

# Accountability for the Gukurahundi atrocities in Zimbabwe thirty years on: prospects and challenges

*Magnus Killander*<sup>\*</sup> & *Mkhululi Nyathi*<sup>\*\*</sup>

## *Abstract*

It is estimated that between 10 000 and 20 000 civilians were killed by state and state sponsored agents between 1982 and 1988 in Zimbabwe. In addition to murder, there were widespread torture, rape and other sexual offences, genital mutilations, assault, and arson. These crimes have come to be known as the 'Gukurahundi atrocities'. The fact that thirty years down the line the alleged main perpetrators of these crimes are still in charge of Zimbabwe's political and security infrastructure, makes it difficult to find justice for survivors and the relatives of those who died. However, as illustrated in this article, most of the legal hurdles put in place by the regime to ensure impunity can be overcome.

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## INTRODUCTION

Soon after Zimbabwe attained independence in 1980 a special military unit, the 5 Brigade, was set up by Robert Mugabe, then Prime Minister and current President of Zimbabwe, ostensibly to deal with armed insurgency in the provinces of Matabeleland and the Midlands.<sup>1</sup> As it would later emerge, the true intention was to quell political opposition in these provinces. Thousands of unarmed civilians were killed while others disappeared without a trace. Other victims of the repression were raped, tortured, arbitrarily detained, had their property destroyed, or were denied emergency food relief. Members of the 5 Brigade were not the only perpetrators of these

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<sup>\*</sup> Magnus Killander jur cand EMA LLD. Associate Professor, Centre for Human Rights, Faculty of Law, University of Pretoria.

<sup>\*\*</sup> LLB LLM. LLD candidate, University of Pretoria.

<sup>1</sup> The facts set out here are based on the most authoritative study of the violations, Catholic Commission for Justice and Peace in Zimbabwe 'Gukurahundi in Zimbabwe: a report on the disturbances in Matabeleland and the Midlands, 1980–1988' (2007) (hereinafter CCJP report). For the purpose of this study the 2007 edition of this report, originally published in 1997, has been used.

atrocities. Other Mugabe supporters, within and from outside of the military, have been implicated. The atrocities ended following the Unity Accord in December 1987 signed by the then two major political parties, Zimbabwe African National Union – Patriotic Front (ZANU-PF) and Patriotic Front Zimbabwe African People’s Union (PF-ZAPU).<sup>2</sup>

These gross human rights violations that have come to be known as the *Gukurahundi* atrocities are not openly discussed in Zimbabwe, mainly because the perpetrators remain in power. Mugabe has persistently refused to discuss the subject.<sup>3</sup> Likewise, ministers who served in the Mugabe government when the atrocities were committed, have refused to apologise.<sup>4</sup> The extent of the human rights violations has also never been fully documented.

Some of the perpetrators of these crimes still hold high political, military, and intelligence offices in Zimbabwe.<sup>5</sup> The investigation of these human rights violations is obviously not in their best interests.<sup>6</sup> In addition to this, as these crimes were committed some thirty years ago, certain of the victims and survivors might by now have died or may die before any legal process is initiated. Those who survive may not be willing to come forward with

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<sup>2</sup> ‘Full text of the 1987 Unity Accord’, available at: [https://www.facebook.com/permalink.php?id=337936363006582&story\\_fbid=409723655827852](https://www.facebook.com/permalink.php?id=337936363006582&story_fbid=409723655827852) (last accessed 5 September 2014).

<sup>3</sup> Available at: [http://www.youtube.com/watch?feature=player\\_detailpage&v=djd23O3v2sA](http://www.youtube.com/watch?feature=player_detailpage&v=djd23O3v2sA) (last accessed 23 May 2014). In this 2013 published interview with Dali Tambo on People of the South, Mr Mugabe responded, when asked to reflect on the events of the *Gukurahundi* era, ‘... we don’t want to talk about that...it’s not a story we should continue...’.

<sup>4</sup> See CCJP report n 1 above at 6. The only person who is said to have apologised was the late Minister Moven Mahachi who is quoted in the report as having said, on 6 September 1992 (Sunday Mail): ‘...events during that period are regretted and should not be repeated by anybody, any group of people or any institution in this country.’

<sup>5</sup> Some of the names that feature prominently in the CCJP report are those of Mr Robert Mugabe (current president); Mr Emmersen Mnangagwa (current vice president); Dr Sydney Sekeramayi (current minister of defence). The commander of 5 Brigade, Mr Perence Shiri, is currently the commander of the Air Force of Zimbabwe. See Eppel, ‘“*Gukurahundi*”: the need for truth and reparation’ in Raftopoulos & Savage (eds) (2004) *Zimbabwe – injustice and political reconciliation* 62.

<sup>6</sup> Liability for international criminal offences attaches not only to actual perpetrators, but also to those who bear command or superior responsibility by virtue of their superior military or political office. For a detailed discussion of general principles of international criminal law, including command and superior responsibility and the defence of superior orders, see Powell & Erasmus ‘General Principles of International Criminal Law’ in Du Plessis (ed) (2008) *African guide to international criminal justice* 143–180.

evidence for fear of victimisation as the same political and state security infrastructure remains in place. This infrastructure has unfortunately perpetuated violence as opposed to persuasion, as a means of political survival.<sup>7</sup>

In this article we consider the possible avenues of redress (for surviving victims and the relatives of those who died) some thirty years after the violations occurred. We consider both criminal and civil redress not only in Zimbabwe, but also in other states and internationally. We further consider the opportunities provided to address the issue through institutions established under Zimbabwe's new Constitution.

We analyse possible measures of redress from a legal perspective – what are the legal challenges that may be encountered in attempting to achieve criminal or civil and indeed other forms of accountability for the atrocities? While in the end the question of whether to address these violations, and if so how, may be largely political, currently there is no political will to pursue accountability on the part of the two main political parties, ZANU-PF and MDC.<sup>8</sup>

This paper is divided into four main sections. The first considers the nature of the violations. Thereafter we consider possible remedies under Zimbabwe's domestic law. In the third section we focus on the possibility of seeking legal recourse under international law. The fourth section reflects on other possible avenues of redress outside of the civil and criminal justice systems. While this article focuses on the human rights violations of the 1980s, some of the challenges highlighted and solutions proposed apply with equal force to other violations committed to date by the Mugabe regime.

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<sup>7</sup> See generally Howard-Hassmann 'Mugabe's Zimbabwe, 2000–2009: massive human rights violations and the failure to protect' (2010) 32/4 *Human Rights Quarterly* 898–920.

<sup>8</sup> Eppel 'Repairing a fractured nation: challenges and opportunities in post-GPA Zimbabwe' in Raftopoulos (ed) (2013) *The hard road to reform – the politics of Zimbabwe's Global Political Agreement* 213. However, the Movement for Democratic Change is, at the time of the writing of this paper, in a state of fracture and is also no longer exercising any political authority since the coming to an end of the 2009–2013 transitional Global Political Agreement.

### NATURE OF THE VIOLATIONS

The 5 Brigade murdered thousands of people in Matabeleland North, Matabeleland South, and the Midlands provinces between 1982 and 1988, allegedly telling the victims that they were being murdered because they were Ndebeles.<sup>9</sup> The killings were invariably preceded by torture and the destruction of property.<sup>10</sup> In Matabeleland South, especially around 1984, the murders and torture were accompanied by starvation as food aid was prevented from reaching that drought-stricken region.<sup>11</sup> Abductions and the murder of ZAPU members and community leaders increased in 1985. Despite this, ZAPU won in all the Matabeleland constituencies in the 1985 elections. Shortly after these elections, ZAPU was banned. In December 1987 Joshua Nkomo and Mugabe concluded the Unity Accord which saw the cessation of these predominantly state or state-sponsored human rights violations.

It is estimated that between 10 000 and 20 000 people were massacred between 1983 and 1987.<sup>12</sup> Some were murdered by public execution through shooting, beating to death and bayonetting, or a combination of these. Survivors were then ordered to dance on the fresh graves of those who had been murdered singing praises of Mugabe's ZANU-PF political party.<sup>13</sup> In one case, up to fifty-five people were murdered in a single incident.<sup>14</sup> In some instances, pregnant women are reported to have had their stomachs ripped open by bayonets 'to reveal still moving fetuses.'<sup>15</sup> In other instances, victims were locked in their homes which were then set alight.<sup>16</sup>

Young children, including infants, were not spared. A four month-old infant is reported to have been axed thrice, and its mother forced to eat the flesh of her dead child; an eighteen year-old girl was raped by six soldiers and then killed; an eleven year-old girl had her vagina burnt with plastic and was later shot; and twin infants were buried alive.<sup>17</sup>

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<sup>9</sup> Eppel n 5 above at 45.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> CCJP report n1 above at 152.

<sup>14</sup> *Id* at 77–78.

<sup>15</sup> *Id* at 150.

<sup>16</sup> *Id* at 154, 164.

<sup>17</sup> *Id* at 223.

Rape, other sexual violence, and genital mutilation were prevalent. In one case the 5 Brigade is alleged to have raped twenty to thirty school pupils who were then also forced to have sex with their fellow school pupils while the soldiers watched, after which they were beaten for three hours.<sup>18</sup> Sexual violence included the practice of forcing sharp sticks into women's vaginas, leading to victims adopting painful, wide-legged gaits.<sup>19</sup> It is also alleged that men were subjected to beatings which focused on their genitalia. The testicles would be bound by rubber strips and then beaten with a truncheon, with some victims complaining of permanent problems with erection and urinating. In one instance a man is reported to have died after his scrotum burst during a beating.<sup>20</sup>

### **THE LEGAL CHARACTERISATION OF THE VIOLATIONS**

Violations such as murder, rape, and assault constitute crimes under Zimbabwean law. This section seeks to determine whether these crimes can be viewed as constituting the international crimes of genocide, war crimes, and crimes against humanity. This is not to say that such a classification should be used if criminal trials related to the *Gukurahundi* atrocities were ever to take place. For example, the Extraordinary Chambers for Cambodia established in 2003 to try leaders of the Khmer Rouge for atrocities in the 1970s, has jurisdiction over the crimes of homicide, torture, and religious persecution as set out in the 1956 Penal Code of Cambodia.<sup>21</sup> However, the classification of the atrocities as international crimes has some bearing on possible accountability measures discussed below.

#### **Genocide**

Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides that genocide refers to killings or other inhuman acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'<sup>22</sup> Zimbabwe only ratified the Genocide Convention in 1991. Nonetheless, genocide was a crime under customary international law well before the 1980s.<sup>23</sup>

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<sup>18</sup> *Id* at 156.

<sup>19</sup> *Id* at 222.

<sup>20</sup> *Id* at 222.

<sup>21</sup> Law on the establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, art 3.

<sup>22</sup> On genocide see generally Schabas *Genocide in international law* (2000).

<sup>23</sup> Reservations to the Convention on Genocide, Advisory Opinion: ICJ Reports 1951 at 15, 23.

Whether the murder of the Ndebele-speaking people on the basis of their membership of that specific ethnic group constitutes genocide, depends on whether the intent was the extermination, ‘in whole or in part’ of this group. As pointed out above, it is alleged that victims were murdered because they were Ndebele.<sup>24</sup> Many Ndebeles who lived through the atrocities would probably agree with the following statement by a woman interviewed by Msindo: ‘Mugabe killed Ndebeles because we were not supporters of ZANU.’<sup>25</sup> In February 1983 Minister Enos Nkala reportedly announced to a gathering in Matabeleland that ‘[i]f you continue supporting dissidents and the Zapu that supports them, there are two places for you – the grave or the prison.’<sup>26</sup> Mugabe himself is alleged to have remarked at the time that ‘where men and women provide food for dissidents, when we get there we eradicate them. We don’t differentiate when we fight, because we can’t tell who is a dissident and who is not...’.<sup>27</sup> There are many ethnic groups in Matabeleland and the Midlands but the Ndebele dominate, and for ZANU, they are all Ndebeles.<sup>28</sup> In fact, it is generally understood that anyone originating from the two Matabeleland provinces and in the Ndebele-speaking parts of the Midlands, is Ndebele, as the Ndebele/Matabele is not a single ethnic group but is a conglomeration of different ethnic groups found in these areas of Zimbabwe.<sup>29</sup>

### War crimes

Zimbabwe ratified the Geneva Conventions in February 1983, and the two Protocols to the Geneva Conventions in 1992. The Geneva Conventions and the First Protocol are applicable in international armed conflict, while the Second Protocol is applicable in non-international armed conflict. Common article 3 of the Geneva Conventions is also applicable in non-international armed conflict. Common article 3 prohibits, amongst other things, ‘violence of life and person, in particular murder of all kinds, mutilation, cruel

<sup>24</sup> Eppel n 5 above.

<sup>25</sup> Msindo (2012) *Ethnicity in Zimbabwe* 221.

<sup>26</sup> *Chronicle* 14 Feb. 1983, quoted in Msindo *Ibid.* Nkala in later years denied any responsibility for the massacres putting all the blame on Mugabe and calling for him to be tried for crimes against humanity. See Gonda ‘Nkala denies contributing to Gukurahundi, wants Mugabe prosecuted’ *SW Radio Africa* 18 December 2009, available at: <http://www.swradioafrica.com/news181209/nkala181209.htm> (last accessed 2 May 2014). See also CCJP report n 1 above at 26.

<sup>27</sup> CCJP report note 1 above at 71.

<sup>28</sup> Msindo n 25 above 212, 224.

<sup>29</sup> For the challenges associated with proof of genocide, see the 2005 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General 4.

treatment and torture'. However, these violations do not constitute 'grave breaches' which state parties are obliged to prosecute in terms of the Conventions and the First Protocol.

The Zimbabwean Geneva Conventions Act (Chapter 11:06) entered into force on 1 February 1984 and provides for the punishment of violations constituting grave breaches of the four Geneva Conventions of 1949 and the First Protocol thereto (1977). The Act incorporates the conventions and the two protocols as schedules to the Act.

Despite some armed activity coordinated by South African forces in Matabeleland, the situation can hardly be classified as an international armed conflict.<sup>30</sup> Non-international armed conflict has been defined as 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a state'.<sup>31</sup> Considering that there were some armed opposition functioning in the area, and also considering the high death toll, the situation in Matabeleland and the Midlands until 1987 can be classified as a non-international armed conflict,<sup>32</sup> and thus common article 3 of the Geneva Conventions applied. It is also clear that the government viewed the situation as an armed conflict.<sup>33</sup>

### **Crimes against humanity**

In 1946 the UN General Assembly affirmed the definition of crimes against humanity in article 6 of the Charter of the International Military Tribunal at Nuremberg, as<sup>34</sup> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during

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<sup>30</sup> See for example CCJP report n 1 above at 50.

<sup>31</sup> *Prosecutor v Tadic*, IT-94-1-T, 2 October 1995 Appeal Chambers decision on the defence motion for interlocutory appeal on jurisdiction, par 70, available at: <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

<sup>32</sup> Marshall 'Major episodes of political violence 1946–2013' available at: <http://www.systemicpeace.org/warlist.htm>.

<sup>33</sup> See *eg* the Report of the UN Working Group on Enforced or Involuntary Disappearances UN Doc E/CN.4/1996/38, par 459, where the government stated 'that since his disappearance occurred during the armed conflict, it was impossible to carry out an investigation as no documents had been kept from this period'.

<sup>34</sup> UNGA resolution 95(I) Affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal; Nuremberg Trial Proceedings Vol 1 Charter of the International Military Tribunal – Constitution of the International Military Tribunal, available at: <http://avalon.law.yale.edu/imt/imtconst.asp>. On the definition of crimes against humanity before the adoption of the statutes of the ICTY, ICTR and ICC see generally Bassiouni (1992) *Crimes against humanity in international criminal law*.

the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

This definition is linked to the existence of an armed conflict. However, there are case law and international treaties which suggest that there is no need for such a *nexus* for crimes against humanity to occur.<sup>35</sup> However, the lack of a settled position in international law is unimportant because, as noted above, there was clearly an armed conflict in Matabeleland and the Midlands at the time.

What took place in Matabeleland and the Midlands in the early 1980s was persecution on political grounds, and the acts committed can clearly be classified as ‘inhumane’. As indicated below, criminal proceedings could be brought based on crimes under national law, and the fact that these crimes would constitute crimes against humanity should lead to the revocation of time-based statutory limitations under Zimbabwean law.

The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) include a requirement that violations must be widespread or systematic in order to constitute crimes against humanity. The *Gukurahundi* atrocities were clearly widespread and systematic, even though this requirement arguably was not part of the definition of crimes against humanity when the atrocities took place.

## **ESTABLISHING THE TRUTH**

### **Investigating the atrocities**

Despite the significant period that has passed since the commission of the atrocities, there is still evidence that proves a *prima facie* case against those implicated. This evidence is contained in a number of reports prepared by reputable national and international organisations, including the CCJP report.<sup>36</sup> The memories are also still vivid among those who lived through

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<sup>35</sup> Cryer *et al* (2007) *An Introduction to international criminal law and procedure* 191.

<sup>36</sup> Some of these reports are referred to in the CCJP report n 1 above and they include: Lawyers’ Committee for Human Rights, (1986) *Zimbabwe: wages of War*; Carver (1989) *Zimbabwe: a break with the past? Human rights and political unity: an Africa Watch Report*; Carver (1992) *Zimbabwe: drawing a line through the past*, Amnesty International; the 1987 CCJP *Confidential report on torture in Zimbabwe*; and the 1986

the violence and survive to tell the tale. In 1998 Eppel found that 60 per cent of interviewees in the rural areas of Matabeleland and the Midlands had been direct victims of the violence of the 1980s.<sup>37</sup>

In 1983 a commission of inquiry, with Simplisius Chihambakwe as its chair, was set up to look into the atrocities – which political leaders prefer to call ‘disturbances’ – in the provinces of Matabeleland and the Midlands.<sup>38</sup> The report of the commission of inquiry has never been made public. There is also no evidence to suggest that the Chihambakwe Commission sought a broad-based input from victims, perpetrators, survivors, and affected communities. In fact, evidence from available sources indicates that the inquiry was too limited in terms of both the number of interviewees and areas covered. Even assuming that the report is released, there is no guarantee that it would not be tampered with or that it addresses the full extent of the atrocities. In any case, the human rights violations continued until 1988, long after the commission had finalised its inquiry. Legal attempts to have the Chihambakwe Commission report published have so far yielded no positive results. In 2003 the Zimbabwe Supreme Court held that two Zimbabwean non-governmental organisations – the Zimbabwe Lawyers for Human Rights and the Legal Resources Foundation – had no right to obtain the report in the public interest.<sup>39</sup>

The most comprehensive report – *Breaking the silence: Building true peace: Report on the 1980s disturbances in Matabeleland and the Midlands* (the CCJP report) – dealing with the atrocities was published in 1997 by the Catholic Commission of Justice and Peace. The report uses both archival and (then) contemporary sources, including reports by human rights organisations, legal records from the Legal Projects Centre in Bulawayo, Zimbabwe, academic sources, and media reports covering the relevant period.<sup>40</sup> One limitation of the report is that, due to resource constraints, its case studies cover violations in only two districts.<sup>41</sup>

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*Memorandum to the Government of the Republic of Zimbabwe* by Amnesty International. See CCJP report n 1 above at 23, 24. While some of the reports may have statistical and other limitations owing to their scope, their collective value cannot be underestimated.

<sup>37</sup> Eppel n 5 above at 46.

<sup>38</sup> For the composition of the Chihambakwe Commission and the limitations of its methodology, see CCJP report; n 1 above, at 97–98.

<sup>39</sup> *Zimbabwe Lawyers for Human Rights v President of the Republic of Zimbabwe* 311/99, 20 November 2003 [2003] ZWSC 12.

<sup>40</sup> CCJP report n 1 above at 11–41.

<sup>41</sup> CCJP report n 1 above at 11–12.

The Zimbabwean atrocities have not featured prominently on the UN human rights agenda. When Zimbabwe was examined by the UN Human Rights Committee in relation to the implementation of the International Covenant on Civil and Political Rights (ICCPR), one of the committee members raised the issue, based on the facts set out in the *Breaking the silence* report, of ‘what the Government was doing to bring those responsible to justice and compensate the victims’.<sup>42</sup> The Zimbabwean representative responded that ‘he did not recall that any specific cases had been drawn to the government’s attention’.<sup>43</sup> The committee expressed concern that ‘immunity has been extended to individuals committing acts of political violence against government opponents’.<sup>44</sup>

Thorough investigation of the facts would require significant resources, for example through a truth commission established by the state. There is in fact provision for the establishment of a National Peace and Reconciliation Commission in the new Constitution of Zimbabwe.<sup>45</sup> The provisions in the Constitution are unfortunately far from clear on when exactly this commission should be established. The relevant part of the provision simply states that ‘[f]or a period of ten years after the effective date [the date the new President assumed office under the new Constitution, which is 22 August 2013], there is a commission to be known as the National Peace and Reconciliation Commission’.<sup>46</sup> It is thus not clear if that commission should have been established immediately after the effective date, and then existed for a period of ten years and not beyond (meaning it cannot exist beyond August 2023, even if its lifespan would be less than ten years),<sup>47</sup> or it can be established at any time after the effective date and still enjoy a ten-year lifespan.

Some of the functions of the commission are to: ensure post-conflict justice, healing and reconciliation; bring about national reconciliation by encouraging people to tell the truth about the past and facilitating the making of amends and the promotion of justice; develop programmes to ensure that persons subjected to persecution, torture, and other forms of abuse receive

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<sup>42</sup> CCPR/C/SR. 1650 par 30.

<sup>43</sup> *Id* par 75.

<sup>44</sup> CCPR A/53/40 (1998), par 225.

<sup>45</sup> S 251 of the Constitution of Zimbabwe.

<sup>46</sup> S 251 (1) of the Constitution of Zimbabwe.

<sup>47</sup> As of November 2014 the National Peace and Reconciliation Commission had not yet been established.

rehabilitative treatment and support; to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate; and recommend legislation to ensure that assistance, including documentation, is rendered to persons affected by conflicts, pandemics, or other circumstances.

In addition to the vague nature of the constitutional provision establishing the National Peace and Reconciliation Commission, there is also a concern that if and when it is eventually established, its composition is likely to be informed by political and self-preservation considerations, thereby affecting its independence and effectiveness. Indeed, earlier attempts to establish similar institutions have proved futile.<sup>48</sup>

### **The time factor**

The alleged crimes were committed some thirty years ago. This presents a serious challenge regarding the quality of the oral evidence of witnesses, either before a truth commission, or in criminal or civil proceedings, who may have difficulty remembering events accurately after such a long a time. However, because most of the crimes were committed against known people in the communities, usually in the most gruesome manner, the details will obviously long remain etched in the minds of witnesses. The only challenge would be the identification of the actual perpetrators. Not only would the current power infrastructure be unwilling to cooperate with deployment and other records, but the actual perpetrators, who in all likelihood were not known to the victims and survivors before the offences, have aged or could even have died, thereby complicating their identification.

It should be noted, however, that the question of the identification of actual perpetrators affects the individual liability of those who were acting under general or specific orders, but does not affect the general liability of those who wielded political power or who were in military and intelligence command. With adequate resources, it should still be possible to assemble a number of witnesses and a considerable body of real evidence to be able

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<sup>48</sup> The Organ on National Healing, Reconciliation and Integration, a non-constitutional body established under the 2008 Global Political Agreement achieved little mainly due to a lack of political will. See Mbire *Seeking Reconciliation and National Healing in Zimbabwe: Case of the Organ on National Healing, Reconciliation and Integration (ONHRI)* (MA dissertation, International Institute of Social Studies, The Hague 33, 2011).

to prove the commission of the crimes by the political, military, and intelligence leaders beyond a reasonable doubt. In any event, the trend under international law is to target those who bear the greatest responsibility for the commission of genocide, war crimes and crimes against humanity. Resort is had to lower-ranking individuals only if this is necessary for the conduct of the case as a whole. This is in fact the policy followed by the prosecutor of the International Criminal Court (ICC).<sup>49</sup>

### REMEDIES UNDER ZIMBABWEAN LAW

Everyone has the right to effective remedies for human rights violations.<sup>50</sup> The obligation to provide an effective remedy requires states to make reparation to individuals for harm suffered as a result of human rights violations.<sup>51</sup> Reparation may take the form of compensation, restitution, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>52</sup>

Gross human rights violations can be addressed in the states where they took place, in other states, or at the international level. National procedures have the advantage of being closer to where the violations took place and of facilitating evidence gathering. This section investigates the legal challenges facing accountability measures at the national level in Zimbabwe.

### Criminal liability

#### *Prescription*

One of the most important procedural issues in relation to criminal liability is the question of prescription. Under Zimbabwean law, criminal liability lapses twenty years after the commission of the offence.<sup>53</sup> The only exception is murder for which there is no statutory limitation.<sup>54</sup> This means

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<sup>49</sup> Gentile 'Understanding the International Criminal Court' in Du Plessis (ed) n 6 at 113.

<sup>50</sup> ICCPR art. 2(3); Universal Declaration of Human Rights Art. 8; European Convention on Human Rights art. 13; American Convention on Human Rights art. 25; African Charter on Human and Peoples' Rights art 7(1)(a).

<sup>51</sup> Human Rights Committee, General Comment No 31 par 16.

<sup>52</sup> General Assembly Resolution 60/147, (16 December 2005), Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, recommended by Commission on Human Rights Resolution 2005/81, (21 April 2005) art 31; Human Rights Committee, General Comment No 31 par 16.

<sup>53</sup> S 23(2) of the Criminal Procedure and Evidence Act [Chapter 9:07].

<sup>54</sup> S 23(1) of the Criminal Procedure and Evidence Act [Chapter 9:07].

that notwithstanding the amount of evidence available, save for the case of murder, no proceedings may be instituted against the perpetrators after twenty years have elapsed since the commission of an offence.

It should be noted, however, that prescription is a statutory procedural defence, as opposed to a constitutional substantive right.<sup>55</sup> It is thus possible to change the rules of prescription and extend the types of crime that could be tried by amending the Criminal Procedure and Evidence Act. This would be in line with the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity. However, it should also be noted that this convention has been ratified by only 54 states, and that Zimbabwe is not among these. Non-prescription would also be in line with the Rome Statute on the International Criminal Court. However, as discussed below, Zimbabwe has also not ratified this treaty.

### *Immunity*

In 1982 the President of Zimbabwe decreed the Emergency Powers (Security Forces Indemnity) Regulations. Section 4(1) of the Regulations provided that 'no civil or criminal proceedings shall be instituted or continued' against the President, a minister or a deputy minister, or a member of the security forces<sup>56</sup> for acts committed 'for the purposes of or in connection with the preservation of the security of Zimbabwe', unless such proceedings were approved by the Minister of Defence. Section 4(3) provided that:

A certificate in writing under the hand of the Minister stating that any matter or thing referred to therein was done for the purpose of or in connection with the preservation of the security of Zimbabwe shall, upon its production by any person, be conclusive proof in any court of law that such matter or thing was so done.

Section 5 allowed for the possibility of anyone prevented from instituting proceedings under section 4, to apply for compensation for patrimonial loss from a five-member board appointed by the Minister of Defence.

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<sup>55</sup> The right to a fair hearing is provided for in s 69 of the Constitution.

<sup>56</sup> According to s 2(1) of the 1982 regulations, members of the security forces included members of the defence forces, police force, prison service and Central Intelligence Organisation.

In 1983 sections 4 and 5 of the Regulations were repealed and substituted by new sections 4, 4A and 5.<sup>57</sup> Provision for civil and criminal liability was made in different sections, with the new section 4 dealing with civil liability, and the new section 4A dealing with indemnity from prosecution. The new section 4A provided that:

No criminal proceedings shall be instituted or continued against  
 The President or any Minister or Deputy Minister in respect of anything done in good faith by him or by any person referred to in paragraph (b) for the purposes of or in connexion with the preservation of the security of Zimbabwe; or  
 Any member of the Security Forces or any person acting under the authority of any such member in respect of anything done in good faith by such member or person for the purposes of or in connexion with the preservation of the security of Zimbabwe;  
 Except by the Attorney-General or a person delegated by the Attorney-General.

Sub-section 2 provided that in case of prosecution by anyone other than the Attorney-General or a person delegated by the Attorney-General, a certificate from the Minister of Defence stating ‘that any matter or thing referred to therein was done in good faith for the purpose or in connexion with the preservation of the security of Zimbabwe’ would preclude prosecution.

In May 1988, the then acting president, Muzenda, pardoned ‘dissidents’, ‘collaborators with dissidents’, and ‘PF ZAPU political fugitives from justice’.<sup>58</sup> The amnesty applied to those at large as of 19 April 1988 who reported to police before 31 May 1988. Some 122 persons took up the offer of amnesty.

In late June 1988, some 75 members of the security forces who were either awaiting trial or had been convicted of murder or ill-treatment in Matabeleland, were pardoned by President Mugabe in ‘an unprecedented

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<sup>57</sup> Statutory Instrument 159 of 1983, Emergency Powers (Security Forces Indemnity) (Amendment) Regulations, 1983 (No 2).

<sup>58</sup> Clemency Order No 1 of 1988, General Notice 237A of 1988, Zimbabwean Government Gazette Extraordinary Vol LXVI, No 25, 3 May 1988.

and extraordinary pardon'.<sup>59</sup> Among those pardoned were four soldiers of the 5 Brigade who had been sentenced to death.<sup>60</sup>

On 23 July 1990, President Mugabe declared a general amnesty<sup>61</sup> which included a pardon for members and former members of the security forces.<sup>62</sup>

A free pardon is hereby granted to every member or former member of the Security Forces in respect of any offence committed by him during anti-dissident operations by the Security Forces, if that offence was committed in good faith for the purpose of or in connection with the restoration or maintenance of good order and public safety in Zimbabwe.

It was no coincidence that the amnesty was declared at this time. The state of emergency which had been in force in Rhodesia/Zimbabwe since 1965, came to an end on 25 July 1990,<sup>63</sup> two days after Mugabe declaration of the amnesty. Section 4 of the amended Emergency Powers Regulations dealing with civil liability had been declared unconstitutional by the Supreme Court in *Granger*.<sup>64</sup> The remaining provisions of the Regulations lapsed with the state of emergency, thereby necessitating the general amnesty. Later amnesties in 1995 and 2000 dealt with political violence in connection with the 1995 and 2000 elections.<sup>65</sup>

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<sup>59</sup> Thornycroft 'Mugabe pardons vicious killers' *Sunday Times* 3 July 1988 at 15; Amnesty International, "Disappearances" and political killings: human rights crisis of the 1990's – a manual for action' ch c-4: 'Zimbabwe: drawing a line through the past' available at: <http://www.amnesty.org/en/library/asset/AFR46/004/1993/en/17f45c56-ecbc-11dd-85fd-99a1fce0c9ec/afr460041993en.html> (last accessed 5 September 2014); Yap *Uprooting the weeds: power, ethnicity and violence in the Matabeleland conflict* (PhD thesis, University of Amsterdam 2001) available at: <http://dare.uva.nl/document/100861>, 268–269.

<sup>60</sup> Amnesty International, *supra* note 59.

<sup>61</sup> Clemency Order No 1 of 1990, General Notice 424A of 1990, Zimbabwean Government Gazette Extraordinary Vol LXVIII, No 54, 27 July 1990.

<sup>62</sup> Defined in s 5(2) as members of 'the Defence Forces of Zimbabwe, the Zimbabwe Republic Police, the Central Intelligence Organization and any other force or organization employed by the Government on anti-dissident operations.'

<sup>63</sup> '25-year-old State Emergency to be Lifted in Zimbabwe', AP, (18 July 1990), available at: <http://www.apnewsarchive.com/1990/25-Year-Old-State-Of-Emergency-To-Be-Lifted-in-Zimbabwe/id-1106b1628fccc46b6c60f4c81a18c02b> (last accessed 7 September 2014).

<sup>64</sup> *Granger v Minister of State* 1984 ZLR 92.

<sup>65</sup> Machakanja (2010) *National healing and reconciliation in Zimbabwe: challenges and opportunities* 10; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128, (ACHPR 2006) par 51.

In contrast to the 1982/1983 Regulations, the 1990 general amnesty noticeably makes no reference to the political leadership, but only to members of the security forces. The 1988 pardon of the seventy-five security forces personnel may prevent the re-trial of those who had already been tried under the double jeopardy rule, but does not prevent the prosecution of others involved in the atrocities. The question then arising is whether the 1990 general amnesty is a legal hurdle to the prosecution of other members of the security forces? While amnesties may be valuable as a means of ending hostilities, they should not be used to shield people from criminal liability, especially for egregious crimes of an international character such as genocide, crimes against humanity, and war crimes. According to the UN Commission on Human Rights, now the Human Rights Council, ‘amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes.’<sup>66</sup>

It should be noted that section 46(1)(c) of the new Constitution of Zimbabwe obliges every court, tribunal, forum or body, when interpreting the Bill of Rights, to take international law and all treaties and conventions to which Zimbabwe is a party into account. The Human Rights Committee, which monitors compliance with the ICCPR, a treaty which Zimbabwe has ratified, has held in a case against Uruguay:<sup>67</sup>

The Committee moreover reaffirms its position that amnesties for gross violations of human rights and legislation such as the Law No. 15,848, *Ley de Caducidad de la Pretensión Punitiva del Estado* are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.

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<sup>66</sup> Commission on Human Rights Resolution 2005/81, (21 April 2005) par 3. See also updated Set of principles for the protection and promotion of human rights through action to combat impunity, recommended in Commission on Human Rights Resolution 2005/81, arts 19, 24; Human Rights Committee, general comment No 31 par 18; OHCHR, Rule-of-law tools for post-conflict states: Amnesties, at 11 (2009).

<sup>67</sup> Communication No. 322/1988, *Rodríguez v Uruguay*, Views adopted by the Human Rights Committee on 19 July 1994, par 12.4.

Even more pertinent, the African Commission on Human and Peoples' Rights held in *Zimbabwe Human Rights NGO Forum v Zimbabwe* in relation to Zimbabwe's 2000 amnesty for political crimes.<sup>68</sup>

[B]y enacting Decree 1 of 2000 which foreclosed access to any remedy that might be available to the victims to vindicate their rights, and without putting in place alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy, the respondent state did not only prevent the victims from seeking redress, but also encouraged impunity, and thus reneged on its obligation in violation of articles 1 and 7(1) of the African Charter. The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.

It is clear, therefore, that the 1990 amnesty cannot stand and that security personnel covered by this amnesty may be prosecuted for murder, and, if the Criminal Procedure and Evidence Act is amended to remove prescription for other crimes, even retroactively for the other crimes as well. As has already been indicated, the political leadership was not covered by the 1990 amnesty. However, the issue of presidential immunity remains to be examined.

Section 30 of the Independence Constitution of Zimbabwe provided for immunity of the President against civil or criminal proceedings while in office; and after leaving office except for actions in his personal capacity.

Presidential immunity is now covered in section 98 of the new Constitution. Section 98(1)–(3) protect the person of the president from liability arising from his or her personal conduct before or during his term of office. While in office, the president is, for example, protected from civil and criminal liability arising from drunk driving; failure to pay maintenance for a spouse or minor children; assault; rape; defamation; etc. Needless to say, this immunity is temporary in scope and lapses when the president leaves office.

Section 98(4) deals with proceedings brought against a former president for anything done or omitted to be done in his or her official capacity while he

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<sup>68</sup> (2006) AHRLR 128, (ACHPR 2006) par 215.

or she held office. In such a case, the Constitution, in addition to any other statutory or common law defences that might be available, allows for a defence of good faith.

Unlike section 98(1) which categorically grants the president immunity from civil or criminal liability arising from his personal conduct while in office, there is no equivalent categorical provision covering acts or omissions of an official nature – that is, those things that the president or former president did or omitted to do in the exercise of his official powers as president. Had it been the intention of the framers of the Constitution to give the president immunity *while in office* under section 98(4), they would have stated so clearly, as was done in section 98(1). In any event, section 167(1)(d) gives the Constitutional Court jurisdiction to determine whether parliament or the president has failed to fulfil a constitutional obligation. Clearly, this means the president can be brought to court in his capacity as such. However, this does not effectively address the issue.

Assuming the president commits a serious crime such as murder on a tenuous basis of threat to national security, in what capacity should he be cited in legal proceedings? Section 98(4) deals with ‘*any* proceedings brought against a former president for *anything* done or omitted to be done in his or her official capacity while he or she was President’.<sup>69</sup> This undoubtedly includes both criminal and civil proceedings. The effect of this cannot be clearer: The president can be held personally liable for what he does when performing or purporting to perform his or her official duties.

However, what of the argument that Mugabe cannot be held accountable for crimes committed while he was prime minister? This kind of argument runs the risk of placing him outside the protection of the entire section 98 – including stripping him of the constitutional defence of good faith. This is so because sections 98(1)–(3) give the president only temporary protection from due process for his *personal* acts and omissions, and section 98(4) gives him the defence of good faith for his *presidential* conduct. Therefore, the Matabeleland and Midlands human rights violations of the 1980s – committed while Mugabe was prime minister, were neither personal nor associated with ‘presidential office’. This would appear to expose him to

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<sup>69</sup> Section 98(4) of the Constitution of Zimbabwe (emphasis added).

immediate criminal and civil liability without the protection even of the defence of good faith.

*Civil liability and state responsibility*

Civil claims in Zimbabwe generally prescribe after three years.<sup>70</sup> From a law reform perspective, with regard to civil action based on murder as the cause of action, an argument could be made that the legal position should be different, as criminal liability for murder under criminal law is not extinguished by time.<sup>71</sup> If there is a more compelling argument to the contrary, prescription should at least start running from the time of the finalisation of the criminal trial, or when it has been established with certainty that no prosecution will take place.<sup>72</sup>

Apart from the issue of civil liability for the actual perpetrators, the atrocities raise the issue of the state responsibility of Zimbabwe and its obligation to provide compensation to the victims and their relatives.<sup>73</sup>

The extent to which compensation has been paid to victims so far is unclear. The UN working group on enforced or involuntary disappearances noted in its 1997 report that it had concluded its consideration of the remaining outstanding case in relation to forced disappearance in Zimbabwe. The working group noted with regard to a case dating back to 1985, that the government had compensated the victim's family in the amount of Z\$ 35 000 in line with its 'policy' after the 1987 Unity Accord to 'compensate all

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<sup>70</sup> Prescription Act Chapter 8:11 s 15(d).

<sup>71</sup> Laws are indeed not cast in stone and should be reformed in order to respond to, among other things, changing perspectives and norms both at the national and international levels. For example, the African Commission on Human and People's Rights in *Kazingachire v Zimbabwe* communication 295/04, Banjul, The Gambia, 51<sup>st</sup> Ordinary Session, 18 April to 2 May 2012, made a recommendation that Zimbabwe should reform its common law that does not provide civil remedies to the survivors of a person whose death was occasioned by the wrongful conduct of another, which law provides only for compensation for loss of support and funeral expenses.

<sup>72</sup> However, ordinarily a civil action should not necessarily have to wait for the institution or finalisation of the criminal proceedings, the basis of which would be the cause of action in the civil action. A civil suit can run parallel to, before or even in the absence of criminal prosecution, or acquittal/discharge of the accused person. In any case, the burden of proving a civil claim is lower than that of proving the guilt of an accused person in a criminal trial.

<sup>73</sup> General Assembly Resolution 60/147, n 52 above.

families with missing relatives, regardless of the circumstances of their disappearance'.<sup>74</sup>

## **REMEDIES AT THE INTERNATIONAL LEVEL AND IN FOREIGN COURTS**

### **Criminal liability before international or foreign domestic courts**

Zimbabwe has not ratified the Rome Statute.<sup>75</sup> This does not necessarily mean that there can be no proceedings against Zimbabwe under the Rome Statute framework. In terms of article 13(b) of the Rome Statute, the UN Security Council has the power to refer situations in which crimes that fall within the jurisdiction of the court have been committed, notwithstanding the territorial and nationality jurisdictional requirement. That is to say, in the event of a referral by the UN Security Council it ceases to matter whether or not the offence was committed in the territory of a state which has ratified the ICC Statute or was committed by a national of a state that has ratified the Statute. The Security Council used article 13(b) to refer the situations in Sudan and Libya to the ICC.<sup>76</sup>

The Rome Statute, however, has no retrospective application. The ICC's jurisdiction is limited to those crimes that fall under the jurisdiction of the ICC and were committed after entry into force of the Rome Statute in July 2002.<sup>77</sup> That is not to say there can be no other international criminal justice interventions outside of the Rome Statute. The criminal tribunals for the former Yugoslavia and Rwanda, for example, were established by the United Nations Security Council (UNSC) as immediate responses to atrocities. A similar arrangement is still possible in theory as the ICC does not have exclusive jurisdiction over international crimes. However, this possibility is highly unlikely.<sup>78</sup>

<sup>74</sup> E/CN.4/1997/34, paras 388–390. See also E/CN.4/1996/38, pars 458–459.

<sup>75</sup> Available at: [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/states%20parties%20%20chronologica%20list.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20%20chronologica%20list.aspx) (last accessed 7 September 2014); Jallow & Bensouda 'International Criminal law in an African Context' in Du Plessis (ed) n 6 above at 41.

<sup>76</sup> Available at: <http://www.amicc.org/icc/referrals> (last accessed 7 September 2014).

<sup>77</sup> Rome Statute art. 11(2).

<sup>78</sup> It should be noted that the AU is also in the process of extending the jurisdiction of the African human rights court to hear cases of international crimes. However, this Court would also only have jurisdiction over a state after ratification of the Protocol. See Statute of the African Court of Justice and Human Rights, STC/Legal/Min/7(I) Rev 1,

The international criminal justice framework is, however, broader than the ICC and UNSC interventions. National courts can make use of their domestic law to try persons accused of international crimes. When national courts make use of their courts and criminal justice systems to enforce international criminal law without a link to the jurisdiction in question – such as a territorial link or the nationality of the offender or victim – they are said to be exercising universal jurisdiction.<sup>79</sup> In fact, the ICC provides complementary, as opposed to primary jurisdiction. This means that where international crimes can effectively be dealt with at the national level, deference is given to national courts.<sup>80</sup>

Depending on the breadth of the domestic statute being used, the territoriality of the offence(s) and nationality of the accused may not matter. Countries with legislation providing for universal jurisdiction for international crimes include Belgium, Canada, Denmark, France, Germany, Netherlands, South Africa, and the United Kingdom.<sup>81</sup>

Because of its proximity to Zimbabwe, it is important to discuss the South African legislation. South Africa enacted the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act). This Act came into force on 16 August 2002.<sup>82</sup> The Act is intended to complement the Rome Statute by allowing prosecution, within South Africa, of people who commit the international crimes of genocide, crimes against humanity, and war crimes anywhere in the world.<sup>83</sup> As the judgment in *National Commissioner of the South African Police Service and Others v the Southern African Human Rights Litigation Centre and Another* shows, the ICC Act can be used to bring to justice those accused of international crimes committed outside of South Africa, even if they are not nationals of a state

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art 46E(1). The Protocol was adopted in June 2014.

<sup>79</sup> Dugard (2011) *International law: a South African perspective* 154.

<sup>80</sup> Rome Statute art 17.

<sup>81</sup> For a brief discussion of these domestic laws, especially in relation to initiation of an investigation, see paragraphs 59 – 63 of the judgment of Supreme Court of Appeal in *National Commissioner of the South African Police Service and Others versus the Southern African Human Rights Litigation Centre and Another* (485/2012) [2013] ZASCA 168 (27 November 2013) available at: [http://www.justice.gov.za/sca/judgments/judgem\\_sca\\_2013.html](http://www.justice.gov.za/sca/judgments/judgem_sca_2013.html) (last accessed 1 December 2013).

<sup>82</sup> Jallow & Bensouda n 75 above. See also Dugard n 79 above at 200–201.

<sup>83</sup> See the Preamble and section 3 of the ICC Act. See also Dugard n 79 above at 201.

party to the Rome Statute.<sup>84</sup> Unfortunately, as with the Rome Statute, the ICC Act does not have retrospective effect<sup>85</sup> and can therefore not be used as the basis for prosecution based on facts occurring prior to the entry into force of the Act.

### **Civil liability and state responsibility before international and foreign domestic courts and tribunals**

Individual civil claims may be instituted in foreign courts, for example, in connection with criminal proceedings in countries allowing for universal jurisdiction. Civil liability proceedings independent of criminal proceedings may be possible in the United States (US) under the Alien Tort Statute which grants relevant US courts jurisdiction over ‘any civil actions by an alien in the US for a tort only, committed in violation of the law of nations or a treaty of the United States’, as long as personal jurisdiction can be obtained over the defendant. The Alien Tort Statute has been used by non-US citizens to mount litigation in US courts challenging human rights abuses around the world including in Ethiopia, Bosnia and Guatemala.<sup>86</sup> However, the 2013 *Kiobel* judgment by the US Supreme Court limits the possibility with its ‘presumption against extraterritoriality’.<sup>87</sup>

With regard to state responsibility, there used to be at least a theoretical possibility within the SADC region, of a successful challenge to some of the statutes that limit criminal and civil liability in Zimbabwe. The SADC Tribunal had at the time of its suspension,<sup>88</sup> developed a progressive human rights jurisprudence which included findings of human rights abuses by the government of Zimbabwe, and went so far as to order compensation in some of the cases.<sup>89</sup> The effective disbanding of the old SADC Tribunal and the

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<sup>84</sup> CCT 02/14 [2014] ZACC 30 (30 October 2014).

<sup>85</sup> S 5(2) of the ICC Act.

<sup>86</sup> Bradley ‘The Alien Tort Statute and Article III’ (2002) 42 *Virginia Journal of International Law* 587; Paul ‘Interpreting liability under the Alien Tort Statute’ (2013) 67 *University of Miami Law Review* 705.

<sup>87</sup> Wuerth ‘*Kiobel v Royal Dutch Petroleum Co*: The Supreme Court and the Alien Tort Statute’ (2013) 107 *American Journal of International Law* 608.

<sup>88</sup> By resolution of August 2010, the SADC Summit of Heads of State and Government decided not to reappoint judges or appoint replacements for retiring judges and the Tribunal was directed not to admit any new cases. Subsequently, in August 2012, the SADC Summit resolved to suspend the operations of the Tribunal and ordered a revision of its terms of reference, including removal of its jurisdiction to entertain matters brought by individuals.

<sup>89</sup> Its most famous case is *Campbell v Zimbabwe* dealing with expropriation of land.

recent adoption of a new protocol with limited jurisdiction and no individual access, means that no recourse can be had to the Tribunal.<sup>90</sup>

The remaining option with regard to state responsibility at the international level is the African Commission on Human and Peoples' Rights. If Zimbabwean courts were to refuse to hear a case, for example on the basis of amnesty or prescription, the matter could be taken to the African Commission claiming that the refusal to provide a remedy violates the African Charter on Human and Peoples' Rights, as indeed the African Commission has already done in relation to Zimbabwe's 2000 amnesty for political crimes as indicated above.<sup>91</sup> The lack of response by Zimbabwe to the Commission's decision in relation to the 2000 amnesty illustrates the limitation inherent in approaching the Commission for remedy.<sup>92</sup>

## CONCLUSION

Egregious crimes such as genocide, war crimes, and crimes against humanity dehumanise and debase the victims, their families, and their communities. The perpetrators themselves may also be equally affected by their own inhuman and criminal acts. As has been observed by some human rights monitoring bodies, non-punishment of these crimes may create a sense of impunity, thereby compromising respect for the rule of law. Over and above these effects, these crimes tend to tear the socio-political fabric of any affected polity apart as a result of the ethnic, racial, and political tensions that normally follow the commission of these crimes. As noted in the CCJP Report, 'one of the most tragic effects of events in the 1980s is that it served to harden "ethnic" differences in Zimbabwe...'.<sup>93</sup> Unfortunately, ethnic tensions, if not properly addressed, tend to affect several generations, and sometimes the consequences can be devastating to the whole international community.<sup>94</sup>

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<sup>90</sup> In August 2014, the SADC Summit adopted a new protocol (on file with the authors), yet to come into force, which removes human rights from the Tribunal's jurisdiction. It also denies individual access to the Tribunal, unlike was the case under the previous regime.

<sup>91</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* n 65 above.

<sup>92</sup> Mutangi, Manganje Aalboek & Kuvheya 'The Impact of the African Charter and Women's Protocol in Zimbabwe in' in *The impact of the African Charter and Women's Protocol in selected African states* (2012) 185.

<sup>93</sup> CCJP report n above 1 at 7.

<sup>94</sup> As noted on page 7 of the CCJP report (n 1 above) ethnic conflicts in ethnically divided societies like Sri Lanka, Rwanda and the former Yugoslavia are a good example.

It needs to be stated that in proceeding against those implicated, either under the criminal justice system or under civil action, due process must be the beacon. The crimes that they are being accused of are most egregious and deplorable, and were clearly meant to divide and polarise the Zimbabwean society along ethnic lines.<sup>95</sup> Proceeding against those implicated in any manner that does not respect due process would be akin to rewarding them for their most abominable deeds, as it might further entrench the ethnic divisions that they worked so hard, through criminal enterprise, to create.

In proceeding against those implicated in the *Gukurahundi* atrocities, the single most significant challenge remains: the perpetrators are still in charge of Zimbabwe's political and security infrastructure, and they are most likely to do everything within their individual or collective power, including further violation of human rights, to avoid due process. This makes seeking justice in Zimbabwe a serious (but not impossible) challenge. However, there is also the option to pursue justice abroad or through international institutions. As illustrated in this article these avenues, too, have their challenges.

The passage of more than thirty years makes the gathering of evidence more difficult. However, the significant challenge posed by the passage of time should not deter those seeking justice. For example, in 1997 the government of Cambodia requested the UN to assist in the establishment of a court to prosecute the senior leaders of the Khmer Rouge, a regime that was in power between 1975 and 1979 and was allegedly involved in the commission of largescale atrocities. An agreement paving way for the establishment of the court was subsequently reached between Cambodia and the UN in June 2003.<sup>96</sup> Also, trials related to forced disappearances, extra-judicial executions, and torture in Argentina between 1976 and 1983 were reopened

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<sup>95</sup> While it is undeniable that the perpetrators of the *Gukurahundi* atrocities might have taken a leaf from the previous Rhodesian Front settler regime in terms of some of the methods employed in the commission of these atrocities and also in terms of the legal instruments used in trying to shield the perpetrators from legal responsibility (see pp 42–45 of the CCJP report n 1 above and the references thereunder), there is clearly no causal link between the actions of the previous regime and *Gukurahundi*. In any case, the appalling nature and scale of the crimes directed against innocent civilians including women and children during *Gukurahundi* cannot be compared to the actions of Ian Smith's Rhodesian Front. This is not to say the latter's crimes should be forgotten, but they clearly pale in comparison.

<sup>96</sup> Jallow & Bensouda n75 at 39.

in 2006 after the Supreme Court declared a presidential pardon unconstitutional with Criminal charges being laid against 419 persons.<sup>97</sup> In February 2014 three men, aged 88, 92, and 94, were detained in Germany suspected of having committed atrocities at Auschwitz some 70 years ago.<sup>98</sup> Yet another example is the recent establishment of the Extraordinary African Chambers in Senegalese courts in February 2013, to try Hissene Habré, (former president of Chad) and others for crimes against humanity, war crimes, and torture, allegedly committed by them in Chad between 1982 and 1990 when Habré was president.<sup>99</sup> Perpetrators of grave human rights violations should never feel that they have successfully evaded justice.

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<sup>97</sup> <http://cels.org.ar/wpblogs/abo/los-responsables/> (last accessed 22 July 2014).

<sup>98</sup> 'Germany arrests three suspected Auschwitz guards' *BBC News* 20 February 2014, available at: <http://www.bbc.com/news/world-europe-26282592>.

<sup>99</sup> See generally Williams 'The Extraordinary African Chambers in the Senegalese Courts: An African solution to an African problem' (2013) 11 *Journal of International Criminal Justice* 1139–1160.