ Dugard (n 40 above) 178; Cassese (n 40 above) 73.

¹¹⁹ n 40 above 178; W Schabas *An introduction to the International Criminal Court* (2004) 42.

¹²⁰ M Shaw *International Law* (2003) 1595.

¹²¹ Shaw (n 120 above) 595; Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) para 77–78 U.N. Doc. S/1994/674.

¹²² n 120 above 595.

show that a determination could be made regarding crimes against humanity beyond the scope of an armed conflict.

3.3 Legal Analysis

The ICC adopted a customary law international definition similar to the ICTY Tadic Appeals Judgment.¹²³ As such Article 7 of the Rome Statute stipulates that: ¹²⁴

Crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender (as defined in paragraph 3) , or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons;(j) the crime of apartheid;(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

In simpler terms it may be accepted that the ICC is conferred jurisdiction for crimes against humanity, where an act from the eleven above mentioned categories is “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹²⁵

Therefore it must be established that:

1. there was an attack ;
2. the actions of the perpetrator were a part of the overall attack ;
3. the attack was evidently “directed against any civilian population” ;
4. the attack could be described as widespread and systematic in nature and
5. the perpetrator was aware that their conduct occurred within a broader context and they also knew that their conduct was a component of the overall attack.¹²⁶

3.4 Politically motivated sexual violence as a crime against humanity

Rape is recognised as a crime against humanity in article 7(g) of the Rome Statute and it was included as a crime against humanity in article 3(g) of the ICTR statute and article 5(g) of the ICTY statute. Unlike the two ad hoc tribunals, the ICC includes other sexual violations (sexual slavery, enforced prostitution, forced pregnancy,

¹²³ *Tadic case* (n 23 above)305 ; Women’s Initiative for Gender Justice (WIGJ)’Sexual violence and international criminal law : An analysis of the ad hoc Tribunal’s jurisprudence and the International Criminal Court’s Elements of crimes’ (2005) 12.

¹²⁴ Rome Statute art 7.

¹²⁵ Rome Statute art 7.

¹²⁶ WIGJ (n 123 above) 13; UNOHC (n 76 above) 271.

enforced sterilization, or any other form of sexual violence of comparable gravity) as crimes against humanity.¹²⁷ This section proposes that rape may in certain circumstances qualify as an act of torture and may therefore qualify as a crime against humanity on two grounds. Firstly rape, as a form of politically motivated sexual violence, will be shown to be a violation of article 7 of the Rome Statute. Secondly it will be argued that where sexually motivated political violence satisfies the requirements for torture, it will qualify as a crime against humanity.

3.5 Rape and sexual violence as crimes against humanity

The ICC elements of crimes stipulate that the elements of rape are:¹²⁸

- I. *The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.*
- II. *The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.*
- III. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*
- IV. *The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*

3.5.1 Penetration

“The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim...”

In order to prove that rape has occurred to a degree that warrants being termed a crime against humanity, it must be shown that rape has actually been perpetrated. This act of rape should be in line the definition of the ICC, which requires that some form of penetration take place. It is mandatory to show that the victim was penetrated sexually by the perpetrator either through their sexual organ, an object or any other part of the body.

This was seen in the case of *Delalic*, which appeared before the ICTY, *Delalic* (the accused) repeatedly raped Ms Antic (the complainant) and penetrated her both anally and vaginally.¹²⁹ In similar cases survivors of politically motivated sexual violence attest to being vaginally penetrated using a foreign object.¹³⁰ Therefore where the

¹²⁷ Rome Statute; Statute of the International Criminal Tribunal for Rwanda; Statute of the International Criminal Tribunal for the former Yugoslavia.

¹²⁸ Rome Statute Elements of the Crimes art 7 (1) (g).

¹²⁹ *Prosecutor v. Delalic, et al*, Case No: IT-96-21, Judgment (Nov. 16, 1998) 501.

¹³⁰ RAU Hiding place(n 20 above) 2; *Kunarac* (n 66 above) 61.

perpetrator engages in penetration through the sexual organs or through the use of an object and penetrates the victim vaginally and/or anally, this satisfies the 1st element.¹³¹

3.5.2 Lack of consent

“The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power...”

The second element requires a show of involuntariness, there must be an indication that the invasion was perpetrated through the use of force or coercion. Furthermore that it occurred without the consent of the perpetrator. The provision also provides for instances where an individual is unable to fully consent.

In the *Foca* case, heard by the ICTY Appeals Chamber, it was stated that rape occurs where the sexual penetration took place without the consent of the complainant. Therefore it must be shown that the complainant was raped despite their refusal. Another relevant factor to consider is that the perpetrator must demonstrate the intention to commit rape fully knowing that the complainant does not consent to the sexual penetration.¹³² Where this is shown penetration is found to have occurred. This principle was endorsed and applied in the Trial Chamber decisions of *Kvočka*, *Kamuhanda*, *Semanza*, *Stakic*, *Nikolic*, *Kajelijeli*, *Gacumbitsi*, and *Muhimana*.¹³³

The Appeals Chamber also went on to explain that circumstances exist where it is not possible to give consent freely and voluntarily, this is to be assessed in light of the environment and surrounding factors; for instance an on-going war or widespread political violence. This is where “true consent is not possible”.¹³⁴ This occurs where the victim is given a choice between two unfortunate alternatives such as being sexually violated or killed.¹³⁵ This principle was applied in both *Furundzija* and *Celebici* cases as heard before the ICTY.¹³⁶

In the case of survivors of politically motivated sexual violence, sexual violence did occur through the use of force, threat of force or coercion. Furthermore despite these protests the perpetrator exerted his own will and sexually violated the individual.

3.5.3 Widespread and systematic attack

“The conduct was committed as part of a widespread or systematic attack directed against a civilian population.”

The Rome Statute broadly describes an attack as “a course of conduct involving the multiple commissions of actsagainst any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such

¹³¹ *Kunarac* (n 66 above) 61.

¹³² *Kunarac* (n above) 460.

¹³³ *Prosecutor v. Kvočka*, Case No: IT-98-30/1, Judgment (Nov. 2, 2001) 16; *Prosecutor v. Kamuhanda*, Case No: ICTR-97-23-S, Judgment & Sentence (Sept. 4, 1998) 707; *Prosecutor v. Semanza*, Case No : ICTR-97-20-A, Judgment (May 20, 2005) 46; *Prosecutor v. Stakic*, Case No: IT-97-24, Judgment (July 31, 2003) 755; *Prosecutor v. Nikolic*, Case No : IT-94-2, Sentencing Judgment (Dec. 18, 2003) 113 ; *Prosecutor v. Kajelijeli*, Case No: ICTR-98-44A-T, Judgment & Sentence (Dec. 1, 2003) 5.; *Prosecutor v. Gacumbitsi*, Case No : ICTR-2001-64-T, Judgment (June 17, 2004) 325.

¹³⁴ *Kunarac* (n 66 above)30.

¹³⁵ ICHRDD (n 16 above) 1.

¹³⁶ The Appeals Chamber reported that in situations where the rape was seeded in crimes against humanity or war crimes “will be almost universally coercive” and that it will not be possible to show true consent.

attack.”¹³⁷ In order for certain conduct to be considered as crimes against humanity it should meet a certain threshold.¹³⁸ The determination of being a “widespread attack” is made on the basis of scale of the attack, the number of humans who were targeted or “the cumulative effect of a series of inhumane acts or the specific effect of a single, large-scale act”.¹³⁹ An assessment of “systematic attack” relates to the organisational component. It is investigated whether the acts committed were planned and organised or are random and spontaneous in nature.¹⁴⁰ A crime against humanity can therefore comprise of a single act as long as the sole act constitutes a part of a larger attack. The attack need not be a military attack and it need not occur within the scope of an armed conflict.¹⁴¹

In reference to element 3 use of the word ‘or’ means that it either “widespread or systematic” needs to be proven, it is not necessary to show both. In cases dealing with politically motivated sexual violence the attacks are capable of being widespread and systematic.

In respect to being widespread, although each incident of sexual violence constitutes a single act, the “cumulative effect” of politically motivated sexual violence is usually very high. This implies that despite the relatively low figures documenting the human rights violations, a large part of the population is detrimentally affected. This is evident from the figures from Kenya, during post-election violence, where 3 000 women were raped but over 300 000 people became internally displaced.¹⁴² A large percentage of the internally displaced were female. Sexual violence contributes significantly to feelings of insecurity and even necessitates fleeing or relocating. Occurrences of politically motivated sexual violence are also systematic where the attack was planned. This is evident from the violence being spread out over various regions and being perpetrated at the instigation of a central figure or command.

3.5.4 Intention of the perpetrator

“The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”

The issue of intent in respect to sexual violence was addressed in the *Foca* case, heard before the ICTY, where the Court discussed the true intention of a perpetrator who commits rape. Despite the obvious sexual gratification gained from committing an act of sexual violation; the main aim or a part of the aim is to support and re-inforce the larger plan or policy which is the attack directed against the civilian population.¹⁴³ This requirement further entails that crimes against humanity may be perpetrated for entirely personal reasons because the purpose of the accused joining in on the attack is irrelevant.¹⁴⁴

¹³⁷ Rome Statute art 7(2)(a).

¹³⁸ The assessment is determined factually per matter raised.

¹³⁹ *Prosecutor v Kordić and Cerkez*, Case No: IT-95-14/2-A, Appeals Judgment (17 December 2004) 94; *Kunarac (n 66) 94*.

¹⁴⁰ *As above*.

¹⁴¹ Rome Statute art 7.

¹⁴² M Roberts ‘Conflict analysis of the 2007 Post-election Violence in Kenya’ (2009)2.

¹⁴³ *Kunarac (n 130 above) 10*.

¹⁴⁴ *Kunarac (n 130 above) 103*.

It is also important to recall that the initial objective of developing the notion of crimes against humanity was for the protection of civilians against the brute force of the state. Hence the pre-requisite that the widespread and systematic attack is directed against a civilian group. The word civilian has been accorded its ordinary meaning by the ICTY, ICTR and the Special Court for Sierra Leone. A civilian population is multi-layered concept including ordinary civilians and individuals who are no longer taking part in hostilities. It is also suggested that it be understood in a wide sense to mean a population essentially comprising of civilians. Thus even populations that accommodate non-civilians may be termed civilian populations as long as most of the occupants are civilians.¹⁴⁵ An example is the refugee camps in the DRC which housed Hutu refugees are regarded as civilian populations despite the fact that they were also being used as base by the Interhamwe (Rwandese rebels).

In respect to politically motivated sexual violence, the aim of perpetrators is to target political opponents.¹⁴⁶ During the post-election violence in Cote d'Ivoire supporters of both Outtara and Gbagbo committed human rights violations against each other.¹⁴⁷ In many societies neighbours are aware of the political views of their community members and political supporters wear political apparel such as T-shirts etc. and this makes readily identifiable. Often attacks made at political rallies or against communities adhere a majority of people support the political dissidents. A political community qualifies as a civilian population. It is submitted that politically motivated sexual violence can be perpetrated against a political population.

3.6 Politically motivated sexual violence as torture

In order to show that sexual violence constitutes an act of torture it must first be shown that the act of sexual violence occurred and then submissions should be made the simultaneous act of torture. In the context of political violence sexual violence it is used to create an environment of fear and terror. It is used as an instrument of oppression against the would-be victim.¹⁴⁸ Under International criminal law torture is "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."¹⁴⁹ This section intends to examine whether indeed certain forms of politically motivated sexual violence qualify as acts of torture.

Torture was stipulated as a crime against humanity in Article 5(f) of the ICTY Statute and Article 3(f) of the ICTR Statute. Torture is a crime against humanity under Article 7(1)(f) of the Rome Statute.¹⁵⁰

According to the ICC Elements of Crimes of the ICC the elements of torture are as follows:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

¹⁴⁵ Prosecutor v *Limaj*, Case No: IT-03-66-T, Judgement (30 November 2005) 186.

¹⁴⁶ Forster-Towne (n 2 above) 12.

¹⁴⁷ Strauss (n 3 above) 481; <http://www.onuci.org/IMG/pdf/doc-68.pdf> (accessed 8 September 2012).

¹⁴⁸ Reeler (n 39 above) 15.

¹⁴⁹ Rome Statute art 7.

¹⁵⁰ Rome Statute art 7; Statute of the International Criminal Tribunal for Rwanda art 3(f); Statute of the International Criminal Tribunal for the former Yugoslavia art 5(f).

2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.¹⁵¹

Rape and various other forms of sexual violence have been found to be acts of torture by the ad hoc tribunals. This occurred where the sexual violation was shown to meet the requirements of torture.¹⁵² There is no longer the requirement that the torture be in “pursuit of information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.”¹⁵³ Unlike the ad hoc tribunals the Rome Statute does not include this element. There is also no longer the requirement that the perpetrator of an act of torture be an official or that the act of torture was carried out on instruction or with the consent of an official.¹⁵⁴

3.6.1 The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

It is trite that rape and sexual violence are harrowing physical ordeals which do cause both severe physical and mental pain and suffering.¹⁵⁵ In the *Kunarac* Appeal of the ICTY, the Appellant Kunarac asserted that the rapes he committed could not inflict severe physical or mental pain and suffering. He further argued that the rape survivors did not show the effects of having suffered pain.¹⁵⁶ The ICTY rejected his arguments and elucidated that once it has been proven that rape has occurred it can be accepted that the occurrence of the rape implies the presence of severe physical or mental pain or suffering even in the absence of a medical certificate.¹⁵⁷

Therefore when an individual experiences politically motivated sexual violence such as rape and other sexual violations, it is accepted that he/she has suffered or endured pain and the first element of torture is satisfied. In certain cases of politically motivated sexual violence, the rape occurs in public or the individual is sexually violated in the presence of their family and friends. This has also been found by the ICTY to inflict severe mental harm equal to torture on the individual being raped.¹⁵⁸

¹⁵¹ Rome Statute Elements of the Crime art. 7(1)(f).

¹⁵² *Kvočka* (n 133 above) 45.

¹⁵³ Rome Statute art 7.

¹⁵⁴ *Kunarac* (n 66 above) 11.

¹⁵⁵ Both the Inter-American Commission on Human Rights and the European Court of Human Rights have found that in certain instances rape may be found to be a form of torture.

¹⁵⁶ *Kunarac* (n 66 above) 41; Prosecution Consolidated Respondent’s Brief, para 6.42.

¹⁵⁷ *Delalic* (n 129 above) 494; *Prosecutor v. Furundzija*, Case No: IT-95-17/1, Judgment (10 December 1998) 163; *Kunarac* (n 66 above) 150.

¹⁵⁸ *Kvočka* (n 133 above) 49.

3.6.2 Such person or persons were in the custody or under the control of the perpetrator.

Control refers to exerting physical or environmental restraint and limiting the freedom of movement of the would-be victim. In the *Kunarac* Appeal case the Appellants were all involved in detaining women and personally committing acts of sexual violence against them. Females would be forcefully kept in school halls and moved to apartments to be raped.¹⁵⁹ At all material times they were held captive and under the custody of the perpetrator.

In cases where politically motivated sexual violence has been reported; the perpetrator would remove the individuals from the place of residence or employment against their will and detain them. In the course of such detention which varies in length the detainees would experience sexual violations including gang rapes and the insertion of foreign objects in their genitalia.¹⁶⁰ Therefore the second element of torture is satisfied where the individual is held against their will, is under the control of the perpetrator and is threatened with further sanction should he or she attempt to escape.

3.6.3 Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

There can be no justification for the sexual violation of an individual. The injuries sustained were not as result of a lawful arrest or legal justified process but are rather as result of an unlawful and unwanted sexual attack. In reference to acts of politically motivated sexual violence, the injuries endured in attempting to escape or resist the perpetrator are not inherent to or incidental to lawful sanction because the act (sexual violation) was illegal.

3.6.4 The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

In the *Kvočka* case, sexual violence (specifically rape) was prosecuted as a crime against humanity. It was discovered that the Accused raped Bosnian Muslim women being held at the camp and that raping women was common in the detention centres.¹⁶¹ In *Kunarac*, the ICTY Tribunal also explained that, in reference to the five criteria regulating rape, it only has to be shown that the attack was widespread or systematic and not the specific occurrence of sexual violence.¹⁶²

In relation to politically motivated sexual violence, it must be shown that the act of sexual violence occurred and was part of the overall attack endured by the civilian population. The perpetrators utilised different means of violating the civilian population and sexual violence is one of them. The acts of sexual violence were not random and sporadic but rather focussed and calculated¹⁶³.

¹⁵⁹ *Kunarac* (n 66 above) 90.

¹⁶⁰ Zimbabwe Human Rights NGO (ZHR Accountable)'Are they accountable? : Examining alleged violators and their violations pre and post the Presidential Election March 2002' (2002) 1; P Reeler 'The perpetrators of gross human rights violations in Zimbabwe from February 2000 to March 2003' (2003)2.

¹⁶¹ *Kvočka* (n 133 above) 30.

¹⁶² *Kunarac* (n 66 above) 85.

¹⁶³ AIDS-Free World (AFW Rape) 'Electing to Rape: Sexual terror in Mugabe's Zimbabwe' (2009) 18.

3.6.5 The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

In these cases politically motivated sexual violence, the perpetrator acts with the full intention to meaningfully contribute to the attack being perpetrated against the civilian population. His/her actions are directed towards furthering the main political goal which is to terrorise political dissenters.

3.5 Conclusion

Remarkable developments have been made in international criminal law; it is a far cry from what it was at its point of origin. Considerable progress has been made specifically in reference to rape as a crime against humanity. Rape is also deemed as an act of torture where it meets all the elements. This chapter has shown that using the jurisprudence of the ICTY and the ICTR, it is possible to establish the legal foundation for politically motivated sexual violence as crimes against humanity. The legal analysis conducted applies to rape and all other forms of sexual violence. Therefore sexual mutilation and sexual slavery are all capable of being found by the ICC to amount to crimes against humanity. The legal analysis applied to torture is also capable of being super-imposed on other forms of sexual violence. Incidents of sexual violence such as mutilation and sexual slavery can amount to crimes against humanity where they meet the elements.

In its attempts to keep up with the nature of international crime, a complainant has been relieved from having to prove certain things. This includes that they suffered or endured mental pain or anguish and also in the case of torture, it is no longer necessary to show that the perpetrator acted in an official capacity or that the purpose of the torture was to extract information or a confession. This is reflective of the reality on the ground. The sheer volume of females who have experienced sexual violence continues to increase sharply and the majority of perpetrators are other civilians. It is also clear that acts of torture are capable of being perpetrated without the aim of extracting information but sometimes merely for the sake of causing severe pain to the individual being tortured.

There is no doubt that the ICC has made impressive attempts to modernise the provisions of the Rome Statute in order to be broader and more flexible towards the prosecution of sexual violations. This is also evident from the appointment of a sexual violence expert to the ICC. It is hoped that the ICC will tackle the issue of politically motivated rape as it features heavily in the current cases submitted to the Court. Specifically relating to the cases concerning Kenya and Ivory Coast which are currently before the ICC.

CHAPTER FOUR

Politically motivated sexual violence in Zimbabwe: Crimes against Humanity?

4.1 Introduction

The aim of this chapter is to describe in detail the occurrence of politically motivated sexual violence in Zimbabwe and to determine if it qualifies as a crime against humanity. The extended period of political unrest in Zimbabwe has created a culture of outright permissiveness which has been characterised by serial impunity and pervasive lawlessness.¹⁶⁴ Urgent clarity on this subject is required as national elections are to be held shortly and valid concerns exist amongst citizens and civil society that political violence could flare up once again if no preventative measures are taken.¹⁶⁵

4.2 Background

Zimbabwe is a landlocked, former British colony located in Southern Africa.¹⁶⁶ She is a member of the Southern African Development Community (SADC) and is surrounded by Botswana, Zambia, Mozambique and South Africa.¹⁶⁷ Zimbabwe obtained independence in 1980 and President Robert Mugabe is the current head of state. From her independence until the mid-1990's Zimbabwe was a model African state who displayed due regard for human rights and sustained a healthy economy often dubbed the 'breadbasket' of Africa.¹⁶⁸ Today Zimbabwe is characterised by a failing economy, widespread human rights violations and undemocratic rule.

Post – independence the Zimbabwe African National Union-Patriotic Front (ZANU-PF) was the uncontested majority political party in Zimbabwe. However the political climate changed in 1999 with the formation of Morgan Tsangarai's Movement for Democratic Change (MDC).¹⁶⁹

Political violence is not new in Zimbabwe and it has historically been attached to elections.¹⁷⁰ National elections were held in Zimbabwe during the years 2000, 2002, 2005, and 2008 and political violence intensified during each year with each election.¹⁷¹ Over the years the incidents of violence recorded have included abductions, arbitrary arrests, arson, assault, enforced disappearances, indecent assault, property destruction, rape, torture and threats.¹⁷² It was typically perpetrated by state security personnel, military agents and supporters of ZANU-PF against political dissenters.¹⁷³

¹⁶⁴ ZHR TJ (n 21 above) 42; HRW Perpetual Fear (n 2 above) 20.

¹⁶⁵ ADI (n 77 above) 16 ; RAU Hiding (n 20 above) 20.

¹⁶⁶ <http://www.bbc.co.uk/news/world-africa-14113509> (accessed 16 March 2011).

¹⁶⁷ HRW Perpetual Fear (n 2 above) 4.

¹⁶⁸ Forster-Towne (n 35 above) 16.

¹⁶⁹ HRW Bullets (n 12 above) 10 ; Forster-Towne (n 35 above) 1.

¹⁷⁰ Redress and the Amani Trust 'Torture in Zimbabwe: Past and present' (2005) 6, available at <http://www.redress.org/publications/Amani2005.pdf> (accessed 11 September 2012); Human Rights Watch (HRW Beaten) 'You will be thoroughly beaten: The brutal suppression of dissent in Zimbabwe' (2006) 18.

¹⁷¹ ADI (n 77 above) 5.

¹⁷² as above 7.

¹⁷³ HRW Perpetual Fear (n 2 above) 20.

Human rights violations occurred during the 2000 elections against ZANU-PF dissidents. In June 2002 during parliamentary elections, extrajudicial executions, assaults and acts of torture were recorded by numerous international organisations.¹⁷⁴ Later on during presidential elections in 2002, international observer missions noted with deep concern the use of state violence against political opposition during election time.¹⁷⁵ Human rights organisations document that some of the individuals implicated in political violence during the 2000 elections were responsible for the bouts of political violence in 2002 indicating serial impunity for perpetrators of political violence.¹⁷⁶

The political violence experienced during the 2008 national elections and subsequent run-off elections was undoubtedly the worst in Zimbabwean history.¹⁷⁷ Over the years the MDC had grown to become a formidable opposition party and in 2008 defeated ZANU-PF and won the National elections.¹⁷⁸ However President Mugabe refused to release the results and later declared that neither party had reached the required 50 percent plus one majority and it was necessary for a run-off election to be held.¹⁷⁹ It was during the preparations for the run-off elections when the situation quickly worsened.

The 2008 election process was characterised by violence and victimisation. ZANU-PF established 'bases' where MDC supporters and perceived sympathisers would be taken to be raped, assaulted and tortured. They would first watch as their property was destroyed before being taken to the 'bases'.¹⁸⁰ Approximately 200 people died and 5 000 more suffered injuries as a result of assaults and torture.¹⁸¹

On 15 September 2008 the MDC and ZANU-PF signed the Global Political Agreement (GPA). This was a power sharing agreement in which both Mugabe and Tsvangarai agreed to form a government of national unity, equally comprised of both parties.¹⁸² The GPA expressed commitment to values such as impartiality and freedom of political expression. Both Mugabe and Tsvangarai vowed to respect democracy and human rights.¹⁸³

The GPA was concluded just as victims of political violence sought urgent redress and justice. However the GPA did not clearly spell out how this would be achieved. It remained silent regarding time lines and possible reforms.¹⁸⁴ The organ for national healing reconciliation and integration has also failed to pursue an agenda for justice.¹⁸⁵ Three years later the MDC still has little if any power in the Government of National Unity (GNU) and

¹⁷⁴ <http://www.web.amnesty.org/library/Index/ENGAFAR460142000?OPEN&of=ENG-ZWE> (accessed 18 August 2008).

¹⁷⁵ Commonwealth Observer Report 'Preliminary report of the Commonwealth observer group to the Zimbabwe presidential election, 9–10 March 2002' (2002) 1.

¹⁷⁶ HRW Perpetual Fear (n 2 above) 20.

¹⁷⁷ ADI (n 28 above) 3; Solidarity Peace trust 'Punishing dissent, silencing citizens: the Zimbabwean Elections 2008' (2008) 1; Zimbabwe Human Rights NGO Forum (ZHR PE) 'If you can't join them, beat them! Post-election violence in Zimbabwe' (2008) 1.

¹⁷⁸ The MDC declared itself the winner of the presidential election as they had tallied the polling results themselves. Infact the results were announced on 2 May and the one month delay in announcing results was strong indication of tampering with ballot boxes.

¹⁷⁹ Electoral Laws Amendment Act 22 of 2004; Traditional Leaders Act 25 of 1998; <http://www.news.bbc.co.uk/1/hi/world/africa/7404603.stm> (accessed 16 October 2012).

¹⁸⁰ RAU Tough (n 77 above) 13; ZHR Accountable (n 160 above) 1; Reeler (n 160 above) 2.

¹⁸¹ HRW Perpetual Fear (n 2 above) 20.

¹⁸² HRW Perpetual Fear (n 2 above) 35.

¹⁸³ Agreement between the Zimbabwe African National Union – Patriotic Front (ZANU-PF) and the two Movement for Democratic Change formations, on resolving the challenges facing Zimbabwe (15 September 2008).

¹⁸⁴ HRW Perpetual Fear (n 2 above) 35.

¹⁸⁵ During September 9- 10 Human Rights Watch held interviews with representatives from Zimbabwean NGO's who expressed their concern that the Organ for National Healing, Reconciliation and Integration did not have a mandate for justice and accountability.

ZANU-PF exploits partisan officials to retain control of powerful state institutions such as the judiciary and security forces.¹⁸⁶

To date victims of political violence have received no redress and impunity reigns in Zimbabwe. Mugabe has made considerable use of presidential clemency in favour of alleged perpetrators of political violence and the Zimbabwean government has not explored the option of Transitional Justice.¹⁸⁷

4.3 Politically motivated sexual violence in Zimbabwe

Politically motivated sexual violence is and will continue to be a harsh reality for women in Zimbabwe. It has permanently altered the lives of the survivors and has affected their families and communities at large. The aims, objectives and manifestations of politically motivated sexual violence were discussed in detail under chapter two; therefore this section will focus on politically motivated sexual violence in Zimbabwe as experienced by women during the 2008 election process.

During the 2008 election process in Zimbabwe hundreds of women were raped or experienced sexual violations at the hands of ZANU-PF supporters. The list of perpetrators included police officials, members of the armed forces and the militia (which comprised of the war veterans and ZANU –PF youth militia).¹⁸⁸ It is also reported that the joint operations command provided state machinery to enable the actions of the ZANU-PF supporters.¹⁸⁹

Politically motivated sexual violence against women has manifested itself in different ways in Zimbabwe. The acts of violence often took place with extreme violence and the perpetrator displayed little if any compassion. Women of all ages were raped in public, in full view of their family, friends and community,¹⁹⁰ some were held captive in order to be gang raped (raped by more than one person) , others were repeatedly raped¹⁹¹ and many more had foreign objects (such as bottles and sticks) inserted into their private organs.¹⁹²

The locations where these sexual violations took place were numerous. Some women were raped or sexually violated in their home, at a discreet location, a torture camp or at a 'base'.¹⁹³ A 'base' refers to a location where political opponents were held captive and endured numerous violations at the hands of ZANU-PF supporters.¹⁹⁴ Over a hundred of these 'bases' were set up in numerous places over the country particularly Manicaland, Mashonaland East, Mashonaland Central, Mashonaland West and Masvingo for the sole purpose of terrorising the community to not vote MDC in the run-off election.¹⁹⁵ It was also established that community buildings such

¹⁸⁶ Human Rights Watch 'Our hands are tied: Erosion of the rule of Law in Zimbabwe' (2008) 11.

¹⁸⁷ ADI (n 77 above) 17; HRW Perpetual Fear (n 2 above) 26.

¹⁸⁸ Zimbabwe Peace Project 'March 29 harmonised elections Post Mortem: An analysis of trends, patterns and predictions for election runoff' (2008) 4; Forster-Towne (n 35 above) 5; HRW Bullets (n 27above) 10.

¹⁸⁹ The JOC is a powerful institutional unit comprising the Zimbabwean National Army, the Zimbabwean Republic Police, the Zimbabwean Prison Service and the Central Intelligence Organisation. It was initially chaired by Emerson Mnangagwa and it was later headed up by Didymus Mutasa post the March 2008 elections.

¹⁹⁰ RAU Hiding (n above 20) 12.

¹⁹¹ RAU Hiding (n above 20) 10.

¹⁹² n 20 above 2.

¹⁹³ AID (n 77 above) 15.

¹⁹⁴HRW Bullets (n 22 above) 2; (n 22 above) 20.

¹⁹⁵ HRW Bullets (n 22 above) 30.

as churches, schools, commercial units and medical centres were being used as torture camps.¹⁹⁶ Victims would be lured or forcefully taken to these locations and suffer rape and other sexual violations.¹⁹⁷

Rapes and sexual violations were often directed against women who were active members of the MDC and women who are related to men who support the MDC.¹⁹⁸ This included women married to MDC supporters or a woman whose brother, son or other male relative was an MDC member or supporter. Therefore women were being targeted for their political beliefs and the political beliefs of the male's kin to her.¹⁹⁹

The crimes endured by these women were heinous and detrimentally affected their social, medical and psychological wellbeing. Survivors of rape or any other sexual violation are entitled to justice and medical assistance. However women in Zimbabwe who have experienced sexual violations are often unable or unwilling to share their ordeals and cannot access medical attention.

Many women have to date not reported the occurrences of politically motivated sexual violence to the police. The women who have tried to report their assailants attest to being turned away from the police station by police officials.²⁰⁰ They were informed that the Police do not investigate 'political' cases or that the Police could not assist them. Sadly many victims are also capable of identifying their perpetrators because the crimes are often committed by recognisable military personnel or senior public officials. Consequently this has encouraged the perception that such sexual crimes were committed with flagrant impunity.²⁰¹

A culture of silence exists around sexual violations in many African communities and Zimbabwe is no different. Therefore very low reporting levels are observed in Zimbabwe for politically motivated sexual violence. Women are very reluctant to step forward and share the details of their harrowing experience of sexual violation. However this failure to speak up has prevented them from obtaining justice, familial support and acquiring medical assistance. Women also do not inform their husbands of the rapes from fear of being abandoned and this prevents them from seeking medical assistance especially testing for HIV.²⁰² This suggests that there is still a need for justice and redress for survivors of the violence. Especially where physical injuries are permanent and where women have contracted HIV. The failure of the GNU to provide some degree of accountability and reparation is a travesty against justice.

4.4 Crimes against Humanity or political violence in Zimbabwe?

The question of whether crimes against humanity have been committed in the context of the political crisis in Zimbabwe is highly topical.²⁰³ Both the Mugabe regime as well International and Zimbabwean non-governmental

¹⁹⁶ Research and Advocacy Unit 'Re-inventing the wheel: Transitional Justice in Zimbabwe' (2008) 3.

¹⁹⁷ n 20 above 10.

¹⁹⁸ n 20 above 4; Forster-Towne (n 35 above)3.

¹⁹⁹ RAU Tough (n 77 above)10.

²⁰⁰ Reeler (n 39 above) 8; ADI (n 77 above) 3.

²⁰¹ n 20 above 13.

²⁰² RAU Hiding (n 20 above) 14.

²⁰³ IDA (n 29 above)2.

organisations (NGO) have very strong views regarding the issue.²⁰⁴ A study on the possible commission of crimes against humanity in Zimbabwe is feasible due to the active human rights community which has collected strong empirical evidence detailing the harrowing ordeals of survivors of political violence.²⁰⁵ In a recent study conducted by RAU and ZADHR it was found that 20 of the women that underwent their clinical study had undergone experiences that satisfied the requirements for torture as per the UN Convention against torture. This figure is shockingly high considering the clinical group was comprised of 27 women.²⁰⁶ In another study Zimbabwean female refugees in South Africa underwent similar trial and they reported being subjected to other heinous forms of torture.²⁰⁷

AidsFreeWorld conducted interviews with Zimbabwean women in South Africa and Botswana. The 70 women had undergone 380 acts of rape by 241 perpetrators. The women identified the perpetrators as ZANU-PF supporters and stated that they could identify them. Over 50% women reported being assaulted before or after the rape. ²⁰⁸ The Medical Foundation for the Care of Victims of Torture released a report detailing 100 women applying for Asylum in and 12% came from Zimbabwe. 80 % of the women in the sample had been raped.²⁰⁹ All of the above indicate the high commission of politically motivated sexual violence in Zimbabwe. This section argues that rape carried out in such a manner is torture and qualifies as a crime against humanity. The gravity of these crimes is such that it cannot be ignored.

4.5 Sexual violence as an act of torture

The definition and components of torture were discussed in chapter three. Below is an analysis of whether the use of politically motivated sexual violence in Zimbabwe satisfies the elements of torture and may be considered as a crime against humanity. The analysis will address each element of the crime of torture and apply it to the Zimbabwean context.

According to the ICC Elements of Crimes of the ICC the elements of torture are as follows:

4.5.1 The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

As previously discussed where it has been shown that rape has been perpetrated there is no need to further prove that the victim has endured severe physical or mental pain or suffering.²¹⁰ In the case of Zimbabwe the domestic criminal process has failed to provide redress to individuals who have experienced sexual violence. This

²⁰⁴ The Mugabe regime arguing that the issue is of the struggle against a white colonial master; MDC submits that it centres around governance and the human rights community seeks that human rights be respected.

²⁰⁵ IDA (n 77 above) 16; RAU Hiding (n 22 above)20.

²⁰⁶ n 20 above 20

²⁰⁷ Centre for the Study of Violence and Reconciliation 'Women on the run: Women survivors of torture amongst refugees in South Africa' (2006) 8.

²⁰⁸ AFW Rape (n 163 above) 18.

²⁰⁹ Medical Foundation 'Justice denied: The experiences of 100 torture surviving women of seeking justice and rehabilitation' (2009) 4.

²¹⁰ Delalic (n 129 above) 480; Furundzija (n 157 above) 163; *Kunarac* (n 66 above)13.

is because police turn the complainants away and remark that they are unable to take up 'political cases' away or do the police simply do not follow up on the charges laid against the perpetrators.²¹¹

However, various NGO's based in Zimbabwe (such as Research and Advocacy Unit and Zimbabwe Association of Doctors for Human Rights) and abroad have collected sworn statements from survivors of sexual violence, they have also conducted medical examinations which corroborate the commission of an act of sexual violence in addition to copies of complaints laid to the police. These attest to occurrence of the rapes and other sexual violations.²¹²

4.5.2 Such person or persons were in the custody or under the control of the perpetrator.

This criterion refers to the physical environment in which the perpetrator kept the victim in order to commit acts of torture. In the Delalic case, the victim was held in a camp with other female detainees and was moved by the Appellant to a separate room where she was raped by him.²¹³ She was being kept there in isolation against her will under the control of the Appellant and was unable to leave. He was convicted on the basis as rape as torture.²¹⁴

Similarly in Zimbabwe the acts of sexual violence occurred under the custody of the ZANU-PF supporters or at locations under their control. This is evident from the establishment of so called torture camps and 'bases' in different regions in Zimbabwe.²¹⁵ Females would be forcefully taken from their homes and taken to the torture camp or 'bases'. While there they would endure brutal rapes (often multiple rapes) as well as be assaulted.²¹⁶

4.5.3 Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

It has been accepted that sexual violence is a source of suffering and pain, therefor the pain and suffering endured is as the result of sexual violence experienced. It can hardly be argued that pain and suffering as a result of sexual violence was inherent to or incidental to lawful sanctions. This is because sexual violence is similar to torture in that no legal justification exists for either of them.²¹⁷ In a statement issued by the Human Rights Committee, it was made clear that survivors of rape endure severe suffering and this necessitates that rape be defined as a form of inhuman treatment. It was further explained that sexual violence by implication causes severe pain or suffering, either physical or mental, and this also necessitates its inclusion as an act of torture.²¹⁸

²¹¹ n 20 above 13.

²¹² n 20 above 7.

²¹³ Delalic (n 129 above) 488.

²¹⁴ Delalic (n 129 above) 499.

²¹⁵ RAU Fighting (n 12 above) 12.

²¹⁶ HRW Bullets (n 12 above) 30.

²¹⁷ *A (FC) and others (FC) v Secretary of State for the Home Department* (2004) UKHL 1; *A and others (FC) and others v Secretary of State for the Home Department* (2005) UKHL 71 (33); *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No 3) (2000) 1 AC 147; Furundzija (n 157 above) 147.

²¹⁸ United Nations Commission on Human Rights, 48th session, Summary Record of the 21st Meeting (11 February 1992) Doc. E/CN.4/1992/SR.21 (21 February 1992) 35.

In the case of Zimbabwe it similarly stands that the acts of politically motivated sexual violence directed against women, cannot be justified on the ground that they caused pain and suffering inherent or incidental to lawful sanction.

4.5.4 The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

Even though each act of politically motivated sexual violence is considered a single act, they often do not occur independently. It is a part of a larger scheme to destabilise the political community. This is concluded from the large number of sexual violations perpetrated and whether they were spread out or concentrated in a single area.²¹⁹

In Zimbabwe, politically motivated sexual violence was undoubtedly committed as a part of a widespread or systematic attack a civilian population. It created significant 'cumulative effect' because the rapes and sexual violence successfully created an environment of fear and terror.²²⁰ This is corroborated when one considers that most of the documented evidence relates to torture being carried out for political reasons.²²¹ NGO reports indicate that ZANU-PF supporter's pursued a uniform goal of rape and sexual violence against female members of the MDC, the wives of prominent MDC members and perceived MDC sympathisers. The policy of sexual violence was carried out in numerous regions in Zimbabwe with serial impunity.²²²

4.4.5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.²²³

The intent factor is indeed to illustrate knowledge of the attack and the overall context in which it functioned. The ICTY held that regarding the intent of an accused charged with torture as a crime against humanity it must be established that a prohibited purpose existed.²²⁴ Therefore even where the motive to rape is somewhat sexual in nature, the perpetrator perpetrated the rape in pursuance of a prohibited purpose namely discrimination. He intended to discriminate the group of which his victim was a member.²²⁵

In reference to Zimbabwe it is submitted that ZANU-PF supporters had the knowledge that their actions were part of a larger political scheme. Although certain acts of sexual violence were opportunistic, their victims were mostly from the same political group, this is indicative of discrimination. They intended to act in such a way with the necessary knowledge of the broader context.

²¹⁹ *Kordić (n 139 above)* 94.

²²⁰ *Forster-Towne (n 35 above)* 6.

²²¹ *IDA (n 29 above)* 15.

²²² *ADI (n 77 above)* 4; *RAU Hiding (n 20 above)* 8.

²²³ *Rome Statute Elements of Crimes art 7(1)(f)*.

²²⁴ *Kunarac (n 66 above)* 186.

²²⁵ *Kunarac (n 66 above)* 153.

4.6 Conclusion

This chapter has shown the detrimental effect that a failing criminal justice system and lack of political will, has towards victims of political crime especially politically motivated sexual violence. With a compromised judiciary and a partial police service, justice and accountability are difficult to obtain in Zimbabwe. However it remains important to continuously document the occurrences of human rights violations in order to provide empirical evidence when it is needed. The Zimbabwean NGO community has been both heroic and diligent in their efforts to ensure that these human right violations do not go undocumented.

The ordeals faced by Zimbabwean women have also been highlighted in the international media, particularly because of the failure of the GNU to bring perpetrators to justice. Women report that they often see their attackers roam freely and they still live in the same neighbourhood with people who attacked them. It is evident that serial impunity prevails in Zimbabwe and there is no indication that the GNU is pursuing a solution.

This chapter has argued that crimes against humanity have been committed in Zimbabwe and that the ICC may be seized of this matter. However Zimbabwe has not ratified the Rome Statute neither has she ratified the United Nations Convention against Torture. A pressing question is how accountability and justice are obtained when no evident enforcement mechanisms exist. It is submitted that the regional bodies are best placed to resolve such issues and have the ability and resources to address this. The potential role of the SADC Tribunal and the AU system will be further addressed in Chapter 5 under conclusion and recommendations.

CHAPTER FIVE

Conclusions and Recommendations

“The impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice.”²²⁶

5.1 Conclusion

This study sought to address whether politically motivated sexual violence perpetrated during peace time satisfies the elements of crimes against humanity. It also aimed to address the ancillary question of whether politically motivated sexual violence as it occurred against women in Zimbabwe, fulfils the elements of rape and torture and qualifies as crimes against humanity.

The study commenced by depicting the magnitude of women who have been detrimentally affected by politically motivated sexual violence in Africa. Politically motivated sexual violence has affected the lives of thousands of women, and simultaneously destroyed families and communities. It is a reality that African states cannot afford to ignore, particularly because it is intrinsically linked to political violence. It is evident that a flawed election process is a contributing factor to the occurrence of politically motivated sexual violence. Research was presented which indicated that the majority of African states who have experienced politically motivated sexual violence had held national elections less than 3 months prior to the outbreaks of political violence. In this respect, it is important to note that elections are a necessary component of a democratic state. They should occur regularly and consistently, however many African states use elections as a solution to pre-existing political disputes or elections are ethnically polarised and this results in the occurrence of political violence.

Chapter 2 argued that sexual violence is used as a tool to attack and silence political dissidents. . It was also argued that during periods of political unrest, sexual violence against women is not a spontaneous and random act motivated by sexual desire. Rather it is part of a calculated and widespread policy to sexually violate women and use sexual violence as a means of injuring the political community. This is evident from the fact that women who belong to a certain political party are sexually violated or that women from a particular region, that is known to support the opposition, are targeted. Hence most of the victims are political opponents or females related to them. The sexual violations also occur in varying means including rape, mutilation and sexual slavery and women are forced to live with the consequences which includes the physical, psychological and social effects which hamper her quality of life and prevent her from returning to her life prior to the act of sexual violation

Chapter 3 presented an analysis of the current position in international criminal law. This indicated that sexual violence is capable of being an act of genocide, a war crime and a crime against humanity. After investigating the severity with which sexual violence was perpetrated in African states, the study addressed instances where an

²²⁶ *González et al v. Mexico* IACHR (16 November 2009) 400.

allegation of rape satisfies the elements of rape and torture, and qualifies as a crime against humanity. The penultimate chapter provided a factual assessment of politically motivated sexual violence in Zimbabwe focusing on the political violence experienced in 2008. It was further reasoned that one of the crimes perpetrated against members of the MDC by ZANU – PF militia was politically motivated sexual violence. The manner, location and systematic way in which the crimes were conducted meet the requirements of crimes against humanity.

5.2 Recommendations

The challenges outlined above are both complex and detailed. They will require a holistic and multi – faceted approach in order to be effectively addressed. Therefore state entities and regional bodies must adopt a cohesive attitude towards solving this problem.

5.2.1 The African Union (AU)

The AU should express its concern and publically condemn the occurrences of politically motivated sexual violence in Africa and especially in Zimbabwe. The AU should declare itself committed to the provisions of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) and the general comments issued in respect to it. It should publically remind AU member states of their human rights obligations under the Maputo Protocol.

5.2.2 Election observers from regional bodies.

It has been indicated that politically motivated sexual violence is closely related to a flawed electoral process. The AU recognises several Regional Economic Communities notably the Southern African Development Community (SADC), the Arab Maghreb Union (AMU), the East African Community (EAC), the Economic Community of Central African States (ECCAS) and the Economic Community of West African States (ECOWAS).

The AU and the relevant REC block should send in election observers to countries that are soon holding elections and display signs that political violence could occur. The election observers should be primarily record that the elections are conducted smoothly and fairly and also that voting irregularities took place. This is capable of decreasing the propensity of electoral rigging and post-election violence.

5.2.3 UN Special Mechanisms

The Special Mechanisms of the United Nations should be invited to provide assistance. The UN Special Rapporteur on Violence against Women or the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should be invited to Zimbabwe in order to highlight the plight faced by female victims of politically motivated sexual violence in Zimbabwe.

5.2.4 African Commission

It is recommended that communications are filed to the African Commission with a view to obtaining jurisprudence regarding politically motivated sexual violence. The communications should be directed against any

African government that recently perpetrated acts of politically motivated sexual violence (namely Zimbabwe, Kenya or Cote d'Ivoire).²²⁷This is done with the view that the African Commission finds that respective state liable for violating article 1 and article 7 of the African Charter. Also that the African Commission will further call on that specific government to establish a Commission of Inquiry into the acts of violence with a view to prosecution.

5.2.5 Human rights non-governmental organisations

It is recommended that Human rights NGO's continue to document and highlight incidents of politically motivated sexual violence. This is encouraged especially in places where the police are partisan and have failed to discharge their duties towards the survivor of sexual violence. They should also directly lobby relevant stakeholders to ensure that cases of politically motivated sexual violence are brought to the attention of the ICC. Where the relevant state has ratified the Rome Statute, the case must be referred to the ICC Prosecutor. In cases where the relevant state has not ratified the Rome Statute the matter must be brought to the attention of the UNSC, with a view that a referral may be granted.

5.2.6 The South African Development Community

As a member of SADC Zimbabwe has committed herself to the principles of human rights, democracy and the rule of law. Although the SADC Tribunal has been declared defunct; SADC state parties. SADC members should pressure Zimbabwean government to desist from engaging in politically motivated violence including sexual violence.

Zimbabwe is also obligated in terms of article 20 of the Gender Protocol to ensure that perpetrators of sexual violence are tried by a court of competent jurisdiction. SADC members should also pressurise Zimbabwe through private and public diplomacy to comply with its obligations under the Gender Protocol

5.2.7 The use of Transitional Justice

The establishment of a Truth and Justice Commission to hear all crimes related to Post Election Violence

It is recommended that a Truth and Justice Commission is created in Zimbabwe. It must be noted that criminal prosecutions are costly and lengthy, therefore where possible efforts must be taken to shorten the process. Individuals who wish to receive amnesty should be able to come to the Truth and Justice Commission and frankly disclose the actions they partook in during the election violence. The Truth and Justice Commission should have the ability to hear applications for amnesty and award amnesty where it is satisfied that full and frank disclosure has occurred. It should also be able to make orders where necessary for victims' reparation.

The establishment of a Special Tribunal to prosecute all crimes related to Post-Election Violence

It is recommended that a Special Tribunal is created in Zimbabwe. The Special Tribunal should comprise of vetted Zimbabwean judges and international judges. It should be established in terms of an act of parliament

²²⁷ Zimbabwe was directed by the African Commission to establish a Commission of Inquiry into crimes perpetrated by ZANU-PF supporters and militia in 2000. This recommendation was not followed through.

which provides some form of financial assistance. The mandate of the Special Tribunal should expressly include the ability to investigate crimes committed by state officials and civilians and also the formation of a prosecutorial unit capable of taking the cases to trial. This should be done in addition to providing for victim participation.

The AU should call for new elections to be held in Zimbabwe. The AU should simultaneously call on the ZANU-PF component of the Zimbabwean government to desist from engaging in and arming ZANU – PF supporters to attack and assault MDC members. This refers to the current situation and in all future elections.

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